IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA255/2024
CA428/2024
[2025] NZCA 261

BETWEEN	SALETAULUA CHARLES FAAMANATU MAKA AND TONGA SEINI FATA AS TRUSTEES OF THE SAMOAN INDEPENDENT SEVENTH DAY ADVENTIST PROPERTY TRUST Appellants
AND	SIAOSI DAVID SOOTAGA TOAILOA First Respondent
	FEU SEUMAALII Second Respondent
	PENIATA SAUNIA Third Respondent
	ATTORNEY-GENERAL Fourth Respondent
	SAMOAN INDEPENDENT SEVENTH DAY ADVENTIST CHURCH (SISDAC) AKA REMNANT CHURCH OF THE LIVING GOD Fifth Respondent

Hearing:	8 October 2024
Court:	Hinton, Brewer and Osborne JJ
Counsel:	J D McBride, R C Woods and S E Cameron for Appellants B O'Callahan and R J Warren for First, Second and Third Respondents D L Harris and A A A Ghandour for Fourth Respondent M K Mahuika and T N Hauraki for Fifth Respondent
Judgment:	19 June 2025 at 3 pm

JUDGMENT OF THE COURT

A **The appeal in CA255/2024 is dismissed, except to the extent the order at [1](c) of the High Court Result Judgment is amended to read:**

(a) that the applicants shall be reimbursed by way of payment from the assets of SISDAC, and if no such assets are available then the SISDA Property Trust, for their legal costs ("the costs"), incurred in commencing and pursuing the main proceeding and the interim orders application, including the costs of and incidental to this application.

(b) the applicants' entitlement to reimbursement will arise when:

(i) the applicants' solicitors have rendered invoices to SISDAC and to the SISDA Property Trust; and, in addition

(ii) the applicants' senior counsel has certified the costs:

1. have been incurred in relation to the proceedings declared reasonable and appropriate by these orders; and

2. are in fact fair and reasonable having regard to the nature of attendances undertaken; and, in addition

(iii) an Associate Judge of this Court, upon presentation of the information at (b)(i) and (ii) above has approved the costs as fair and reasonable.

B **The appeal in CA428/2024 is allowed to the extent the orders appointing Andrew McKay as manager of the Samoan Independent Seventh Day Adventist Property Trust and of the Samoan Independent Seventh Day Adventist Church and making directions in relation to his appointment are quashed.**

C **In CA428/2024 the order whereby the preservation order currently in place was to remain in place pending the manager's first report to the Court is varied to the extent of deleting the words "pending the manager's first report to the Court" and inserting the words "until further order of the Court or agreement of the Parties".**

D **Costs and disbursements of both appeals are reserved.**

REASONS OF THE COURT

(Given by Osborne J)

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Introduction

[1] Two appeals have been heard together. They concern orders made by the High Court in relation to litigation concerning the administration of two charitable trusts: the Samoan Independent Seventh Day Adventist Church (SISDAC) and the closely related Samoan Independent Seventh Day Adventist Property Trust (SISDA Property Trust) (in this judgment collectively referred to as "the Trusts").

[2] SISDAC, operating from more than 20 locations in New Zealand, is an important part of the lives of (largely) Samoan people who comprise its congregations. The congregations fund SISDAC through tithes and donations. As this judgment explores, cogent evidence has been presented in an interlocutory context to suggest that the management structure of the Trusts operates without proper regard to the legal principles which underpin charitable trusts, has limited commercial competence and, at least indirectly, continued to be influenced by a pastor whose inappropriate conduct had led to his disqualification from being an officer of the entities.

[3] The first, second and third respondents (whom we will refer to as the substantive applicants) are respectively a former pastor and two elders of SISDAC and, as such, were formerly board members of SISDAC's Trust Board.

[4] The substantive applicants proposed to commence proceedings (the "main proceedings") seeking orders as to the Trusts' constitutions and administration for:

(a) removal and replacement of trustees of the Trusts by suitably independent professionals with governance expertise;

(b) related interim orders appointing a receiver and restraining disposition of trust property; and

(c) the substantive applicants' reasonable legal costs to be met from SISDAC's assets or, failing that, from the SISDA Property Trust's assets.

[5] The appellants are the current trustees of the SISDA Property Trust, a third trustee, Matauaina Eliu, having died since the judgments under appeal were delivered. The substantive applicants are also, with numerous others, trustees of SISDAC.

[6] In August 2023, the substantive applicants filed their statement of claim. At the same time, they sought (without notice) an interim preservation order, under r 7.55 of the High Court Rules 2016, restraining the appellants from a full range of dealings over properties of the SISDA Property Trust, held by the Trust itself or by Sunrise Global Homes Limited (Sunrise). On 17 August 2023, Lang J made orders accordingly, reserving leave to the appellants to apply for rescission or variation on five working days' notice.[1]

[7] The first appeal is against a judgment of Johnstone J dated 31 May 2024 (the *Beddoe* Decision).[2] The Judge declared it was reasonable and appropriate for the substantive applicants to commence the proceedings and to seek interim orders appointing an interim receiver or trustee. The Judge also ordered the substantive applicants' reasonable legal costs to be met from the assets of SISDAC or, failing that, from the SISDA Property Trust.

[8] The appellants, in the second appeal, challenge the subsequent decision of Wilkinson-Smith J dated 10 June 2024 appointing, on an interim basis, a manager of the Trusts (the Manager Decision).[3] In the Manager Decision, the Judge also ordered that an interim preservation order was to remain in place pending the manager's first report to the Court.[4]

[9] The fourth respondent, the Attorney-General, in her role as the protector of charities,[5] has been represented in the High Court proceedings and on this appeal. She represents the public interest to ensure property devoted to charitable purposes is not used improperly. She represents the beneficial interests of the charity. SISDAC was

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1 *Toailoa v Eliu* HC Auckland CIV-2023-404-1747, 17 August 2023 (Minute).
2 *Toailoa v Eliu* [2024] NZHC 1412 [*Beddoe* Decision].
3 *Toailoa v Eliu* [2024] NZHC 1509 [Manager Decision] at [253].
4 At [253(g)].
5 *Better Public Media Trust v Attorney-General* [2020] NZCA 290, (2020) 25 PRNZ 498 at [16]; and *National Council of Women of New Zealand Inc v Charities Registration Board* [2014] NZHC 1297 at [34]–[35].

joined as a party in the High Court proceedings after the *Beddoe* Decision and the Manager Decision and was subsequently joined as a fifth respondent in both appeals. It supports the appeals.

Structure of this judgment

[10] As there is a substantial overlap in the material relevant to the *Beddoe* Decision and the Manager Decision, we will set out the relevant factual background as it relates to both proceedings and then identify the subject matter of the causes of action in the main proceedings by reference to a series of topics. That done, we will describe the *Beddoe* Decision and determine the appeal relating to that. We will then describe the Manager Decision and determine the appeal relating to that, both in relation to the appointment of a manager and to the continuation of the preservation order.

The substantive applicants

Pastor Toailoa

[11] Pastor Toailoa has been a church minister of SISDAC since 2005 and a pastor of SISDAC since 2014.

[12] Pastor Toailoa was appointed as Division Leader for the Central New Zealand Division of SISDAC in August 2020 and as such a trustee of SISDAC; chairman of the SISDAC Executive Committee in January 2021; and SISDAC Church Administrator in February 2021.

[13] In May 2023, Pastor Toailoa was asked to stand down as Division Leader and instead serve as a pastor with the Peniamina branch of the Remnant Church. Pastor Toailoa did not agree with those decisions and shortly afterwards announced also his decision not to join the Remnant Church. Pastor Toailoa's decision was viewed by the SISDAC Executive Committee as Pastor Toailoa "leaving the church". The Executive Committee in August 2023 resolved to remove Pastor Toailoa as Chairman and replaced him.

Feu Seumaalii and Peniata Saunia

[14] Feu Seumaalii and Peniata Saunia are elders of SISDAC.

Charitable trusts, incorporated boards, registered charities and Charities Services

[15] We adopt Johnstone J's summary of the legislative regime for establishing charitable trust boards and registering charities, and administering the regime:[6]

> [4] The trustees of charitable trusts may apply to the Registrar of Incorporated Societies for their incorporation as a board under s 7 of the Charitable Trusts Act 1957. The Registrar's role under that Act is to register trust boards, and to record changes to trust deeds, addresses and other details. The Registrar is not empowered to enquire into an incorporated board's activities or operations.
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> [5] Qualifying entities may apply for registration as charitable entities under s 17 of the Charities Act 2005. The primary advantage of doing so is that registered charities may qualify for certain tax benefits, including tax exemptions for all or some of their income, and donee status, which allows donors to claim tax credits on donations.
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> [6] Charities Services is an agency established within the Department of Internal Affairs to administer the Charities Act, and to assist the Charities Registration Board to make decisions about registering or de-registering charities. Its website states that they "strive to be a modern, responsive, risk-based regulator focused on promoting public trust and confidence in the charitable sector and encouraging the effective use of charitable resources".

The incorporation and registration of the Trusts

[16] The Trusts were established and registered as charities as follows:

29 September 1980	SISDAC incorporated as a charitable trust board
4 February 2008	SISDA Property Trust established
19 May 2008	SISDA Property Trust registered as a charity
30 June 2008	SISDAC registered as a charity

6 *Beddoe* Decision, above n 2.

Purposes of the Trusts

[17] SISDAC's purposes are to profess the beliefs of Jesus Christ and to foster the teachings of the Bible among all people, and particularly the Samoan people, in New Zealand. SISDAC has accumulated considerable assets from tithes and donations of congregation members. It is beneficially entitled to some 19 properties, including a new church hall in Māngere built at a cost in excess of $30 million.

[18] The SISDA Property Trust was established to manage SISDAC's operations. The parties disagree and there is uncertainty as to whether its governing instrument is its original deed of 2008 or a new deed dated 6 December 2022. The new deed added an objective to provide community housing and undertake commercial investments for SISDAC and the "wider community".

The "World Committee"

[19] SISDAC operates in New Zealand, Australia, Samoa, American Samoa and the United States. Its administration is overseen by an informal governing body known variously as the "World Committee", the "Executive World Committee" or the "SISDAC World Committee", and also sometimes referred to as the "World Council" (World Committee). Pastor Willie Papu since 1983 has been and remains the Executive Director and "World Leader" of the World Committee. The precise governance structure is not clear from the evidence but the hierarchy as explained narratively in Pastor Papu's evidence appears to be in descending order:

- World Leader (Pastor Papu);
- World Council (meeting once a year but have not done so since COVID-19);
- Executive Committee or World Committee (since COVID-19 meeting monthly with the divisions via Zoom);
- National Divisions;

- Local Churches.

[20] A portion of all tithes and donations collected from all SISDAC churches was historically given to the World Committee to make decisions on funding allocations[7] but (as explained at [44] below), since the establishing of the Remnant Church in New Zealand, tithes from all the Mt Wellington and Ōtara SISDAC churches are now directly assigned to the Remnant Church and paid into its bank account. This current approach, as indicated by the evidence of Tonga Fata appears to stem from a view that there is no reason for separation of funds as the separately incorporated entities are "one and the same".

Management of the Trusts 2013 to 2021

Overview

[21] As a result of the conduct of the affairs of the Trusts from 2013, SISDAC was subjected to a number of investigations, initially by Charities Services (as an agency within the Department of Internal Affairs) then (on referral) by the Serious Fraud Office, and subsequently again by Charities Services and then by the Charities Registration Board.

Events: 2013 to 2021

[22] The investigation of SISDAC by the Serious Fraud Office led to the prosecution of Elizabeth Papu, the daughter of Pastor Papu. In 2017 she was convicted and sentenced on charges relating to theft and misappropriation of $1.6 million of funds from SISDAC in her role as a finance administrator of SISDAC from between 2011 and 2015.[8]

[23] In the meantime, SISDAC from 2016 had invested almost $1 million into a cryptocurrency scheme, OneCoin. OneCoin was subsequently determined by the Commerce Commission and other authorities to be either a Ponzi or a pyramid

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7 Pastor Toailoa put the historical portion at "about 20% of all tithes".
8 *Serious Fraud Office v Papu* [2017] NZDC 21687.

scheme. After SISDAC was aware that a return on its investment was unlikely, further investments of SISDAC's funds with OneCoin were made.

[24] From 2017 to 2019, Charities Services carried out an investigation of SISDAC. The investigation found there had been serious wrongdoing by Elizabeth Papu, Joseph Stowers, Pastor Papu, Sina Hunt and Willie Papu Junior (Pastor Papu's son) involving unlawful and corrupt use of SISDAC's funds and gross mismanagement of the trust. The mismanagement identified included the "poor quality" and "highly risky" investments of almost $1 million in OneCoin cryptocurrency (above at [23]) and $1.7 million in WFE Capital (below at [29]).

[25] It was established that Joseph Stowers, SISDAC's former treasurer, took $498,997 of SISDAC's funds as undeclared income. The investigation found that Pastor Papu took $84,031.32 of SISDAC's funds for the personal benefit of himself and his family and influenced the entity to make further improper payments of $63,309.88. Another officer Sina Hunt was found to have taken over $200,000 of funds for her personal benefit. Willie Papu Junior was found to have wrongfully received over $316,000 for his personal benefit.

[26] The Charities Registration Board considered SISDAC's (systemic) poor financial management had given Elizabeth Papu and Joseph Stowers the opportunity to unlawfully or corruptly take SISDAC's funds. The Charities Registration Board found Pastor Papu and Sina Hunt had been allowed to exercise an inappropriate level of influence over investment decisions. The findings were disputed by Pastor Papu and Willie Papu Junior. Charities Services recommended to the Charities Registration Board that SISDAC be deregistered as a charity and that several officers be disqualified from being an officer for periods of four to five years.

[27] On 17 December 2020, the Charities Registration Board deregistered SISDAC with effect from 5 February 2021 and disqualified Pastor Papu and Joseph Stowers from acting as officers of a charitable entity for four years.[9]

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9 *Samoan Independent Seventh Day Adventist Church (CC31057)* Charities Registration Board Decision 2020-2, 17 December 2020.

[28] The Charities Registration Board concluded that Pastor Papu, in 2020, retained his ability to influence SISDAC's operations due to the interwoven nature of SISDAC and the World Committee. It referred to submissions Pastor Papu had made, including:[10]

> I know that Charities Services would love to kill my influence. But influence is not something you can kill. It is a Legacy, built upon a lifetime of service and compassion. And now more than ever, I need that influence to … not only complete our current building project with the worship Centre complex, but to reach out to the world with our current spiritual concept of a "church without walls."

[29] In the meantime, in 2019, SISDAC had invested $1.7 million into WFE Capital, an offshore company based in Hong Kong, licensed to provide financial services in New Zealand or Hong Kong. In September 2019 (after the investment was made) the Financial Markets Authority issued a warning that WFE Capital may involve a scam.

The 2021 Bitcoin investment

[30] Upon receipt in December 2020 of the Charities Registration Board's highly critical report, the officers of the Trusts were on notice the Board considered there had been a repeated failure by officers to invest funds prudently, including through the influence of Pastor Papu and Sina Hunt.

[31] Soon afterwards, the decision was made to invest $1 million into Bitcoin. That decision was made through SISDAC's Executive Committee on 15 March 2021, shortly after Pastor Toailoa's appointment in January 2021 as chairman of that committee.

[32] It is Pastor Toailoa's evidence that Pastor Papu proposed the Bitcoin investment in early 2021, without consulting any independent investment advisors. Pastor Toailoa says Pastor Papu told him the Bitcoin investment was his first task. Pastor Toailoa says that due to a lack of knowledge he was not in a position to contribute to the Board's discussion that followed.

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10 At [94].

[33] The Bitcoin was purchased from investors in the United States. Pastor Toailoa says that, although $1 million was paid for the Bitcoin, the value received was around $700,000 (New Zealand currency). Pastor Toailoa believes the balance ($300,000) has never been recovered by SISDAC.

[34] The Bitcoin received was held in a wallet (saved on a computer) kept in Pastor Toailoa's office. The computer was subsequently (in late 2021 or early 2022) removed from Pastor Toailoa's office by Willie Papu Junior and taken to another location where it apparently remains.

[35] Willie Papu Junior refers to having assisted Pastor Toailoa to purchase the Bitcoin. He deposes that, after the purchase, "[w]e then reinvested the coins in other companies". He also deposes he showed Pastor Toailoa how to withdraw cryptocurrency from a wallet to pay for his rent.

[36] Willie Papu Junior has deposed that he found, upon checking the wallets in about September 2023, the remaining value was roughly $300,000. He added he had heard at a meeting of "the Ministers" that cryptocurrency had been given to the United States branch of SISDAC. Pastor Papu has not disputed he had influence over the Bitcoin investment and that the investment was not "vetted by an independent investment advisor", but refers repeatedly to the fact Pastor Toailoa was Chairman of the Executive Committee at the time and "at no time did he show any reservations".

[37] The ultimate fate of the $1 million investment in Bitcoin is not explained in the appellants' narrative evidence. The financial report for SISDAC prepared by Michael Prasad for the 2021 financial year (see below from [55]) identifies a sum of $1 million as impaired, with a note explaining: "A payment of $1,000,000 was made to SISDAC California on 15 April 2021 which was for investment purposes. At balance date, the investment was not recoverable." No recoveries are shown in subsequent reports. Mr Prasad does not identify the investment as a purchase of Bitcoin, but the item in the report is clearly referring to the Bitcoin purchase.

[38] The evidence of Willie Papu Junior (that in 2023 the remaining value of the Bitcoin was roughly $300,000) appears irreconcilable with Mr Prasad's note as to the level of impairment. It may also be indicative of a very poor state of record-keeping.

The Māngere Church building project (the Church Build)

[39] SISDAC undertook a major building project of a church hall at Māngere (the Church Build). The project is now materially complete. From an initial quotation for the new build (January 2019) of $9,813,986, with another $2 million for required renovation, the hall has been completed with a very substantial cost overrun. Total costs to 2023 were reported as exceeding over $30 million. When an architect/designer was engaged in 2022 in relation to one stage of the project, they concluded there had been no adequate design documents for the build to that point and no quantity surveyor involved. It was also difficult to determine precisely what work had been done.

Aftermath of the deregistration decision

The Remnant Church is established

[40] On 17 December 2020 (the day of the deregistration decision), a new church named the "Universal Remnant Church of the Living God (URCLG)" was established as a charitable trust board in Samoa.

[41] On 29 June 2021, the same Remnant Church (having since changed its name to "Universal Remnant Church of the Living") was incorporated as a charitable trust board in New Zealand, pursuant to a trust deed dated 28 June 2021. The Remnant Church was established, as deposed by the second-named appellant Ms Fata, to advance a mission of SISDAC to go "global" and unite people of the same beliefs but of different denominations. Some 14 branches of the Remnant Church were established in 2022 with separately incorporated boards.

[42] In May 2022, Pastor Papu announced SISDAC's local churches in Auckland, with the exception of Mt Wellington and Ōtara, had been reconstituted to form part of the Remnant Church. Pastor Toailoa initially remained as pastor of the Mt Wellington

and Ōtara churches. Feu Seumaalii and Peniata Saunia, the second and third respondents are elders of the Ōtara church.

[43] On 21 September 2023, at an annual general meeting of the SISDA Property Trust it was resolved:

(a) the trustees were re-appointed;

(b) SISDAC, the SISDA Property Trust and the Remnant Church were "amalgamated"; and

(c) the properties held by the SISDA Property Trust were affirmed to be held not personally by the trustees but on trust for the benefit of the Church.

[44] Pastor Toailoa's evidence is that, since the rearrangements involving the Remnant Church, all tithes from the original SISDAC local churches, apart from those ear-marked for the Church Build, have gone straight to the Remnant Church but tithes from the Mt Wellington and Ōtara SISDAC churches go to the SISDAC divisions, before being transferred to the Remnant Church.

[45] Before the substantive applicants commenced their High Court proceedings (August 2023) no steps had been taken to have the Remnant Church registered as a charity in New Zealand. Such steps were taken in early 2024, with application made for registration on 22 February 2024. The application was accompanied by a different version of trust deed to that with which the Remnant Church was incorporated in New Zealand as a charitable trust board in June 2021. This other version of the trust deed is dated 7 April 2021 and contains a number of different provisions. Whereas the first stated purpose of the Trust in the 28 June 2021 deed was to establish a branch of SISDAC, the equivalent identified purpose of the 7 April 2021 version was to establish a branch of the Remnant Church of the Living God Trust. The Trust was then registered as a church on 22 March 2024 under the name "Universal Remnant Church of the Living God".

Mortgage defaults by SISDAC

[46] As a consequence of SISDAC's deregistration, it was in default under its mortgages with General Finance Ltd (General Finance). General Finance issued a default notice in February 2021. SISDAC negotiated further funding from General Finance for funds urgently needed to continue with the Church Build, agreeing in March 2021 to borrow $2,896,055.77 (partly to repay an existing General Finance loan). Pastor Papu arranged funding from overseas branches of SISDAC to cover interest payments and to prevent further default.

Re-registration of SISDAC

[47] In 2021, SISDAC faced a significant tax liability if it were unable to be re-registered within 12 months from deregistration. In December 2021, SISDAC applied to be re-registered as a charitable entity. In its application letter, SISDAC referred to work undertaken to address Charities Services' concerns as to SISDAC's core financial management. SISDAC identified intended amendments to SISDAC's constitution to meet regulatory concerns. SISDAC said it was establishing an Investment Committee to establish an investment policy. It said it would shortly be transferring assets of SISDAC to the SISDA Property Trust to avoid adverse tax consequences arising from the deregistration. SISDAC identified that Pastor Papu had "made the decision to take a step backwards and to let the Executive Committee lead and manage SISDAC" — Pastor Papu's role was now "mainly to provide spiritual guidance to the other pastors and to the congregation", not being "involved in the day-to-day administration and management of SISDAC".

[48] SISDAC's new constitution was passed on 31 December 2021.

[49] On 1 February 2022, SISDAC was re-registered as a charitable entity.

Transfer of SISDAC properties

[50] On 28 January and 3 February 2022, SISDAC's 19 properties were transferred to the SISDA Property Trust.

[51] On 14 July 2022, a private company, Sunrise Global Homes Ltd (Sunrise) was incorporated. On 19 July 2022 four of the previously SISDAC properties were transferred by the SISDA Property Trust to Sunrise. Sunrise is not a charitable company and is not registered as a charity. The appellants are its shareholders and directors.[11]

SISDAC's financial accounting

[52] Section 41 of the Charities Act 2005 imposes on every charitable entity a duty to prepare annual returns within six months after each balance date. Pursuant to s 42C of the Act, the Trusts are required to have their financial statements audited by a qualified auditor.

[53] SISDAC's balance date is 31 December.

[54] When the substantive applicants commenced their proceedings (August 2023) the state of financial reporting was as follows:

(a) For SISDAC, the latest statement of financial performance filed with Charities Services was for the year ended 31 December 2018, filed in October 2020. It appeared that draft accounts may have been prepared for the year ended 31 December 2019.

(b) For the SISDA Property Trust, the latest statement of financial performance filed was for the year ended 31 December 2021. SISDAC, when applying in December 2021 for re-registration, advised Charities Services that the decision had been made to engage the firm of William Buck Audit (NZ) Ltd (William Buck) as external auditors to SISDAC. No reference was made to the auditing of the statements of the SISDA Property Trust.

(c) William Buck was appointed auditor to SISDAC in August 2019 but was not appointed to any associated entity such as the SISDA Property

[11] The shareholding is held by the appellants in equal shares with Matauaina Eliu, now deceased; see above at [5].

Trust. Michael Wood, an accountant with William Buck gave evidence of his firm's work for SISDAC. The initial audit was to be of the statements for the years ending 31 December 2016, 2017 and 2018. It took William Buck some time to produce audit reports for three years due to shortcomings with SISDAC's records, including the lack of paperwork relating SISDAC's cryptocurrency investments — he deposed "SISDAC was not able to produce statements, contracts, certificates or other paperwork of any kind to verify the existence and validity of the investments". The audit reports had to be qualified.

(d) William Buck repeatedly sought information for the 31 December 2019 audit but failed to obtain from SISDAC supporting audit information. William Buck issued a disclaimer of opinion in September 2022 relating to the 31 December 2019 audit. William Buck was thereafter not prepared to accept further engagement as auditor due to its concerns over the lack of appropriate financial procedures and controls within SISDAC and its concerns over the Board's financial management practices.

[55] In the week before the *Beddoe* application was heard (in February 2024), the appellants filed an affidavit of Michael Prasad. Mr Prasad deposed his accounting firm had been appointed (on an unidentified date) to complete the financial statements of SISDAC, the SISDA Property Trust and the Remnant Church for the years up to and including 31 December 2022. He deposed his firm had now completed SISDAC's financial statements for the 2020, 2021 and 2022 years. He said the financial statements of the SISDA Property Trust for the 2021 year had been prepared by the Trust's previous accountants and that his firm had completed a draft (but incomplete) set of financial statements for the Trust for the 2022 year. He deposed his firm had also commenced work on the financial statements for Sunrise for the 2022 year. His firm had completed the financial statements for the Remnant Church for the 2022 year, that being the Remnant Church's first set of (New Zealand) financial statements. None of the financial statements produced by Mr Prasad had been audited.

[56] Evidence provided by the substantive applicants records the understanding of senior members of the Church that the Remnant Church and SISDAC are "one and the same". The draft financial statements prepared by Mr Prasad show funds being transferred from the SISDA Property Trust to the Remnant Church but do not show funds being transferred from SISDAC, despite the appellant's evidence being that that has been occurring.[12]

[57] Mr Prasad's financial statements show that in the period to 31 December 2022:

(a) SISDAC received $2,262,121 in donations and tithes and made $1,566,454 in donations and distributions (other than the transfer of SISDAC's properties to the SISDA Property Trust);

(b) the SISDA Property Trust received $11,488,264 in donations and made $855,131 in donations and distributions. It is noted in the financial statements that the Trust "had transactions and payments with the [Remnant Church] … recorded as donations made and/or received"; and

(c) the Remnant Church received $1,458,841 in donations, fundraising and revenue, and made $503,960 in grants and donations. It is noted in the statements that the Remnant Church "entered into various transactions and payments with the [Property Trust] … recorded as donations made and/or received."

[12] Affidavit of Tonga Seini Fata affirmed 27 September 2023: "… intermingling of funds is … inevitable and there is no reason for them to be separated as while they have been incorporated as separate entities, they however are one and the same."

The application for *Beddoe* and prospective costs orders (PCOs)

[58] The substantive applicants, by originating application, sought both *Beddoe* orders and PCOs, together with ancillary declarations. The orders specifically sought were as follows:[13]

> *Beddoe application*
>
> 1.1 Declaring that it is reasonable and appropriate for the applicants, to commence proceedings (**the main proceedings**) seeking to:
>
> 1.1.1 Declare the proper deed of the Samoan Independent Seventh Day Adventist Property Trust (**SISDA Property Trust**);
>
> 1.1.2 Transfer trust property currently legally owned by other persons and entities to SISDA Property Trust;
>
> 1.1.3 Remove and replace the trustees of SISDA Property Trust and the Samoan Independent Seventh Day Adventist Church (**SISDAC**); and
>
> 1.1.4 Amend the constitution of the SISDA Property Trust and SISDAC to better ensure the proper administration of those trusts in the future.
>
> 1.2 Declaring that it is reasonable and appropriate for the applicants to seek interim orders in the main proceedings:
>
> 1.2.1 Restraining the respondents from selling, transferring or otherwise disposing of certain property until the conclusion of the proceedings; and
>
> 1.2.2 Appointing an interim receiver or trusteeship until the conclusion of the proceedings.
>
> 1.3 That the applicants are entitled to be reimbursed out of the assets of SISDA Property Trust and/or SISDAC for their reasonable legal costs in commencing and pursuing the main proceeding and the interim orders application, including the costs of and incidental to this application.
>
> *Prospective Costs Orders*
>
> 1.4 That an order be made prospectively that the applicants be indemnified for their reasonable costs in relation to the main proceeding from the assets of SISDA Property Trust and/or SISDAC, such costs to be paid regularly on presentation of (redacted) invoices from the applicants' solicitors accompanied by a certificate from those solicitors that the costs have been incurred in relation to the main proceeding.

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[13] Emphasis in original.

1.5 That, unless it be shown that the applicants have acted unreasonably, the applicants be immune from any order as to costs against them in relation to the main proceeding.

Respondents' costs

1.6 Declaring that until further order of the Court, the respondents are not entitled to meet their costs in relation to the main proceeding from the assets of the SISDA Property Trust or SISDAC.

The *Beddoe* Decision

[59] Johnstone J adopted the explanation of *Beddoe* orders and PCOs set out by Thomas J in *McLaughlin v McLaughlin*:[14]

> [19] A *Beddoe* application is made in prior separate proceedings for directions as to whether to bring or defend the main proceedings at the expense of the trust. Applicants — often trustees — primarily seek the sanction of the Court to bring or defend claims, the question being whether the trust's funds should be spent or placed at risk in the main proceedings. An applicant must fully disclose the strengths and weaknesses of those proceedings. If granted, the applicant is indemnified by the trust fund for the cost of bringing or defending the main proceedings. It may extend to immunity from a costs award against the applicant personally. However, it will not typically deal with issues of costs as between the parties in the main proceedings. These are more commonly dealt with in prospective costs orders.
>
> [20] Prospective costs orders are made in advance of the trial and are therefore contrary to the usual principle that costs follow the event. They fall into two broad categories. First, an applicant may seek an order that their own costs be paid out of the trust fund on an indemnity basis. Secondly, they may seek an order, in advance of the substantive hearing in the main proceedings, that they will not be liable to pay the other party's costs, regardless of the outcome of the case. The former category can overlap with orders sought under a *Beddoe* application.

[60] Johnstone J referred to the general right of trustees to indemnity out of trust assets for costs and expenses properly incurred in the administration of the trust. The Judge identified the three categories of trust litigation explained in the classic statement of Kekewich J in *Re Buckton*.[15] He noted the Court of Appeal's description (as used in *Re Buckton*) of the concept of "hostile" claims as involving a crude shorthand for cases where it is inappropriate to pre-empt allocation of costs in advance.[16] He referred to the better (although not wholly accurate) label of

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[14] *Beddoe* Decision, above n 2, at [31] citing *McLaughlin v McLaughlin* [2018] NZHC 3198, [2019] NZAR 286 at [19]–[20] (footnotes omitted).

[15] *Re Buckton* [1907] 2 Ch 406 (Ch) at 413–417.

[16] *McCallum Jnr v McCallum* [2021] NZCA 237, (2021) 32 FRNZ 851 at [42].

"self-interested" litigation, which is unlikely to earn pre-emptive indemnity under a *Beddoe* order.[17]

[61] Johnstone J viewed the descriptions of "*Beddoe* application" or "prospective costs application" as less significant than the consideration of three scenarios:[18]

> (a) Actions demonstrably necessary to the proper administration of trusts and the protection of trust property are more likely to justify pre-emptive orders, particularly of the applicant's own costs.
>
> (b) Actions which carry the risk of self-interest are less likely to justify pre-emptive orders.
>
> (c) Pre-determination of costs consequences as between the parties is rare.

[62] The Judge noted the test endorsed by the Court of Appeal in *McCallum Jnr v McCallum*, namely that *Beddoe* applications are gauged against what is in the best interests of the trust.[19] This is also, in the Judge's view, similarly determinative of applications for prospective costs orders in trust litigation.[20]

[63] The Judge declared it was reasonable and appropriate for the applicants:[21]

> (i) to commence substantive proceedings seeking certain orders as to the trusts' constitutions and administration, for removal and replacement of trustees of [SISDAC] and [the SISDA] Property Trust, and for the transfer of various properties from the [SISDA] Property Trust back to [SISDAC]; and
>
> (ii) to seek interim orders in those proceedings, appointing an interim receiver or trustee, and restraining disposition of trust property except for stated purposes;

[64] The Judge also ordered the substantive applicants' fair and reasonable costs were to be met from SISDAC's assets, or failing that, the assets of the SISDA Property Trust, the Judge specifically ordering:[22]

> that the applicants shall be reimbursed by way of payment from the assets of SISDAC, and if no such assets are available then the SISDA Property Trust,

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17 *Beddoe* Decision, above n 2, at [33(e)].
18 At [33(f)].
19 At [34] citing *McCallum*, above n 16, at [43], which endorsed *McLaughlin*, above n 14, at [29].
20 At [35].
21 At [64(a)].
22 *Toailoa v Eliu* [2024] NZHC 701 (Result Judgment) at [1(c)].

> for such of their legal costs, incurred in commencing and purs[u]ing the main proceeding and the interim orders application, including the costs of and incidental to this application, as may be approved by the Registrar of this Court as fair and reasonable having regard to the nature of the attendances undertaken, and upon presentation to SISDAC and/or SISDA Prope[r]ty Trust of invoices rendered by the applicants' solicitors and accompanied by a certificate from those solicitors that the costs have been incurred in relation to the proceedings declared reasonable and appropriate by these orders.

[65] The Judge made these orders in light of his findings as to the main proceedings being reasonable and appropriate and that such orders were in the best interests of maintaining the integrity and the charitable purposes of the Trusts.[23]

[66] The Judge declined to immunise the substantive applicants against the prospect of an adverse costs award upon the determination of such proceedings. He also refused to make a declaration that the substantive applicants were not entitled to have their costs met from assets of the Trusts.[24]

The *Beddoe* Decision is stayed

[67] On 24 July 2024 Johnstone J granted a stay of the *Beddoe* order pending the outcome of the appeals against it. The SISDA Property Trust was ordered to pay $100,000 into court to fund the substantive applicants' legal costs on the appeals, as well as associated steps in opposition to the appellants' applications. The Trust made the required payment into court. The *Beddoe* order has accordingly been stayed in the interim.

The appeal against the *Beddoe* Decision

Grounds of appeal

[68] In the appeal against the *Beddoe* Decision the appellants recorded five specific grounds of appeal, which we summarise:

(a) The *Beddoe* orders were inappropriate as neither SISDAC nor the SISDA Property Trust were named as a party to the proceedings and they were not represented.

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23 *Beddoe* Decision, above n 2, at [65].
24 At [66].

(b) The application was supported by an opinion from the substantive applicants' own solicitors as to the prospects of success and related issues when that solicitor was conflicted and not appropriately qualified and his opinion did not meet the requirements of r 19.4A(1) of the High Court Rules. Further, the applicants' entitlement to natural justice was breached through the opinion being withheld from them and the solicitor's submitted costs estimate also being withheld.

(c) The substantive applicants' costs to the date of the appeal ("conservatively" claimed at $438,706.85 (including GST) on 27 May 2024) are neither reasonable nor proportionate.

(d) The evidence relied on by the substantive applicants in the High Court was largely inadmissible opinion evidence and hearsay, fuelled by documented personal grievances and animosity between different factions within SISDAC.

(e) The High Court erred in law by making *Beddoe* orders against the SISDA Property Trust when the substantive applicants are not and never have been trustees of the SISDA Property Trust or persons in a position analogous to trustees.

[69] For the purpose of the appeal hearing in relation to the *Beddoe* Decision the parties agreed to confine the issues to two:[25]

(a) Did the Trusts need to be named as defendants and served, and if so what is the significance of any failure to do so?

(b) Should the High Court have made a *Beddoe* order or PCO against the Trusts?

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[25] As to issue (a), see below at [81]–[86]; as to issue (b), see below at [90]–[150].

Submissions

[70] Mr McBride submitted the Judge erred by not recognising a significant distinction between a *Beddoe* application and a PCO application, given that *Beddoe* orders entitle trustees to be indemnified out of the assets of the trust for their costs and expenses properly incurred in the administration of the trust. Mr McBride submitted the Judge failed to appreciate the substantive applicants "simply do not have control of the [SISDAC] funds, in the way that trustees seeking *Beddoe* protection do". In contrast, those seeking PCOs, which may include beneficiaries, are not entitled to indemnity and, as submitted by Mr McBride, are only available in the most extreme instances.

[71] Mr McBride submitted, as the substantive applicants therefore needed to pursue a PCO, the correct test was not (as identified by the Judge) "what is in the best interests of the trust", but rather whether an indemnity costs order in favour of the substantive applicants is a post-trial inevitability.

[72] Mr McBride also submitted that, while the Judge stated it would have been inappropriate to form a view on the merits of the substantive applicants' claims, the Judge nevertheless reached conclusions on the merits through a number of his findings.

[73] Mr McBride submitted that the Judge also failed to take into account a lack of necessity in the proceedings, with the substantive applicants not having sent a letter before action seeking changes or undertakings on the part of the trustees.

[74] Mr McBride submitted the proposed litigation came within the category of "hostile" litigation described in *Re Buckton*. He submitted the making of a *Beddoe* order in favour of a non-trustee/non-beneficiary who makes allegations of serious misconduct against trustees is contrary to authority.

[75] Mr McBride submitted there is no public interest in aggrieved persons, such as the substantive applicants, proceeding against a trust when there are alternative

avenues available, including through Charities Services[26] and by intervention of the Attorney-General.[27]

[76] Ms Harris, for the Attorney, rejects the appellants' criticism of the Judge's reasoning and conclusions on the application for a *Beddoe* order and for a PCO. She observes the *Beddoe* Decision is primarily focused on the relief sought by way of a *Beddoe* order but recognises there is an overlap between that type of order and a PCO.

Discussion—the standing of the substantive applicants

[77] Through a *Beddoe* application, a representative who is proposing to conduct litigation seeks the guidance of the court as to whether it is proper for them to conduct or defend the proceedings. The applicants are usually, but not invariably, trustees.[28] Thus, *Beddoe* applications have been successfully brought by former trustees.[29]

[78] The appropriateness of allowing former trustees to bring *Beddoe* applications was explained by Walker J in *Singh v Attorney-General*:[30]

> As former trustees are entitled to have their reasonable expenses and costs met if they act reasonably in a challenge to their removal, I see no good reason why they should not have standing in the inherent jurisdiction to apply for Beddoe orders since they are the pre-emptive version of the same principle. To hold otherwise risks permitting an errant trustee with power to remove other trustees avoid scrutiny by dismissing someone who is intent on holding them to account. This would not serve the beneficiaries' interest. No (former) trustee would take on the risk of being personally exposed to costs in that scenario. Moreover, in this case, no other party may be likely to seek the Court's intervention. Quarantine from scrutiny runs counter to the interests of the Trust, the beneficiaries and the public interest in respect of a charitable trust.

[79] Johnstone J correctly concluded that Pastor Toailoa, as a former trustee of SISDAC, had standing to pursue a *Beddoe* application. Even had Pastor Toailoa not had such standing, the remaining substantive applicants would have had standing

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26 Charities Act 2005, s 10(i).
27 Charitable Trusts Act 1957, s 58.
28 *McCallum*, above n 16, at [40].
29 *Singh v Attorney-General* [2022] NZHC 666. See also *McLaughlin*, above n 14, at [19]. While r 19.4(f) of the High Court Rules provides for a trustee to make a *Beddoe* application, the Court may invoke its inherent jurisdiction in relation to applicants having other capacities: *Singh*, at [96]. See also *Fundación Pimjo AC v Aguilar & Aguilar Ltd* [2015] NZHC 1402 at [31]–[32].
30 *Singh v Attorney-General*, above n 29, at [96].

because they continue to be SISDAC elders and are therefore members of SISDAC's trust board.

[80] We also consider correct Johnstone J's conclusion that because the interests of SISDAC and the SISDA Property Trust are so closely aligned, the substantive applicants have standing in relation to the SISDA Property Trust derived from their responsibilities relating to SISDAC. We further find the arrangements made by SISDAC, for the SISDA Property Trust to hold the SISDAC properties on its behalf, necessitate a finding that the substantive applicants have standing in relation to the proceedings in relation to both trusts.

Discussion—the joining of parties

[81] By their amended originating application the substantive applicants joined as parties the three persons who were trustees of both the SISDA Property Trust and of Sunrise.

[82] Directions as to service were sought and SISDAC was formally served before the (26 February 2024) hearing of the *Beddoe* application. Following service, SISDAC itself did not seek to be separately represented or to participate in the proceedings. It is clear, however, that the interests of both the Trusts were the subject of comprehensive submissions presented on behalf of the respondent trustees.

[83] For the Attorney, Ms Harris recognised it might have been appropriate for orders to have been made for the joinder of SISDAC in the High Court proceedings, given SISDAC is incorporated as a trust board with a separate legal identity. Ms Harris submits, in the absence of any prejudice to SISDAC, the failure to join SISDAC in the High Court proceeding does not justify overturning the High Court judgment on that ground alone. She submits there has been no miscarriage of justice.

[84] We agree. SISDAC had been served and could have sought joinder. The trustees opposing the *Beddoe* application, in the submissions presented by Mr Kohler KC at the 14 February 2024 hearing, expressly recorded they were representing SISDAC, described as a congregation about 1,000 to 1,300 strong in

Auckland alone. They referred to a petition signed by 1,000 members of SISDAC which they had exhibited in evidence.

[85] SISDAC was subsequently joined as a party on this appeal and Mr Mahuika has presented separate submissions on its behalf.

[86] We do not find any miscarriage of justice to have arisen from the fact SISDAC was not formally joined as a party in the High Court on the *Beddoe* application. Its interests were fully represented through Mr Kohler.

The quality of the substantive applicants' evidence

[87] By one of their grounds of appeal, the appellants asserted the evidence relied on by the High Court in the *Beddoe* Decision was "largely inadmissible opinion evidence and hearsay, fuelled by documented personal grievances and animosity between different factions within the SISDAC church". It was suggested for the appellants that the High Court had failed to take account of the petition signed by more than 1,000 members of SISDAC opposing the proceedings.

[88] We have carefully reviewed not only the Judge's reasoning but also the extensive evidence relied on by the respective parties. The evidence does contain many instances of hearsay. That is particularly so in relation to the alleged influence Pastor Papu retains over the Trusts. That said, there is the uncontested evidence as to how those involved treat the Remnant Church and SISDAC as "one and the same" and "merged". In relation to the other areas of concern raised by the substantive applicants, any aspects of hearsay evidence assume relatively little significance because direct evidence exists — this applies to purported variations of the trust deed; transfer of SISDAC properties; the non-filing and non-auditing of financial statements; and the handling of the $1 million invested in Bitcoin.

[89] As the appellants' complaint as to the quality of evidence is central, we will examine the evidence in more detail by reference to three topics that are identified in the causes of action in the main proceedings. Our conclusion, as we come to at [139] to [143] below, is that the appellants have demonstrated no error in the Judge's

consideration of the evidence as it relates to whether the proceedings are reasonable and appropriate and in the best interest of the Trusts.

Discussion—the justification for a Beddoe *order*

The correct legal approach

[90] As Johnstone J identified, the Court of Appeal in *McCallum* identified the fundamental question on a *Beddoe* application, quoting *McLaughlin*:[31]

> The test as deduced from case law is simply that *Beddoe* applications are gauged against the fundamental question of what is in the best interests of the trust. The Court must therefore exercise its jurisdiction in the best interests of the trust, and the beneficiaries as a whole, having regard to all the circumstances.

[91] In *McCallum*, this Court reviewed the way in which courts and commentators have previously characterised trust proceedings, including through the classic statement of Kekewich J in *Re Buckton*.[32] It was recognised the label "hostile" adopted in *Re Buckton* is a crude and inaccurate label, the Court observing:[33]

> [42] We referred earlier to the concept of "hostile" claims. There are a number of New Zealand authorities suggesting that a Beddoe order will not be granted in hostile litigation, or only in exceptional circumstances. The expression "hostile" is a convenient but crude shorthand for cases where it is inappropriate to pre-empt allocation of costs in advance of the ultimate event. Typically, such a case involves a claim by a beneficiary asserting breach of trust or other fiduciary duty by the trustee. Because the label is crude, it is also inaccurate. For example, it is not inappropriate to pre-empt indemnity where trustees are defending the interests of the trust against third parties. Such litigation is "hostile" in a general sense, but the trustee will be indemnified for the reasonable and necessary costs in defending the trust estate against insurgents. In that sense the label "hostile" is wrong; some "hostile" claims will earn pre-emptive indemnity via a Beddoe order. A better (but still not wholly accurate) label would be "self-interested" litigation. In that sense, the fifth, sixth and seventh modern Lewin categories referred to at [35] above are "self-interested litigation" and unlikely to earn pre-emptive indemnity via a Beddoe order. Whether, in the end result, indemnity is available to trustees *defending* such actions will depend on the ultimate outcome of, and the trustees' conduct in, the litigation.
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> [43] Thomas J in *McLaughlin v McLaughlin* was right to criticise earlier authority suggesting a Beddoe application brought in hostile proceedings will succeed in exceptional circumstances only. …

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31 *McLaughlin*, above n 14, at [29], quoted by *McCallum*, above n 16, at [43].
32 *McCallum*, above n 16, at [34]–[36] citing *Re Buckton*, above n 15.
33 Footnotes omitted.

[92] The Court then explained the way in which the relevance of self-interest falls to be assessed:

> [45] No absolute rule can, or should, be stated. As Sir Terence Etherton observed in *Spencer v Fielder*:[34]
>
> > I have emphasised that what matters is whether, in substance, trustees who are parties to litigation are acting in the best interests of the trust rather than for their own benefit. It is clear, for example, that, depending on the precise facts, trustees may be entitled to an indemnity for costs even though incidentally they will secure a personal benefit from a successful claim or defence or where there are allegations of breach of trust …
>
> What can be said is that the greater the degree of self-interest of the trustee bringing or defending the proceeding, the less likely it will be that a Beddoe order should be made. That is because it is correspondingly less likely predetermination of that matter is in the best interests of the trust. But there will still be circumstances where the trustee defence would be self-interested, but it would nonetheless be right to grant pre-emptive indemnity. For instance, where the substantive proceedings are weak or vexatious, and should be tested by way of strike-out or summary judgment, or where it is in the interests of the trust that the claim be defended but the trustees otherwise lack resources to do so.

[93] In addition to these considerations identified in *McCallum*, there must be added, in this case involving charitable trusts, the public interest involved. Such was recognised by the High Court of Australia in *Macedonian Orthodox Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* where it was stated:[35]

> … in this litigation the interests at stake are larger and more complex than whether a defaulting trustee should make good the financial consequences allegedly flowing from mismanagement of a trust fund. There is a public aspect to those interests because they concern the administration of a charitable purpose trust.

[94] This approach has been similarly adopted in New Zealand, Walker J observing in *Singh*:[36]

> … courts ought to be more interventionist where a charitable trust is involved. Leading text writers also suggest courts are more likely to intervene in respect

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34 *Spencer v Fielder* [2014] EWHC 2768 (Ch) at [27] (footnotes omitted).

35 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42, (2008) 237 CLR 66 at [114].

36 *Singh v Attorney-General*, above n 29, at [112] (footnotes in original).

> of a charitable trust and pay more regard to the views of the Attorney-General than [they] would pay to the views of the beneficiaries in the case of a private trust.[37] There is a public overlay to the interests at stake.[38]

[95] In the light of these principles, we turn to consider the subject-matter of the causes of action in the main proceedings by reference to the three topics which arose.

Topic 1: Trust deed of SISDA Property Trust

[96] The SISDA Property Trust was settled by Pastor Papu by trust deed dated 4 February 2008. When the SISDA Property Trust came to be incorporated as a charitable trust board in December 2022, a different trust deed was uploaded in support of the registration, this dated 6 December 2022, again identifying Pastor Papu as settlor of the same trust. The December 2022 trust deed purported to add to the objectives of the trust a new provision:

> (f) To provide Community Housing and Commercial Investment to convenient (sic) for the purposes of the Samoan Independent Seventh Day Adventist Church and to a wider community

[97] By their statement of claim, the substantive applicants assert the new objective purports to permit purposes that are not charitable — a reference to the objective including a "wider community" than the Church and "commercial investment".

[98] The substantive applicants seek a declaration that the 4 February 2008 deed is the valid deed of the SISDA Property Trust. They assert the 6 December 2022 trust deed is ineffective to broaden the Trust's objectives as the trustees have not followed the procedure required under the Charitable Trusts Act 1957 for the variation of a charitable trust deed.

[99] In the High Court, the appellants disputed that Court approval was required for amendment of the trust deed and further disputed that the new objective was non-charitable. Additionally, they submitted the issue was "insubstantial".[39]

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37 *Tudor on Charities* (10th ed, Sweet & Maxwell, London, 2015) at [16-098].
38 *Macedonian Orthodox Community Church St Petka Inc*, above n 35, at [114].
39 *Beddoe* Decision, above n 2, at [40(a)].

[100] The Attorney's position has consistently been that the amendment of the trust purposes is governed by s 32 of the Charitable Trusts Act and that the necessary procedure has not been followed.

[101] In the *Beddoe* Decision, Johnstone J concluded in relation to this issue:[40]

> (a) Determination whether the Property Trust's new deed is valid appears to require the Court's intervention. Whether the issue is indeed insubstantial as the respondents suggest is yet to be seen. It may be that without the new objective, the symbiotic relationship with Remnant proposed by the respondents cannot be maintained or developed. In any event, it appears common ground that proper administration of the Property Trust requires Court proceedings which the trust's current trustees appear reluctant to pursue.

[102] In his submissions on this appeal, Mr McBride for the appellants did not focus on this issue. The submissions for the Attorney (presented by Ms Harris) on the other hand proceeded on the basis the 6 December 2022 trust deed was in the nature of a variation which required the approval of the High Court under the Charitable Trusts Act — a belated application for variation of the charitable purposes was therefore required.

[103] We consider Johnstone J's conclusion there is an issue in this regard was correct. This is a matter that appears to require the Court's intervention. If the Trust does not have the broader purposes intended to be introduced by the 6 December 2022 trust deed, there is a serious issue as to whether Pastor Papu's vision of a broader reach for the combined efforts of the Remnant Church and of SISDAC can be lawfully achieved. Given the appellants' position that the trust deed of the SISDA Property Trust has been effectively amended without the need for Court approval, and that the appellants have therefore taken no steps to seek High Court approval, the effectiveness (or otherwise) of the 2022 amendment is a matter suitable for declaratory relief at the suit of others.

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[40] *Beddoe* Decision, above n 2, at [57(a)].

Topic 2: Transfer of SISDAC properties to Sunrise

[104] As noted, a precautionary decision was taken to transfer 19 SISDAC properties to the SISDA Property Trust to avoid any adverse consequences from the deregistration of SISDAC.

[105] The substantive applicants' second cause of action relates to the subsequent transfer of four of those properties to Sunrise without consideration. Apart from the formal transfer documents, the transfers were not documented whether as to their basis or otherwise. As a consequence, the properties are now held by a private company (Sunrise) which is owned and controlled by the appellants.

[106] Mr McBride, for the appellants, submitted the transfer of the properties to Sunrise was "perfectly orthodox", as it involved no change of beneficial ownership. He referred to the lack of a written resolution or similar evidence as a "non-event" because the transaction can be readily documented.

[107] The reason for transferring properties to Sunrise has been explained in Ms Fata's evidence. She refers to advice taken about incorporating a company to be "the commercial arm of SISDAC", with the possibility of the SISDA Property Trust dealing directly with financiers or moving some residential properties to a limited liability holding company to assist with financing. Ms Fata deposes the appellants' three directors/shareholders of Sunrise understood their role was to hold the company's shares on trust for SISDAC. The four properties in question were chosen because they were the only properties SISDAC owned outright. Ms Fata confirmed there is no trust deed between the SISDA Property Trust and Sunrise. She explains that is because the trustees acknowledge the Sunrise properties are held for the benefit of the Trusts.

[108] Ms Harris, for the Attorney, submitted there is no apparent risk of dissipation of the four properties. That said, she submitted it is of concern that the legal basis for the transfer was not addressed by the trustees given the trust deed does not appear to provide any power for such a transfer, and the properties were transferred out of the SISDA Property Trust without adequate documentation, an omission that has not been

rectified. Ms Harris recognised that it may be possible to rectify the situation without litigation or, at a minimum, with Court oversight.

[109] In the *Beddoe* Decision, Johnstone J found it seemingly inexplicable that the appellants had failed to assure the Court the four properties were being re-transferred to the SISDA Property Trust when it was acknowledged Sunrise holds the properties on trust for the benefit of the SISDA Property Trust.[41] Johnstone J found court proceedings seeking re-transfer were reasonable and appropriate in the absence of such assurance.

[110] We consider on this issue Johnstone J's conclusion was also correct. The evidence indicates the contemplated financing through Sunrise did not eventuate. On the assumption that was the single purpose for incorporating and utilising Sunrise, which is not a charitable entity, there is clear justification for seeking a re-transfer order, given the appellants have shown no inclination to effect a re-transfer. This finding appropriately contributed to the Judge's overall conclusion that the proposed proceedings were appropriate.

Topic 3: Governance and administration/replacement of the trustees

[111] The substantive applicants assert issues in relation to the governance and administration of the Trusts are such as to require the replacement of the trustees of the Trusts. In particular, they identify issues arising from:

(a) the relationship between the Remnant Church on the one hand and the Trusts on the other (topic 3A);

(b) the influence of Pastor Papu on major decisions (topic 3B);

(c) poor management of investments and finances (referring particularly to the Bitcoin purchase and the Church Build) (topic 3C); and

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41 *Beddoe* Decision, above n 2, at [57(b)].

(d) administrative failures in relation to record-keeping and financial reporting (topic 3D).

[112] We will refer to each of these sub-topics separately, but note they are closely interrelated.

[113] These interrelated topics led Johnstone J, in the *Beddoe* Decision, to conclude:[42]

> Formulation of a suitably independent and professional new governance structure for the Church and the Property Trust, for consideration and if appropriate, adoption by the Court, would likely indeed be a substantial and costly exercise. However, in light of the context of de-registration and Pastor Papu's unsatisfactory prior behaviour, the ongoing administrative difficulties now encountered by the Church and the apparently hands-off nature of supervision by Charities Services combine so that in my view the exercise is reasonable and appropriate, and in the trusts' best interests.

Topic 3A: The role of the Remnant Church

[114] The substantive applicants identify that the intended purpose of the Remnant Church was to operate as a "branch" of SISDAC, but apparently doing so with broader purposes than those permitted under SISDAC's trust deed. This, it is argued, was done to avoid the restrictions and oversight applicable to SISDAC as a charitable entity. The substantive applicants point to the extent to which the Remnant Church utilises for its own purposes the properties held by the SISDA Property Trust (for SISDAC) and by Sunrise and is receiving and utilising the tithes and donations made to SISDAC. The substantive applicants plead the way in which the trustees of SISDAC and the SISDA Property Trust are dealing with and providing for the Remnant Church involves breaches of trust.

[115] The appellants by their evidence acknowledge they are treating the Remnant Church and SISDAC as "one and the same". Mr McBride refers to their decision in relation to the Remnant Church as having involved a "decision to re-brand or at least co-brand [SISDAC] and the Remnant Church".

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42 *Beddoe* Decision, above n 2, at [57(c)].

[116] The appellants reject any suggestion that the way in which SISDAC has dealt with the Remnant Church was done to avoid regulatory scrutiny. They also reject the proposition that there has been a misuse of trust assets for the benefit of non-objects. Both in the High Court and on appeal, the substantive applicants have emphasised that Pastor Toailoa was, particularly through his role as chairman of the executive committee, a party to many of the decisions of which he now complains.

[117] The Attorney took the position that the main and associated interim proceedings had been brought by the substantive applicants for the purpose of ensuring the proper administration and governance of the Trusts, and that it is unclear on what basis the Remnant Church purports to operate as a branch of SISDAC. Ms Harris submitted the relationship between SISDAC, the SISDA Property Trust and the Remnant Church would benefit from examination and clarification.

[118] Johnstone J adopted the Attorney's submissions in this regard. He noted the chronological sequence by which, following the immediate establishment of the Remnant Church upon SISDAC's deregistration, the substantive applicants had been dislocated from SISDAC due to their reluctance to engage with the Remnant Church and to treat it and SISDAC as one and the same. Johnstone J identified SISDAC had achieved re-registration as a charity, with attendant tax-related benefits, on the basis of promised managerial independence from Pastor Papu. The Judge noted the appellants (as trustees of the SISDA Property Trust) had then appeared content to share SISDAC's resources with an unregistered charity closely associated with Pastor Papu. Johnstone J identified, by reference to Mr Prasad's financial statements as summarised at [56] above, that considerable funds appear to have been donated to the Remnant Church. Johnstone J found it arguable that the establishment and operation of the Remnant Church has been a device to avoid the attentions of Charities Services and that there had been an apparent lack of inclination on the part of Charities Services to enforce strict compliance with the Trusts' financial reporting requirements.

[119] Ms Harris, for the Attorney, has submitted there may not be a "real and present danger" (as pleaded by the substantive applicants) of the SISDA Property Trust's assets being wasted due to incompetent management or lost to charity. She submits

Charities Services may be the appropriate body to investigate the SISDA Property Trust and/or failures in relation to financial reporting.

[120] Johnstone J took the supervisory role of Charities Services into account in relation to this issue and others. He found a proceeding for orders establishing a suitably independent and professional new governance for the Trusts to be reasonable and appropriate in the context of the identified issues and having regard to the "apparently hands-off nature" of supervision by Charities Services.

[121] We consider Johnstone J correctly concluded the substantive applicants' treatment of the Remnant Church and SISDAC as "one and the same" justified the bringing of proceedings to ensure the proper administration and governance of the Trusts. Had there been evidence that Charities Services was actively investigating the SISDA Property Trust and/or failures in relation to financial reporting, Ms Harris' submission that Charity Services was the appropriate body to investigate those matters would have carried weight. But neither Johnstone J nor this Court could ignore the absence of such evidence.

Topic 3B: The influence of Pastor Papu on major decisions

[122] The substantive applicants assert that Pastor Papu has and continues to influence decisions concerning financial expenditure, investment and employment of assets in relation to the Trusts. This is allegedly occurring notwithstanding Pastor Papu's disqualification from being an officer of a charitable entity during the period ending 5 February 2025. The substantive applicants refer to Pastor Papu's role as World Leader of the World Council and the direct consultation with and influence he can exercise over board members and trustees. The substantive applicants assert this means decisions are being made by someone other than those entitled to do so under the rules of the Trusts. The substantive applicants refer to what Pastor Toailoa has deposed as to Pastor Papu's influence in relation to the Bitcoin investment.

[123] For his part, Pastor Papu, in his main affidavit under a heading "Influence" accepted he has an "influential position within the Church and amongst the congregation", but identified his involvement (since the deregistration of SISDAC) as having been "merely to act as spiritual leader and to fundraise on behalf of the

Church". He rejected any suggestion that he controlled the trustees of SISDAC, the SISDA Property Trust or the Remnant Church. He stated he did not accept the trustees "are generally prepared to obey my instructions *without question*".[43] He stated his "role as the spiritual leader is paramount and *more important than any other role*".[44] He further deposed that he has "long retired from the [administration] and management of the Church".

[124] Building on this evidence, counsel for the appellants in the Court below and on appeal assert that, while Pastor Papu remains involved as the spiritual leader of SISDAC, he has no defined role in church administration or management and has complied with the terms of his disqualification. Counsel submitted, on the basis of the evidence, that "the trustees know their responsibilities".

[125] The Attorney has, in submissions in the High Court and on appeal, submitted if there is substance to the allegations that Pastor Papu is continuing to have undue influence, then, as with some other issues raised by the substantive applicants, Charities Services may be the appropriate body to investigate this issue. Ms Harris in her submissions referred particularly to the need for responsible use of public resources, as an alternative means of dispute resolution.

[126] We conclude Johnstone J correctly took account of the role of Pastor Papu in matters that affected the affairs of the Trusts. Pastor Papu's previous "unsatisfactory prior behaviour" was relevant.[45] So, too, was his influence over the Remnant Church as the recipient of SISDAC funds. So, too, was the fact Pastor Papu's seemingly carefully worded evidence, while placing emphasis on his role as spiritual leader, does not exclude some role in giving "instructions" to the trustees. The evidence of Pastor Toailoa, in relation to Pastor Papu's involvement in the 2021 Bitcoin investment, is evidence of a continuing involvement of Pastor Papu beyond matters of a spiritual nature, being matters for financial decision-making on the part of the trustees.

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43 Emphasis added.
44 Emphasis added.
45 *Beddoe* Decision, above n 2, at [57(c)].

[127] As noted above at [120], Johnstone J found it reasonable and appropriate that the substantive applicants be able to pursue orders for new governance in light of the fact no steps had apparently been taken by Charities Services.

Topic 3C: Poor management of investments and finances

[128] The substantive applicants have pleaded the circumstances relating to the 2021 Bitcoin investment and to the management of the Church Build constituted poor management of SISDAC's finances justifying replacement of the current trustees.

[129] The main submission Mr McBride made in relation to the Bitcoin investment was that Pastor Toailoa was a party to many of the decisions he now complains of including the Bitcoin investment.

[130] There are potentially at least two criticisms of SISDAC's handling of the Bitcoin investment. First, that such a significant investment was made in a highly speculative commodity and, secondly, that the asset purchase has not been the subject of proper management or accounting. It is the second aspect which is the primary focus of the statement of claim. How the Bitcoin has been handled appears not to have been adequately explained in the appellants' evidence. To the extent information has been provided, there is the inconsistency between Mr Prasad's conclusion (above at [37]) that the (approximately) $1 million is totally impaired against the affidavit evidence of Willie Papu Junior that his check of the Bitcoin (in September 2023) revealed a remaining value of "roughly $300,000".

[131] Johnstone J found the substantive applicants' proposed proceedings might disclose the whereabouts of the substantial quantity of Bitcoin.

[132] For the Attorney, Ms Harris submitted the Bitcoin investment, following so close upon the deregistration of SISDAC, raises a significant concern in terms of its timing and the merits of such an investment and the lack of clarity around its current value.

[133] The initial purchasing and subsequent fate of the Bitcoin is arguably the clearest of the issues raised which calls for Court scrutiny. Only months earlier the

Charities Registration Board had severely criticised SISDAC for investing in poor quality and highly risky ventures and doing so through the influence Pastor Papu and Sina Hunt exercised over SISDAC's investment decisions, without SISDAC carrying out any adequate due diligence into the investments. The fact Pastor Toailoa, recently after his appointment as chairman of the Executive Committee, had been involved in the decision to buy Bitcoin does not materially affect the appropriateness of having SISDAC's governance and management decision-making subjected to the Court's scrutiny. The apparent total loss of the $1 million investment equally calls for the scrutiny to which the investment has not been subjected to date — this is especially so when the appellants appear to accept the foreshadowed Investment Committee had yet to be formed and no independent financial advice was sought or obtained.

[134] The issues surrounding the management of the Church Build project and its overruns are not a focus of extended discussion in the *Beddoe* Decision. Johnstone J noted the brief submission made by Ms Harris that cost overruns on the Church Build "may not indicate mismanagement." That is a logical observation of fact. But, there is at least an indication of mismanagement of the Trusts demonstrated through the evidence summarised at [39] above, the extent of cost overruns on the project, combined with an apparent lack of attention to the need for design and costing advice as the project proceeded. As a stand-alone issue this might not have justified scrutiny through a court proceeding, but it was one of a number of serious issues.

[135] We conclude it was appropriate, as found by Johnstone J, where other aspects of the trustees' management of the Trust's investments and finances are being considered, that this issue was also pursued in the proposed proceedings.

Topic 3D: Administrative failures

[136] The substantive applicants' primary allegation of administrative failure on the part of the Trusts is the failure to file annual returns with Charities Services as required by law. There has also been an apparent failure to complete audits for such financial statements.

[137] The substantive applicants also plead the trustees of SISDAC and the SISDA Property Trust have failed to comply with a number of requirements relating to the conduct and recording of meetings.

[138] The lengthy period over which annual returns have not been filed promptly and auditing has not been completed raise proper concerns that are worthy of scrutiny by the Court, as the supervisor of trusts, if Charities Services is not actively scrutinising the conduct involved.

The best interests of the Trusts

[139] Johnstone J identified he was required to determine whether the orders sought were in the best interests of the Trusts (and their "beneficiaries" as a whole). He found the main proceedings and the associated application for interim preservation and receivership orders were clearly for the purpose of the Trusts' proper administration (rather than arguably self-interest) and the claims were "reasonable and appropriate".[46]

[140] When the subject-matter of the substantive applicants' identified concerns is set against these background considerations, we find Johnstone J correctly concluded the intended proceeding was the reasonable and appropriate step for the substantive applicants to take and one which was in the best interests of the Trusts.

[141] The relief sought through the amended statement of claim is not self-serving. We recognise that in the original statement of claim the substantive applicants included a prayer for relief that damages of $1 million be paid to the applicants (this relating to the apparently lost Bitcoin). That clearly misconceived prayer was abandoned before the February 2024 hearing, and was replaced by conventional prayers focused on the governance and management of the trust.

[142] The fact other avenues exist by which issues of mismanagement may be scrutinised — scrutiny by Charities Services and the Attorney-General being specifically identified — does not undermine the *Beddoe* Decision. The Judge took into account submissions made as to the expertise of and potential for scrutiny by

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[46] *Beddoe* Decision, above n 2, at [36] and [64].

Charities Services. But in our view the Judge correctly concluded, in the absence of any such intervention to date in relation to the identified issues, it was appropriate for the substantive applicants to invoke the High Court's supervisory responsibilities.

[143] We conclude the Judge did not err in making a declaration that it was reasonable and appropriate for the applicants to commence the main proceedings seeking the identified relief.

Discussion—reimbursement of legal costs

[144] Where a *Beddoe* order is sought by trustees with access to the trust fund, there is strictly no need for an order entitling the trustees to reimburse themselves for their recoverable expenses from the trust fund — their status as trustees entitles them to reimburse themselves.

[145] The substantive applicants in this case framed the first limb of their amended application for a PCO as that they be "indemnified for their reasonable costs". We infer they recognised that, without such a direction for indemnity, a successful application for a *Beddoe* order would likely leave them carrying the costs for the duration of the substantive proceedings (and possibly any appeals).

[146] In its recent decision in *Edwards*, the Supreme Court explained the circumstances in which PCOs are ordinarily sought (by beneficiaries and sometimes by trustees):[47]

> **PCOs in equity and trusts**
>
> [27] As PCOs are familiar in equity and trusts cases, and because the Crown placed some reliance on them, it is worth surveying that jurisdiction briefly, first. These cases tend to concern trustees or beneficiaries either initiating or responding to proceedings relating to the management of trust assets. There tends also to be a fund within those assets from which trustee (and sometimes beneficiary) costs may be met.
>
> [28] In the case of trustees, *Beddoe* orders may be sought before the merits are determined. These orders give judicial approval to trustees bringing or defending proceedings at the cost of the trust. It is in effect an advance costs order for indemnification of the applicant's expenses from the trust fund. As

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47 *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira O Waiōweka (Prospective Costs Order)* [2024] NZSC 119, [2024] 1 NZLR 418 [*Edwards*] (footnotes omitted).

> trustees ordinarily have an entitlement to indemnity for their own costs properly incurred as a consequence of the discharge of trustee duties, the purpose of the *Beddoe* application is to obtain judicial confirmation that costs in that case will be properly incurred. However, as the Court of Appeal noted in *McCallum Jnr v McCallum*, a *Beddoe* order will not normally deal with party-and-party costs — that is, costs between the applicant trustees and the other parties to the substantive proceedings. And because the trustees remain at risk for those costs, they may also seek a PCO.
>
> [29] PCOs are sought by beneficiaries (and sometimes trustees), either directing advance costs (by indemnity or partial indemnity) or protecting against other-party costs risk (by immunity or partial immunity). …

[147] We focus on the first of those two categories of PCO identified in that passage from the judgment in *Edwards* — directing advance costs by indemnity or partial indemnity.

[148] It is an order of that nature that Johnstone J made alongside the primary *Beddoe* order.

[149] The substantive applicants filed evidence establishing their inability to fund from their personal resources the cost of the main proceedings and their interim application. Without the addition of a PCO, the declarations made in the form of a *Beddoe* order would have been ineffectual.

[150] We are satisfied it was appropriate, and in the best interests of the Trusts, that such a PCO be granted in relation to the main proceedings.

Discussion—the amount of legal costs incurred

[151] We have set out at [64] above the order Johnstone J made in relation to the basis upon which the substantive applicants could recover costs charged by their solicitors pursuant to the *Beddoe* Decision. The test was what was "fair and reasonable" having regard to the nature of the attendances undertaken. The supporting information was to be provided by a certificate from the appellants' solicitors that the costs were incurred "in relation to the proceedings declared reasonable and appropriate by these orders".[48] The officer charged with then approving the claimed costs was the Registrar.

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[48] *Toailoa v Eliu*, above n 22, at [1(c)].

[152] In the appellants' amended notice of appeal, it was recorded that the substantive applicants on 27 May 2024 had lodged (implicitly with the Registrar) a "'conservative' claim" for legal costs from SISDAC of $438,706.85 (including GST). The appellants assert such costs were neither reasonable nor proportionate.

[153] The reasonableness of the costs claim was not included by the parties in their agreed issues for determination on the appeal (above at [69]). We therefore will not determine whether the sum was reasonable or not and observe the detailed information that we would expect to have been provided to the Registrar was not put before this Court. What we are driven to observe, however, is the sheer quantum of the costs claim invites a searching scrutiny on the part of the approving body (at present in terms of the *Beddoe* Decision, the Registrar) as to its "fairness and reasonableness".

[154] The present steps by which the substantive applicants may obtain payment of legal costs involve certification by their solicitors and approval by the Registrar, focussed on whether "the costs have been incurred in relation to the proceedings declared reasonable and appropriate by these Orders". These steps do not, in our view, constitute a sufficient mechanism when regard is had to the quantum claimed since the *Beddoe* Decision was issued. There is not within the *Beddoe* Order, as it stands at present, a requirement for certification as to the reasonableness of the quantum of costs, nor scrutiny by a judicial officer experienced in assessing such reasonableness.

[155] A more appropriate set of requirements having regard to be quantum claimed to date, with counsel of Mr O'Callahan's experience involved, would be for the certificate to be provided by the substantive applicants' senior counsel, including as to the reasonableness of quantum, and for the approving officer to be an Associate Judge, as a judicial officer with greater experience than a Registrar in considering the reasonableness of costs.

[156] For this reason, although we will dismiss the appeal in relation to the *Beddoe* order itself, we will allow the appeal to the extent that the costs-fixing mechanism (above at [64]) will be amended to provide for counsel's certification and an Associate Judge's approval. The parties will understand this amendment to convey this Court's expectation that fairness and reasonableness will be fully accounted for in

the calculation of legal costs that the substantive applicants seek to recover under the *Beddoe* Decision.

Discussion—the Beddoe *Decision in relation to the interim receivership application*

[157] By the *Beddoe* Decision Johnstone J declared it was reasonable and appropriate for the applicants not only to pursue the main proceedings but also to seek interim orders in the main proceedings. That included an order appointing an interim receiver or trustee of the Trusts.

[158] By reason of the findings we make on the appeal from the Manager Decision, it is unnecessary to determine whether the declarations made in the *Beddoe* Decision correctly extended to the application for appointment of an interim receiver.

[159] That said, for reasons parallel to those relating to the order made concerning the main proceedings, we consider the *Beddoe* Decision to be correct in that regard also.

The Manager Decision

The interlocutory application

[160] By an amended application, and pursuant to the *Beddoe* Decision, the substantive applicants pursued orders appointing an interim receiver of the Trusts and the continuation of the preservation order.

[161] The specific receivership order sought read as follows:

> *Appointing receiver for SISDA Property Trust and SISDAC*
>
> 1.2 Under s 138(1) of the Trusts Act 2019, appointing Andrew McKay of BDO New Zealand as the receiver of the SISDA Property Trust and of the Samoan Independent Seventh Day Adventist Church (SISDAC);
>
> 1.3 Under s 138(4) of the Trusts Act 2019, imposing the following conditions on the receivership:
>
> 1.3.1 The receivership is to continue until further order of this court or the determination of the proceeding;

1.3.2 The receiver is entitled to exercise any power of a trustee until further order of this Court;

1.3.3 The receiver must endeavour to consult with the applicants and the first respondents when making decisions relating to funding the ongoing operation of SISDAC or the construction, use, maintenance or disposal of buildings or real property owned by the SISDA Property Trust;

1.3.4 The receiver must seek to identify and secure the property of SISDA Property Trust and SISDAC;

1.3.5 The receiver must endeavour to prepare audited accounts for SISDA Property Trust and SISDAC;

1.3.6 The receiver must prepare periodic reports of their activities to the Court and parties to this proceeding no less often than every three months;

1.3.7 The receiver's actual and reasonable fees are to be paid out of the assets of the SISDA Property Trust;

1.3.8 The receiver's fees are capped at $50,000 (excluding GST), with leave to apply to the Court to extend this cap.

[162] The application was expressly for orders under s 138 (subss (1) and (4)) of the Trusts Act 2019. At the conclusion of the notice of application, reliance was also placed on ss 58 and 60 of the Charitable Trusts Act.

The statutory provisions

[163] Section 138 of the Trusts Act empowers the court to appoint a receiver to administer a trust:

138 Court may appoint receiver for trust

(1) The court may, on an application by an interested person or on its own motion, appoint a receiver to administer a trust.

(2) The court must be satisfied that the appointment of a receiver to administer the trust is—

(a) reasonably necessary in the circumstances of the trust; and

(b) just and equitable.

(3) Only a person qualified to be a trustee may be appointed under subsection (1).

(4) When appointing a receiver under this section, the court (having regard to the terms of the trust and the interests of justice) must determine—

(a) the extent of the duties and powers of the receiver; and

(b) the duration of the receivership; and

(c) the principles that the receiver is to apply in determining priorities; and

(d) whether the receiver is to be paid from the trust assets.

(5) If a court determines under subsection (4) that a receiver has a power in relation to a trust, the trustee of the trust cannot exercise that power for the duration of the receivership.

[164] We adopt the explanation of the s 138(2) test identified by Walker J in *Armani v Armani*, where it was stated:[49]

> In its context, reasonably necessary means something more than expedient or desirable, falling closer to "required" or essential to achieve a particular outcome or purpose, but is not necessarily restricted to measures of a last resort. Even so, the availability of alternative, less drastic remedies will be a factor going to the "just and equitable" requirement.

[165] Section 60(1)(d) of the Charitable Trusts Act empowers the court to give directions in respect of the administration of a charitable trust. Section 60(1) relevantly provides:

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

(1) Application may be made to the Court by the Attorney-General or any officer of the Government service or person in respect of any property or income subject to a trust for a charitable purpose within the meaning of either Part 3 or Part 4, whether or not a scheme in respect of the property or income or money has been approved by the Court under Part 3 or Part 4 or otherwise or by the Attorney-General under Part 4 for an order—

…

(d) giving directions in respect of the administration of the trust; or in respect of any examination or inquiry under section 58; or of any question to be answered or assistance to be given by any person in connection with any such examination or inquiry:

…

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[49] *Armani v Armani* [2021] NZHC 3145, [2022] 2 NZLR 547 at [86].

[166] In its terms, s 60(1)(d) provides for the appointment of neither a receiver nor a manager. But the substantive applicants, in making their application in the High Court, relied on the High Court's judgment in *Khyentse v Hope.*[50] In that case the corresponding section under the old Act was successfully invoked as the jurisdictional basis for appointing the Public Trust as "manager and administrator" of a Buddhist charitable trust for the purpose of managing and administering property of the trust until further order of the Court.

The judgment

[167] The Judge recorded the substantive applicants had advanced their application on the basis either a receiver or a manager should be appointed to administer the trust until further order of the Court.

[168] The Judge extensively reviewed the evidence, covering the matters we have summarised above at [11]–[57].

[169] The Judge identified the High Court's power to appoint a receiver or manager as arising in three ways, namely through the two statutory provisions under the Trusts Act and the Charitable Trusts Act and also under the inherent jurisdiction of the Court.[51]

[170] The Judge found the substantive applicants had standing to bring the proceedings.

[171] The Judge found (adopting the s 138(2)(a) Trusts Act test) that it was "reasonably necessary" to appoint a receiver or manager. The Judge identified the substantive applicants' concerns arose from the evidence of the continuing administrative influence of Pastor Papu and the lack of "delineation between the Remnant Church and SISDAC". She recorded:[52]

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50 *Khyentse v Hope* [2005] 3 NZLR 501 (HC) [*Khyentse v Hope* (HC)]. This decision was successfully appealed on the facts and the Public Trustee removed in *Khyentse v Hope* [2007] 1 NZLR 645 (CA).

51 *Body Corporate 81012 v Memelink* [2022] NZHC 1244 at [39]; Manager Decision, above n 3, at [204]; Trusts Act, s 138; and Charitable Trusts Act, s 60(1)(d).

52 Manager Decision, above n 3.

> [220] The historic events behind the de-registration are not actually very historic. Pastor Willie Papu is not to be held accountable for the sins of his daughter, Ms Papu, but the decision of the Charities Board is very clear as to his own failings as an administrator.
>
> …
>
> [223] The evidence suggests that Pastor Willie Papu has continued to act as a de facto officer of the Trusts. The level of influence he holds is demonstrated by emails from as late as June 2023 where church administrator, Ms Fata, advised Pastor Toailoa that all financial decisions needed to be approved by Pastor Willie Papu.
>
> [224] The reverence in which Pastor Willie Papu is held is apparent from the affidavits filed by the respondents. There is an apparent "blind faith" in Pastor Willie Papu, certainly as a spiritual leader, and I find there is real difficulty for the Respondents in drawing a line between Pastor Willie Papu's spiritual guidance and his involvement in the financial administration of the Trusts. There is a risk that the safeguards put in place upon re-registration are insufficient because of the reverence with which Pastor Willie Papu is treated and regarded by the congregation and by the trustees.
>
> [225] The way in which the Remnant Church is treated as indistinguishable from SISDAC supports the applicants' position. It does not seem to be disputed that charitable donations to SISDAC have been paid to the Remnant Church and that there is no clear delineation between the two entities. The Respondents themselves depose that they regard the entities as "one and the same" and say that intermingling of funds is inevitable.
>
> [226] There is evidence of actual intermingling of SISDAC and Remnant Church funds. Emails exhibited show that donations sought from donors by SISDAC were deposited into accounts belonging to the Remnant Church.
>
> [227] Charitable donations have apparently been passed to Remnant Church at a time when it was not registered as a charity. I note that the registration as a charity is extremely recent and there are questions as to the validity of the registration. The tax implications do not seem to have been considered at all and the apparent lack of understanding of the difference in status is of concern. This supports the applicants' contentions regarding mismanagement and represents, in my view, an unacceptable risk to both trusts.

[172] The Judge recorded the appellants' grounds of opposition, which we summarise:

(a) A manager appointed by the Court might resort to realising church property to meet the manager's obligations.

(b) The Trusts' financier would be likely to treat the appointment of a receiver or manager as an event of default.

(c) Appointment of a manager or receiver would be premature as any appointment should be determined at a substantive hearing.

[173] The Judge recognised the appointment of a manager created a risk of significant financial consequences but found those risks had to be balanced against the existing risks.[53] She referred to uncontested evidence that funds donated to SISDAC were being passed to the Remnant Church, of which Pastor Papu was not only the spiritual leader but had considerable influence in every respect. She identified Mr Wood's evidence as establishing ongoing and recent concerns about financial management of the Trusts; the further high-risk investment in Bitcoin; and the risk of further deregistration.

[174] The Judge identified risks arose for the Trusts because:[54]

(a) Compliance with SISDAC's reregistration had been avoided by the establishment of the Remnant Church and the ongoing influence of Pastor Papu in management.

(b) The transfer of properties to Sunrise, otherwise than in accordance with the SISDA Property Trust deed, was symptomatic of poor management and a lack of proper oversight.

(c) There might be further action by the Charities Board if the Court did not appoint an interim manager.

[175] The Judge found in the circumstances nothing short of appointment of an interim manager would suffice to ensure the Trusts' obligations are being met, so the appointment was reasonably necessary.[55]

[176] Had the Judge appointed a "receiver" pursuant to s 60(1)(d) of the Charitable Trusts Act, the provisions of the Receiverships Act 1993 would have applied to the

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53 At [231].
54 At [238]–[240].
55 At [245].

receiver.[56] Pursuant to s 14(1) of the Receiverships Act, the receiver would also have the powers and authorities expressly or impliedly conferred by the order of the court by which the appointment was made.

[177] It is also apparent from the Manager Decision that the Judge anticipated the appointee would be undertaking some form of investigation into the allegations raised by the substantive applicants. In referring to the concerns of the substantive applicants, the Judge observed that "[i]f there is no substance in the concerns, the appointment of a manager will reveal that, and the litigation will be at an end".[57] The Judge identified the test as being whether the appointment of the manager/receiver was reasonably necessary.

[178] The Judge determined that there would be an appointment of a manager under s 60(1)(d) of the Charitable Trusts Act, limited in expense but not in time, with the manager required to report to the Court every three months.

[179] In appointing a "manager" under s 60(1)(d) of the Charitable Trusts Act, the Judge expressly stated the appointment would not be for the usual purpose that a receiver is appointed.[58] It is apparent from the Judge's discussion that the Judge was drawing a distinction between a receiver appointed in an insolvency situation and a person appointed as manager or administrator to deal with broader management issues.

[180] The Judge then made the following orders:[59]

> (a) Andrew McKay of BDO New Zealand is appointed as manager of the Samoan Independent Seventh Day Adventist Property Trust (SISDA Property Trust) and the Samoan Independent Seventh Day Adventist Church (SISDAC) for the purpose of managing and administering each charitable trust in the best interests of the objects of the trust until further order of the Court or determination of the proceeding.
>
> (b) The manager is entitled to exercise any power of a trustee until further order of this Court.
>
> (c) The manager must endeavour to consult with the applicants and the First Respondents when making decisions relating to funding the

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56 See the definition of "receiver" under s 2 of the Receiverships Act 1993.
57 Manager Decision, above n 3, at [237].
58 At [230].
59 At [253].

ongoing operation of SISDAC or the construction, use, maintenance or disposal of buildings or real property owned by the SISDA Property Trust.

(d) The manager must seek to identify and secure the property of SISDA Property Trust and SISDAC.

(e) The manager must endeavour to prepare audited accounts for SISDA Property Trust and SISDAC.

(f) The manager must prepare periodic reports of his activities to the Court and parties to this proceeding no less often than every three months.

(g) The preservation orders currently in place remain in place pending the manager's first report to the Court.

(h) The manager may request variation or removal of the preservation orders at any stage. Any such request may be dealt with on the papers if not opposed by the parties.

(i) The manager's actual and reasonable fees are to be paid out of the assets of the SISDA Property Trust.

(j) The manager's fees are capped at $50,000 (excluding GST), with leave to apply to the Court to extend this cap.

(k) Leave is reserved to the manager to seek any further directions or orders that might be required to implement the above orders.

(l) Leave is reserved to the parties to seek further directions or orders following receipt of each report provided by the manager.

The appeal against the Manager Decision

Grounds of appeal

[181] Mr McBride summarised the grounds of appeal:

(a) no jurisdiction existed under s 60(1)(d) of the Charitable Trusts Act to appoint a "manager". The term "manager" as used by the Judge is undefined and (in contrast to the specific role of a receiver) the powers and obligations of the role are unidentified in legislation or authority;

(b) Charities Services is the appropriate organisation to provide oversight; and

(c) the cultural competency of any manager appointed is relevant given the nature and purpose of the Trusts.

Submissions

[182] The appellants' position has been that it would be financially disastrous if a receiver were appointed (on an interim basis).

[183] The appellants' submissions in relation to the financial implications did not rest simply or even principally on the costs that would be incurred through appointment of a manager. The submissions were made against the background that the Trusts, through the *Beddoe* Decision, were already committed to funding not only the costs they would incur in defending the main proceeding but also the costs of the substantive applicants of that proceeding and of interlocutory steps. The information before us has put the costs arising from the representation of the substantive applicants, to the time of the hearing before us, at $486,727.63.

[184] Mr McBride observed the Judge had expressly considered the jurisdiction to appoint a receiver under the provision primarily invoked by the substantive applicants in their interlocutory application, namely s 138(1) of the Trusts Act. The Judge implicitly considered, having regard to the implications of receivership for the Trusts, it would be inappropriate to appoint a receiver.

[185] Mr McBride submitted the alternative source of jurisdiction posited by the substantive applicants — power to appoint a manager under s 60(1)(d) of the Charitable Trusts Act — was misconceived. Mr McBride submitted s 60(1)(d) does not contemplate the appointment of a "manager" (or administrator) over a trust.

[186] Mr McBride submitted s 60 essentially confirms the Court's ability to provide directions as to the administration of a charitable trust consistent with the Court's supervisory role over trusts under both the Trusts Act and in equity. Mr McBride identified there is no express provision in s 60 as to the appointment of a person in the nature of manager or receiver — that may be contrasted with the specific provision for appointment of a receiver under s 138 of the Trusts Act.

[187] Mr McBride further noted the similarities between s 133 of the Trusts Act (providing for directions sought by trustees) and s 60(1)(d) of the Charitable Trusts Act. As described by the High Court in *New Zealand Māori Council v Foulkes*, the s 133 power to give directions (then found in s 66 of the Trustee Act 1956) is "a robust, parallel source of jurisdiction to resolve any substantial question of law concerning the meaning or administration of a trust".[60]

[188] Finally, Mr McBride submitted the decision in *Khyentse v Hope*[61] appears to have involved (without argument) an incorrect assumption that jurisdiction to appoint a manager existed under s 60(1)(d). The appointment of a manager was not contested in that case and the decision solely focused on disputed access to a property for residential purposes. The focus of the manager's role was in any event a narrow one.

Discussion

[189] The Manager Decision represented a rejection of the substantive applicants' primary position that there ought to be appointment of a receiver under s 138(1) of the Trusts Act. That was a reasoned rejection and has not been the subject of a cross-appeal. We therefore do not consider whether (if other bases for the manager appointment are shown to be incorrect) there ought to have been appointment of a receiver.

[190] We accept, as submitted by Mr McBride, there is a real question as to whether the scheme of s 60 of the Charitable Trusts Act is to be interpreted as permitting the Court, pursuant to a power to give directions in respect of the administration of a trust, to appoint a manager of the trust (whether in addition to or in place of the trustees). Apart from the High Court's judgment in *Khyentse v Hope*, where the jurisdiction to make such an appointment under s 60(1)(d) was not challenged and the focus was narrow, counsel have not referred us to any decision in which s 60(1)(d) was invoked to appoint a manager, administrator or the like.

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60 *New Zealand Māori Council v Foulkes* [2014] NZHC 1777, [2015] NZAR 1441 at [46].
61 *Khyentse v Hope* (HC), above n 50.

[191] For the reasons that follow, it is unnecessary we determine the precise scope of the power under s 60(1)(d) of the Charitable Trusts Act. It is sufficient for the purposes of the following discussion that we assume, without deciding, the High Court may have power to appoint a manager under s 60(1)(d) of the Charitable Trusts Act.

[192] The Judge was essentially invited by the parties to choose between two options — to appoint a manager or receiver as an interim measure to trial or to leave the determination as to whether there should be a manager or receiver to be determined on the evidence at the substantive hearing.

[193] In considering the financial implications for the Trusts, the nature of the Trusts must be considered. They are organisations which exist for the purposes of supporting church communities. The evidence is that they depend for income on tithes and donations from their members. The additional funds required to comply with the orders in the *Beddoe* Decision and, subsequently, in the Manager Decision, would inevitably impact on the functioning of the organisations and of the broader church communities in their core role.

[194] We respectfully disagree with the Judge that the financial implications for the Trusts should be accorded less weight for the reasons she identified: that on the one hand "costly High Court litigation" will continue if a manager is not appointed and, on the other hand, if a manager is appointed and there is no substance to the substantive applicants' concerns, the "litigation will be at an end".[62]

[195] Counsel differed as to the impact of the manager's appointment on the powers of the incumbent trustees, whose powers were not expressly suspended or abridged in the Manager Decision. Mr McBride, in relation to the manager's powers, asked rhetorically: does the manager have some sort of supervisory role over the trustees, and on what basis? Mr O'Callahan submitted the "context" of the orders made in the Manager Decision indicated clearly the manager, vested with the power of a trustee, was intended to replace the decision-making powers of the incumbent trustees.

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[62] Manager Decision, above n 3, at [236]–[237].

[196] Such differences in construing the Manager Decision point to significant issues with the orders as they stand — for instance, whether the manager has the power, to the exclusion of the trustees, to control the conduct of the Trusts' defence of the claims and/or to settle the claims on terms the manager thinks fit. Mr O'Callahan submitted, if the extent of the manager's and trustees' respective powers pursuant to the orders is unclear, this Court could clarify the extent of the respective decision-making powers. We note these differences, which point to material uncertainty in the scope of the manager's role, but by reason of our conclusion that the order appointing the manager must be quashed we do not need to engage with Mr O'Callahan's suggested solution.

[197] To the extent the Judge took into account the risk there would be further action by the Charities Board were the Court to decline to appoint an interim manager, we disagree that any such risk is significant in this case. As emphasised in the *Beddoe* Decision, the Charities Board appears to have taken no steps in recent times in relation to the various issues identified. In any event, if the Charities Board did take "steps" it is not for this Court to pre-empt that.

[198] Other specific issues identified by the Judge, such as the circumstances in which the four properties were transferred to Sunrise, while clearly calling for examination, do not require response by way of interim management. As the Judge observed, they could be characterised as "symptomatic of poor management and a lack of proper oversight", but those matters can appropriately be determined at a substantive hearing.[63] The properties themselves should not be at risk in the interim. A preservation order is in place. The same applies to the other properties and the new church hall at Māngere.

[199] That leads to what the Judge identified as the central issue, namely the influence and involvement of Pastor Papu as a *de facto* officer of both Trusts. As the Judge observed, there are strong reasons to reject the suggestion the problems that existed at the time of SISDAC's deregistration have been effectively resolved. There is equally strong reason to believe there is no internal way to address the problem. But that is the very subject matter of the substantive proceeding.

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63 At [239].

[200] What is clear, from the voluminous evidence filed in the High Court, is that all persons directly involved in these proceedings will now be very well-aware of the issues that have been raised. The actions of those trustees responsible for the governance and management of the Trusts will be under the continuing scrutiny of the Court, and any failures to strictly comply with the rules of the Trust will be identified. In the case of Pastor Papu, he says on oath he observes the distinction between involvement in spiritual matters on the one hand, and direction of the trustees in relation to matters of governance and management on the other hand. If he fails to observe that distinction, it will constitute evidence in support of remedies sought by the substantive applicants and in particular the prayer for the replacement of trustees.

[201] The combination of the preservation orders and the proper role of Pastor Papu fulfilling his role in accordance with what we view as an undertaking to the Court, should address most interim issues.

[202] We do not suggest, on the evidence filed to date, risks of continued poor governance or mismanagement do not exist. But those risks cannot be assessed in a vacuum. The test for appointment of an interim receiver (under s 138(2) of the Trusts Act) is whether it is reasonably necessary and just and equitable. Assuming a manager could be appointed under s 60(1)(d) of the Charitable Trusts Act, a similar test is likely to be applied. A test of reasonableness must have regard to all the circumstances affecting the organisations in question, including their financial situation. The test of what is just and equitable must have similar regard.

[203] For the above reasons, coupled with the expense and funding already involved through the making of the *Beddoe* Decision, we respectfully disagree with the Judge that the appointment of an interim manager (under s 60(1)(d) of the Charitable Trusts Act assuming such a jurisdiction existed) was reasonably necessary or just and equitable.

[204] The parties have clearly expended very significant funds in having the litigation reach this point and in filing the voluminous evidence to which we have referred. What is now reasonably required is that, through appropriate cooperation between counsel and the parties, the substantive litigation is promptly readied for

hearing, thereby limiting the continuing financial consequences of the *Beddoe* Decision, and ensuring the disputed evidential issues are resolved efficiently through a substantive hearing. The High Court can be expected to apply to the proceedings to the strictest of case management to ensure they proceed to a timely hearing.

[205] By reason of these conclusions, it is unnecessary that we reach a concluded view on the further ground of this appeal (above at [167(c)]) by which it was asserted the Judge erred in the identification of the manager, having regard to the need for "cultural competency". We recognise the orders made in relation to the role of manager did not directly address the fact SISDAC exists to serve a Samoan church community with that community's values and its individual beliefs. There is a legitimate question as to whether the appointment of a chartered accountant as manager without identified "cultural" qualifications would be a just and equitable appointment for such an organisation. While directions were made to address the manager's role in matters such as property and financial reporting, no directions were made as to the manager's role in relation to the functioning of SISDAC in serving the faith interests of its church community. We recognise that, in the context of an appropriate appointment, such directions could have been sought and made. As it is, given our primary conclusion, this issue of the appointed manager's "cultural competency" need not be resolved.

[206] The appeal against the Manager's Decision is therefore allowed.

The appeal against the continuation of the preservation order

The preservation order

[207] As identified at [6] above, the High Court had, in August 2023, made an interim preservation order (under r 7.55 of the High Court Rules) over all the assets held by the SISDA Property Trust.[64] In the Manager Decision, Wilkinson-Smith J ordered that the preservation order remain in place pending the manager's first report to the Court.[65] That continuation order is appealed.

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64 Minute, above n 1.

65 Manager Decision, above n 3, at [252] and [253(g)].

The rule

[208] Rule 7.55(1) of the High Court Rules, under which the preservation order was made, provides:

> A Judge may at any stage in a proceeding make orders, subject to any conditions specified by the Judge, for the detention, custody, or preservation of any property.

Ground of appeal

[209] We reproduce the appellants' succinct written synopsis which identified their grounds of appeal:[66]

> 101. "Preservation of property" orders under r 7.55 are not freezing orders. Short of a charging order (r 17.41), a freezing order, or a search order, the Court is reluctant to interfere with the assets of a party pending judgment.[67]
>
> 102. "Property" must mean something "of a kind capable of detention, custody or preservation", and in the case of land "preservation against excavation, mining or the like", as opposed to legal or equitable interests in land.
>
> 103. The preservation orders should never have been made against the property titles. Those orders should be formally discharged.

Submissions

[210] Ms Cameron, presenting this aspect of the appellants' submissions, followed the points made in the appellants' synopsis. She submitted the order sought and obtained by the substantive applicants, although framed as a preservation order, was in fact a freezing order. She submitted the concept of "property" referred to in r 7.55(1) is intended to cover such matters as evidence and even property such as a house but not the title to a property. If title is to be the subject of an order, she submits it should be the subject of an application for a freezing order.

[211] Ms Cameron further submitted the preservation order was in any event not justified on the facts as there was no evidence of a risk of dissipation of property, with

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66 One footnote omitted.

67 *Investors Protection Co Ltd v Ray Courtney Architects* (1993) 7 PRNZ 1 (CA).

the trustees having confirmed they hold the properties received from SISDAC in trust for SISDAC.

[212] Ms Warren, who presented this aspect of the submissions for the substantive applicants, submitted the preservation order had been properly made and continued. She made three main points:

(a) a preservation order under r 7.55 may attach to land. The authority invoked by the appellants (*Investors Protection Co Ltd v Ray Courtney Architects Ltd*)[68] was decided under the predecessor r 331(1) when the High Court Rules did not contain a definition of "property";[69]

(b) the substantive applicants' purpose of seeking the preservation order was to safeguard the property, as intended by r 7.55, and was not for the purpose of ensuring the defendants remained judgment worthy;

(c) the orders sought were "necessary" to preserve the properties now held by the SISDA Property Trust, assurances having been given by the trustees only after orders were obtained. There remained a risk of dissipation, even if somewhat mitigated by intervening events.

Discussion

[213] As submitted by Ms Warren, real property may be the subject of a preservation order under r 7.55 by reason of the definition of "property" in the Rules — the authority relied on by the appellants turned on the provisions of the Rules as they stood in 1993.

[214] On the evidence, the clear purpose for which the substantive applicants sought the preservation order was to preserve the transferred properties for the benefit of the beneficial owner. Further transfers (whether to Sunrise or any other entity) were thereby restrained. We conclude there remains, should there not be a prohibitory order,

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68 *Investors Protection Co Ltd*, above n 67.

69 Under the current rules "property" is defined to include real property and any estate or interest in real property: High Court Rules, r 1.3 definition of "property".

a risk of dissipation. The High Court could not ignore the trustees' failure to protectively document the basis of property transfers to the SISDA Property Trust and the still-unexplained failure of the Sunrise directors to transfer the properties held by Sunrise back to the Trust.

[215] We are not satisfied the Judge erred in ordering the preservation order was to remain in place. With the decision we have reached to quash the manager's appointment, it is arguably even more appropriate the preservation order remain in place for the time being, with an appropriate amendment of wording to no longer refer to the manager's report.

Result

[216] The appeal in CA255/2024 is dismissed, except to the extent the order at [1](c) of the High Court Result Judgment is amended to read:

> (a) that the applicants shall be reimbursed by way of payment from the assets of SISDAC, and if no such assets are available then the SISDA Property Trust, for their legal costs ("the costs"), incurred in commencing and pursuing the main proceeding and the interim orders application, including the costs of and incidental to this application.
>
> (b) the applicants' entitlement to reimbursement will arise when:
>
> (i) the applicants' solicitors have rendered invoices to SISDAC and to the SISDA Property Trust; and, in addition
>
> (ii) the applicants' senior counsel has certified the costs:
>
> 1. have been incurred in relation to the proceedings declared reasonable and appropriate by these orders; and
>
> 2. are in fact fair and reasonable having regard to the nature of attendances undertaken; and, in addition
>
> (iii) an Associate Judge of this Court, upon presentation of the information at (b)(i) and (ii) above has approved the costs as fair and reasonable.

[217] The appeal in CA428/2024 is allowed to the extent the orders appointing Andrew McKay as manager of the Samoan Independent Seventh Day Adventist Property Trust and of the Samoan Independent Seventh Day Adventist Church and making directions in relation to his appointment are quashed.

[218] In CA428/2024 the order whereby the preservation order currently in place was to remain in place pending the manager's first report to the Court is varied to the extent of deleting the words "pending the manager's first report to the Court" and inserting the words "until further order of the Court or agreement of the Parties".

[219] Costs and disbursements of both appeals are reserved.

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Kāhui Legal, Wellington for Fifth Respondent