

# SUPREME COURT OF QUEENSLAND

CITATION: *Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) ABN 90 103 392 182 & Ors* [2019] QSC 194

PARTIES: **TAUA MEAULI FAAMATE**  
(first applicant)  
and  
**LAGILAGIA FAAMATE**  
(second applicant)  
and  
**VAEA LOLE NOUATA**  
(third applicant)  
and  
**SEGIA NOUATA**  
(fourth applicant)  
and  
**MAIAVA PERETISO MULIAGA**  
(fifth applicant)  
and  
**NAUMATI MULIAGA**  
(sixth applicant)  
and  
**TUITEA MAFUTAGA FOE**  
(seventh applicant)  
and  
**LEITU FOE**  
(eighth applicant)  
and  
**TAGO AVE IATIGA**  
(ninth applicant)  
and  
**SEUAANA TAOFIA MULIAGA**  
(tenth applicant)  
and  
**LINE MULIAGA**  
(eleventh applicant)  
and  
**FAALAA TUSI FANOLUA**  
(twelfth applicant)  
and  
**ALA FANOLUA**  
(thirteenth applicant)  
and  
**LUATUA ASOSILI SETEFANO**  
(fourteenth applicant)  
and  
**TALALELEI SETEFANO**

(fifteenth applicant)

and

**FALEAUTO TALUVALE FA**

(sixteenth applicant)

and

**JUNIOR PAPUA**

(seventeenth applicant)

and

**SENIA PATO**

(eighteenth applicant)

and

**ASO AUKUSO**

(nineteenth applicant)

and

**TIANA AFAESE**

(twentieth applicant)

and

**LEAVEA JONES**

(twenty-first applicant)

v

**CONGREGATIONAL CHRISTIAN CHURCH IN  
SAMOA-AUSTRALIA (IPSWICH CONGREGATION)**

ABN 90 103 392 182

(first respondent)

and

**KERITA REUPENA**

(second respondent)

and

**TIPI TISEMA**

(third respondent)

and

**LOLINI SAKAIO**

(fourth respondent)

FILE NO: SC No 12831 of 2016

DIVISION: Trial Division

PROCEEDING: Originating Application

DELIVERED ON: 9 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 18 – 27 March 2019; supplementary submissions from the applicants received 3 April 2019, 2 August 2019; supplementary submissions from the respondents received 4 April 2019, 2 August 2019

JUDGE: Wilson J

ORDERS:

**I declare that:**

- 1. The applicants are members of the first respondent, except for the nineteenth and twentieth applicants.**
- 2. The purported amendment to the first respondent's constitution which is alleged to have occurred on 4 September 2016 is invalid.**
- 3. The first respondent's constitution is the document exhibited as TMF-2 to Mr Taua Meauli Faamate's affidavit filed herein.**
- 4. Any appointment to the first respondent's management committee, not in compliance with clauses 11 to 13 of the first respondent's constitution, was invalid.**

**I order that:**

- 1. The application for winding up be dismissed.**
- 2. The parties will provide a draft Order giving effect to the reasons for judgment within fourteen days.**
- 3. The question of costs is adjourned to a date to be fixed.**

CATCHWORDS:

CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE – OTHER CASES – where the applicants seek winding up of a solvent ongoing charitable organisation – whether the Association should be wound up on the just and equitable ground

*Associations Incorporation Act* 1991 (Qld) s 3, 48, 60, 61, 62, 69A, 71, 89, 90

*Ananda Marga Pracaraka Samgha Ltd v Tomar (No 2)* [2010] FCA 1342, cited

*ASIC v ABC Fund Managers* [2001] VSC 383; (2000) 39 ACSR 443, cited

*Australian Public Service Association (Fourth Division Officers) v Lawrence* (1982) IR 166, cited

*Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49, cited

*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289, cited

*Finch v Oake* [1896] 1 Ch 409, cited

*Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641, considered

*Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413, cited

*In re Bleriot Manufacturing Aircraft Company Ltd* [1916] TLR 253, cited

*Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018)

125 ACSR 227, followed  
*In re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, cited  
*Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105, cited  
*Overmyer Industrial Brokers Pty Ltd v Campbells Cash & Carry Pty Ltd* [2003] NSWCA 305, cited  
*Pine Rivers, Caboolture and Redcliffe Group Training Scheme Inc* [2013] QCA 358; [2015] 1 Qd R 542, cited  
*Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247, applied  
*Reupena v Senara* [2016] WSSC 140, cited  
*Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440, cited  
*Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408, cited

COUNSEL: V B Brennan for the applicants  
P K O'Higgins for the respondents

SOLICITORS: Corney & Lind Lawyers for the applicants  
Neumann and Turnour for the respondents

### The proceeding

- [1] The dispute in this proceeding involves two competing groups in the Congregational Christian Church in Samoa-Australia (Ipswich Congregation) (“the Association” or “the Ipswich Church”).
- [2] The Association is conducted as a church and is a registered charitable organisation<sup>1</sup> incorporated under the *Associations Incorporation Act 1981* (Qld) (“the Act”).
- [3] The applicants seek orders winding up the Ipswich Church on the just and equitable ground.<sup>2</sup> Alternatively, they sought the appointment of a receiver,<sup>3</sup> however, no longer seek such an alternate order.<sup>4</sup>
- [4] At the commencement of the trial, the respondents openly accepted the appointment of a receiver as a means of avoiding this trial.<sup>5</sup> However, on day three of the trial the respondents’ counsel submitted in opening address:<sup>6</sup>

“MR O’HIGGINS: Your Honour, the applicant’s case is seeking to wind up the association as your Honour has heard on the grounds of insolvency, and on the ground that is just and equitable that the association of the church be wound up. They maintain the alternative belief for the appointment of a receiver. The respondent’s opposable of the relief sought.”

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<sup>1</sup> Australian Charities and Not-for-profits Commission Registration Search, exhibit 5 (trial bundle), tab 24.  
<sup>2</sup> Amended Originating Application filed 3 August 2018 (“Application”), exhibit 5 (trial bundle), tab 1, p 2, [1]-[4].  
<sup>3</sup> Application, exhibit 5 (trial bundle), tab 1, p 2-3, [5].  
<sup>4</sup> Transcript of the hearing on 1 April 2019, p 58, line 1-10.  
<sup>5</sup> Exhibit 3 (written submissions on the issue of appointment of a receiver).  
<sup>6</sup> Transcript of the hearing on 20 March 2019, p 50, line 32 to 36.

- [5] The applicants ultimately submitted that they did not consider the appointment of a receiver to be an “appropriate” remedy.<sup>7</sup> At the end of the trial, the applicants formally abandoned the alternative relief sought of the appointment of a receiver.<sup>8</sup>
- [6] The respondents oppose winding up of this solvent<sup>9</sup> ongoing charitable organisation providing religious and community activities for the Samoan Christian community.
- [7] The respondents’ primary position is that the application to wind up ought to be refused and no appointment of a receiver ought to be made.
- [8] However, if it became necessary to do so in the context of an appointment of a receiver, the respondents would concede that all of the applicants<sup>10</sup> were members (plus those on their list for which Mr Faamate, the first applicant, did not account and which appear on the respondents’ list) for the purpose of a receiver convening a general meeting to determine the Ipswich Church’s future.<sup>11</sup>
- [9] The respondents considered that this relief is a less drastic means of resolving the dispute than winding up (a remedy of last resort), particularly for an otherwise solvent entity.<sup>12</sup>
- [10] The respondents have, upon a request from me, provided a draft order and affidavits by Mr Harris and Mr Connelly who both consent to be appointed by the Court to act as a receiver of the Association.<sup>13</sup>
- [11] The applicants’ further amended application<sup>14</sup> also seeks that the Court declare that:
- a. the purported amendment to the first respondent’s constitution which is alleged to have occurred on 4 September 2016 is invalid;
  - b. the purported undocumented amendment to clauses 11 and 12 of the first respondent’s constitution which is alleged to have occurred on or about 20 October 2013 is invalid;
  - c. the first respondent’s constitution is the document exhibited as TMF-2 to Mr Taua Meauli Faamate’s affidavit filed herein;
  - d. the appointment of the second, third and fourth respondents as the first respondent’s committee is invalid; and
  - e. the applicant is a member of the first respondent.

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<sup>7</sup> Transcript of hearing on 22 March 2019, p 78, line 38-45.

<sup>8</sup> Transcript of the hearing on 1 April 2019, p 58, line 1-10.

<sup>9</sup> Exhibit 4 (expert report). The applicants have conceded the Association is solvent, see exhibit 29 (applicants’ final submissions), p 4, [1].

<sup>10</sup> Save for Junior Papua and Segia Papua, Aso Aukuso and Tiana Afaese, see Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 358, [40]-[41].

<sup>11</sup> Exhibit 30 (respondents’ final submissions), p 29, [137].

<sup>12</sup> Exhibit 30 (respondents’ final submissions), p 1, [4].

<sup>13</sup> Affidavit of William James Harris affirmed 2 August 2019, received 2 August 2019; Affidavit of Anthony Norman Connelly sworn on 2 August 2019, received 2 August 2019; draft Order received 2 August 2019.

<sup>14</sup> As amended by leave on 26 March 2019.

[12] The applicants' further amended application<sup>15</sup> seeks the following order:

- a. the first respondent take all reasonable steps to register with the Office of Fair Trading Queensland the document exhibited as TMF-2 to Mr Taua Meauli Faamate's affidavit as the first respondent's constitution.

[13] The declarations sought by the applicants form part of the underlying issues of the winding up application.<sup>16</sup>

### **Legal principles: winding up on just and equitable grounds**

[14] Pursuant to section 90(1)(e) of the Act, an incorporated association may be wound up by the Court if the Court is of the opinion that it is just and equitable to do so.

[15] This ground of winding up, on just and equitable grounds, confers upon the Court a discretionary power of a very wide character.<sup>17</sup> The words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the Court to any case.<sup>18</sup> It is a question of fact and each case must depend on its own circumstances.<sup>19</sup>

[16] However, the Court would decline to make a winding up order on the just and equitable ground where there is an alternative means of redress short of such an order.<sup>20</sup>

[17] Section 89(1) of the Act states that an incorporated association may be wound up by special resolution of the members passed at a general meeting called for that purpose. A special resolution must be passed by the votes of three quarters of the members who are present at the meeting and entitled to vote.<sup>21</sup>

[18] It is noted that this alternative means of liquidation in the form of voluntary winding up in section 89(1) of the Act requires a special majority. It follows that a compulsory winding up will only be ordered where the circumstances are so exceptional as to justify the Court in disregarding the statutory requirement in a members voluntary winding up of three-fourths majority.<sup>22</sup>

[19] In *ASIC v ABC Fund Managers*,<sup>23</sup> Warren J (as her Honour then was) said:<sup>24</sup>

"There are general fundamental principles applied by the courts with respect to a winding-up application on the just and equitable ground. First, there needs to be a lack of confidence in the conduct and management of the affairs of the company: see *Loch v John Blackwood Ltd* [1924] AC 783 at

<sup>15</sup> As amended by leave on 26 March 2019.

<sup>16</sup> List of Agreed Issues as at 28 March 2019.

<sup>17</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [135], referring to *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492.

<sup>18</sup> *In re Bleriot Manufacturing Aircraft Company Ltd* [1916] TLR 253 at 255.

<sup>19</sup> *In re Bleriot Manufacturing Aircraft Company Ltd* [1916] TLR 253 at 255.

<sup>20</sup> *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227 at [78].

<sup>21</sup> *Associations Incorporation Act* 1981 (Qld) s 3(4).

<sup>22</sup> See McPhersons Law of Company Liquidation, Thomson Reuters, online, [4.225], referring to sections 9 and 491(1) of the *Corporations Act* 2001 (Cth).

<sup>23</sup> [2001] VSC 383; (2000) 39 ACSR 443.

<sup>24</sup> [2001] VSC 383; (2000) 39 ACSR 443 at [119].

788; [1924] All ER 200. Second, in these types of circumstances it needs to be demonstrated that there is a risk to the public interest that warrants protection. Third, there is a reluctance on the part of the courts to wind up a solvent company”.

- [20] The “lack of confidence” must be grounded on the conduct of the directors and not in regard to their private life or affairs, but in regard to the company's business. The lack of confidence cannot spring from being outvoted on the company policy or on what is called the domestic policy of the company.<sup>25</sup> The lack of confidence can be based on lack of probity in the conduct of the affairs of the company.<sup>26</sup>
- [21] One of the principal reasons for the remedy, which developed from partnership law,<sup>27</sup> is to allow a member to withdraw their capital investment from the firm, where because it is solvent, it is not suitable for winding up in insolvency.<sup>28</sup>
- [22] The analogy between a corporation and an association and particularly the members of each (and the relationship of those members to each other and the body corporate) is one which was explained by King CJ in *Chiropractic and Osteopathic College of SA Inc v Struthers*.<sup>29</sup> In that case, the Chief Justice observed:<sup>30</sup>

“... Incorporation under [the South Australian Act] renders the association and its members for the time being a body corporate (section 12), capable of holding property and of suing and being sued in its own name. Other powers are conferred by the Act on an incorporated association. I think that there is a valid analogy between the relationship of members of an incorporated association and body corporate on the one hand, and the relationship of members of a company incorporated under the Companies Act and the body corporate on the other. On the analogy of the principles applied in the cases under the Companies Act it seems to me that upon incorporation each member of the Association and the body corporate enter into a contract with each other in terms of the rules and that thereafter there is not only a binding legal relationship between the members inter se but also between each member and the incorporated association. Similarly, when a member joins an already incorporated association, a contract in terms of the rules comes into existence”.<sup>31</sup>

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<sup>25</sup> *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105 at [118] per Hasluck J.

<sup>26</sup> *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105 at [118] per Hasluck J, citing *Loch v John Blackwood Ltd* [1924] AC 783.

<sup>27</sup> *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227 at [77].

<sup>28</sup> See McPherson, B, ‘Winding up on the “Just and Equitable” Ground’, *Modern Law Review*, May 1964, 282 at 286; see also McPhersons Law of Company Liquidation, Thomson Reuters, online, [4.225], citing the remarks of Lord Cairns in *Re Suburban Hotel Co* (1867) LR 2 Ch App 737 at 742-743, set out at [4.10]; *Re Co-op Development Funds of Australia Ltd (No 3)* (1978) 3 ACLR 437; [1977-78] ACLC 40-396 at 468 (ACLR).

<sup>29</sup> *Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49.

<sup>30</sup> *Chiropractic and Osteopathic College of SA Inc v Struthers* (1981) 97 LSJS 49 at 51.

<sup>31</sup> See also *Pine Rivers, Caboolture and Redcliffe Group Training Scheme Inc* [2013] QCA 358; [2015] 1 Qd R 542 at 551, [31] in which Fraser JA referred to an extensive number of matters by which incorporated associations have “striking similarities with companies”.

- [23] A person seeking winding up on the just and equitable ground must come to the Court with clean hands.<sup>32</sup>
- [24] The classes of conduct which justify the winding up of a company on the just and equitable ground are not closed, and the ground brings in broad equitable considerations.<sup>33</sup>
- [25] The courts have regard to pre-existing categories of cases, without necessarily treating those categories as rigid or comprehensive.<sup>34</sup> Those categories include where:
- a. it becomes impossible to achieve the objects for which the company was formed;
  - b. it has become impossible to carry on the business of the company; or
  - c. there was been serious fraud, misconduct or oppression in regard to the affairs of the company.<sup>35</sup>
- [26] It is not easy to apply the recognised categories where a company is not a commercial company.<sup>36</sup>
- [27] Although the categories of cases are not closed and courts have been reluctant to define the circumstances in which an association or a company should be wound up on the just and equitable ground, the reported cases establish some categories of conduct which, in all the circumstances, will provide a sufficient basis to wind up a body corporate on the just and equitable grounds, including:
- a. if there is oppression by those controlling the defendant in the expulsion of members, as directors and members of the body corporate;<sup>37</sup>
  - b. if there is a lack of confidence in the conduct and management of a body corporate's affairs;<sup>38</sup>

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<sup>32</sup> *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 at 387 (AC); See also *Ruut & Charest Pty Ltd v Head* (1996) 20 ACSR 160 where Santow J did not dismiss the application for winding up merely because the applicant had not come with clean hands but it was “an important factor in the exercise of the court’s discretion along with other factors ...”.

<sup>33</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [136], referring to *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492.

<sup>34</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [136].

<sup>35</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [136] citing *International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368 at 371 per Young J.

<sup>36</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [137].

<sup>37</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [137].

<sup>38</sup> *Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408 at [152] per Lindsay J citing *In the matter of SJG Securities Pty Limited* [20113] NSWSC 588 at [13] per Black J.



- c. if the body corporate has not carried on its business candidly and in a straightforward manner with the public, or failed to comply with regulatory requirements relating to financial records and reports;<sup>39</sup>
- d. if there is a breakdown of trust and confidence of the members;<sup>40</sup> or
- e. if there is a deadlock which, in effect, totally inhibits the functioning of the body corporate. For example, circumstances in which management of an association is deadlocked or paralysed by a loss of mutual trust and confidence between the members of the association.<sup>41</sup>

[28] In this case, the Association is solvent.<sup>42</sup>

[29] The applicants concede that winding up a solvent body corporate is a “remedy of last resort”,<sup>43</sup> however still assert that “if there was going to be an association in this State that needed to be wound up on the just and equitable grounds, this is it”.<sup>44</sup>

[30] The reasonableness of the applicants’ position needs to be assessed by consequence of the events and circumstances upon which the application is founded and what is necessary to address them:<sup>45</sup>

“[46] In my view, the reasonableness of the applicant’s position is to be assessed by reference to the consequences of the events and circumstances upon which the application is founded and what is necessary to redress them. If they could be redressed only by a winding up, then the pursuit of a winding up order would not be unreasonable in the relevant sense. On the other hand, if there is an alternative remedy which would equally redress those consequences, then an applicant’s preference for a winding up order would usually be considered to be unreasonable, because ordinarily the winding up of a solvent company will have far reaching effects. It will not only deprive the other shareholders of their investment in a solvent enterprise, but it will also be likely to affect the interest of others, such as the company’s employees and third parties whose interests from transacting business with the company would be affected. It is the likelihood of substantial and wide ranging prejudice of this kind which would cause judges to describe a winding up of a solvent company in this context as an extreme step. In *Hillam v Ample Source International Ltd (No 2)*, the Full Court of the Federal Court (Emmett, Jacobson and Buchanan JJ) said that although there is no presumption against the winding up of a solvent company, a court should bear in mind the “warnings given in the authorities, that an order to wind up a solvent company is an extreme step”.

<sup>39</sup> *Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408 at [152] per Lindsay J citing *In the matter of SJG Securities Pty Limited* [2011] NSWSC 588 at [13] per Black J.

<sup>40</sup> *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492 at 380 (AC).

<sup>41</sup> *Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408 at [153] per Lindsay J.

<sup>42</sup> Exhibit 4 (expert report). The applicants have conceded the Association is solvent, see exhibit 29 (applicants’ final submissions), p 4, [1].

<sup>43</sup> Exhibit 29 (applicants’ final submissions), p 58, [140], citing *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227.

<sup>44</sup> Transcript of the hearing on 18 March 2019, p 7, line 18-19.

<sup>45</sup> *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227 at [46]-[52], footnotes omitted.

[47] The evident purpose of the proviso in s 467(4) is to avoid the extreme step of a winding up if there is an alternative and adequate remedy. Consequently a winding up will be ordered if there is no other remedy which is adequate, in that it would redress the consequences of the facts and circumstances which are the basis for relief. This is another way of saying what McPherson J said in *Re Dalkeith Investments Pty Ltd* about the statutory predecessor of s 467(4) namely “that winding up is to be regarded as a remedy of last resort and which ought not to be granted if some other less drastic form of relief is available and appropriate. In referring to a winding up as “drastic form of relief”, McPherson J was referring to the far reaching consequences of a winding up. In referring to an alternative form of relief which was “appropriate”, his Honour was referring to what was necessary, in the interests of the applicant, to redress the consequences of the relevant events and circumstances.

[48] That principle has been endorsed in many cases: see for example: *French & Ors v Smith & Ors*; *Netbush Pty Ltd v Fascine Developments Pty Ltd*; *Turner v Ulicorp Pty Ltd*; *Short v Crawley (No 30)*; *Re Hollen Australia Pty Ltd*; *Holt v Burnside*; *Tomanovic & Anor v Global Mortgage Equity Corporation Pty Ltd & Anor*; *In the matter of Amazon Pest Control Pty Ltd* and *Ian Allan Byrne v AJ Byrne Pty Ltd*.

[49] In *Short v Crawley (No 30)*, White J (as he then was) discussed the statement by McPherson J in *Re Dalkeith Investments Pty Ltd* and explained its relevance to the operation of s 467(4) in terms which I would respectfully adopt:

“In *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247, McPherson J ... said (at 252) that winding-up is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate. Presumably, if some other less drastic form of relief is available and appropriate, it can then be seen that the applicant for winding-up is acting unreasonably in seeking such an order, even if such an applicant has cogent reasons to advance in support of the application ... [W]here the various parliaments have re-enacted s 367(3) of the *Companies Code* as s 467(4) of the *Corporations Law* and then as s 467(4) of the *Corporations Act* ... it may be taken that the legislatures have adopted the judicial construction of the provision, particularly where the construction is by an acknowledged authority in the field.”

[50] Against those authorities is *Re Bluechip Development Corporation (Cairns) Pty Ltd* where that passage from the judgment of White J was criticised as follows:

“In *Re Dalkeith Investments Pty Ltd* it was said that the effect of an earlier provision similar to s 467(4) of the *Corporations Act* was that winding up “is to be regarded as a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate”. In *Short v Crawley (No 30)* (*Short*) with respect to this statement, it was said, “Presumably, if some other less

drastic form of relief is available and appropriate, it can then be seen that the applicant for winding up is acting unreasonably in seeking such an order, even if such an applicant has cogent reasons to advance in support of the application.” ... Section 467(4) identifies two matters that, taken together, would justify not making a winding up order, namely, that some other remedy is available to the applicant, and that the applicant is acting unreasonably in seeking to have a company wound up instead of pursuing another remedy. The passage from *Short*, in my respectful opinion, gives no weight to the reference to an applicant acting unreasonably.” (footnotes omitted)

[51] In my respectful opinion, that criticism of *Short v Crawley (No 30)*, and thereby of *Re Dalkeith Investments Pty Ltd*, did not pay sufficient regard to White J’s reference to an alternative remedy which is “appropriate”, meaning that it is appropriate to redress the position in which the appellant or the company have reached as a result of the relevant events and circumstances.

[52] It follows that I differ from the trial judge in the present case, insofar as he declined to apply the statement in *Re Dalkeith Investments Pty Ltd*. His Honour apparently regarded that statement as being too restrictive of the power to order a winding up, even where, as he recognised, a court should keep in mind that the winding up of a solvent company is an extreme step. In my view, that is a warning which is not inconsistent with what was said in *Re Dalkeith Investments* and the cases which have applied it.”

- [31] The respondents submit that there does not appear to be any Australian decision in which a court has wound up a solvent charitable incorporated association on the just and equitable ground.<sup>46</sup>
- [32] The closest authority to the circumstances of this case is that of *Gregor v British-Israel World Federation (NSW)*<sup>47</sup> which involved an application to wind up a non-profit company (with some religious aims), which was limited by guarantee,<sup>48</sup> on the just and equitable ground.
- [33] In that case, Austin J was persuaded that there was a practical impossibility of carrying out the activities of the company because of a bifurcation of the board, which could not be remedied by re-admission of members.<sup>49</sup> The two bitterly opposed factions were fighting for control at board level and both purported to be holding meetings and to be running the organisation. The dispute about membership could not be resolved because it took a properly constituted board to exercise its discretion to admit or refuse members and the records were an “irretrievable mess”. This had occurred at a time when the company had received a bequest to be used for the objects of the entity and the board could not make any decisions.

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<sup>46</sup> Exhibit 30 (respondents’ closing submissions), p 6, [22].

<sup>47</sup> [2002] NSWSC 12; (2002) 41 ACSR 641.

<sup>48</sup> Defined in section 9 of the *Corporations Act 2001* (Cth) as “a company formed on the principle of having the liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up”; such companies are public companies (section 112(1)).

<sup>49</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [139]-[140].

- [34] The banks had “stopped” the company’s bank accounts. A bequest was left to the organisation, the application of which the court found could best be directed by the overseas entity in accordance with the wishes of the testator.<sup>50</sup> The overseas entity with which the company was affiliated had withdrawn its endorsement and its representative gave evidence about the dis-endorsement and said that on winding up it would not seek to benefit from the assets but would hold the assets as “security” for the re-establishment of another entity under properly constituted and acceptable management.<sup>51</sup> Austin J found that winding up provided the “best chance” for the assets, including the bequest, to be used for the purposes of the company.<sup>52</sup>
- [35] Whilst there is no presumption against the winding up of a solvent company, a court should bear in mind the “warnings given in the authorities, that an order to wind up a solvent company is an extreme step”.<sup>53</sup>
- [36] Winding up is a remedy of last resort; one only to be considered where there is no alternative remedy that would equally redress the legitimate concerns of those applying for winding up.<sup>54</sup>
- [37] Accordingly, the grounds relied upon by the applicants ought to be scrutinised with care.
- [38] If an alternative remedy which is less drastic and extreme than winding up is available, then the Court would not order winding up in lieu of that lesser remedy.<sup>55</sup>

## Background

- [39] The Ipswich Church was established in 1988<sup>56</sup> by five families in Goodna and was incorporated under the Act in 1991,<sup>57</sup> principally to allow it to be the legal owner of real property.<sup>58</sup>
- [40] The Association’s objects include:<sup>59</sup>
- a. providing premises, facilities, leadership and teachings to give spiritual and pastoral care to the Samoan people and other people, and enable them to protect and practise their faith;

<sup>50</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [149].

<sup>51</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [72].

<sup>52</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [158]-[160].

<sup>53</sup> *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227 at [46] citing *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336 at 350 [70].

<sup>54</sup> *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247; *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227.

<sup>55</sup> *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247; *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227.

<sup>56</sup> Exhibit 7 (list of agreed facts), [1].

<sup>57</sup> Exhibit 7 (list of agreed facts), [3].

<sup>58</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 162, [6]-[9].

<sup>59</sup> Constitution, exhibit 5 (trial bundle), tab 10/11.

- b. acting as a cultural centre for the Samoan people and others, holding religious services, funeral services, marriages, meetings or any other form of gathering to provide, foster and promote the religious beliefs, social customs, practices and cultural beliefs of those people;
- c. guiding and helping the Samoan communities residing in Australia and Samoa to practise their religion and provide such groups with the personnel and finances to establish their own organisations, so as to further the religious and cultural needs and interests of these communities;
- d. holding and arranging fundraisings, the proceeds of which are devoted to Church funds for its development;
- e. holding and arranging social functions, gatherings or meetings for the purpose of supporting and furthering the traditional island cultural pursuits; and
- f. conducting lectures, classes and other forms of instruction to promote the continuance of traditional family, religious and social customs, beliefs and practices.

[41] The Association was, and still is (according to many of the respondents' witnesses),<sup>60</sup> a hub for spiritual and community activities for its congregation, including:<sup>61</sup>

- a. church services;
- b. Sunday school;
- c. bingo nights;
- d. youth groups, men's groups, women's groups and bible studies; and
- e. a meeting place and hub for the surrounding community.<sup>62</sup>

#### *Affiliation with the Mother Church*

[42] For 28 years, the Association was one of a network of Australian associations which had a direct affiliation with the Congregational Christian Church in Samoa ("the Mother Church" or "the Samoan Church").

[43] That affiliation is enshrined in the original constitutional objects<sup>63</sup> whereby its first object was that it was a part of a network of Churches that had, as its head, the Congregational Christian Church in Samoa (the Samoan Church).

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<sup>60</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 139, [35]; Affidavit of Tepatasi Melila, exhibit 14 (respondents' book of affidavits), tab 3, p 90, [27]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 181, [101]; Affidavit of Lolini Sakaio, exhibit 14 (respondents' book of affidavits), tab 13, p 460, [40]; Affidavit of Michelle Seupule, exhibit 14 (respondents' book of affidavits), tab 14, p 467, [25]; Affidavit of Temukisa Tisema, exhibit 14 (respondents' book of affidavits), tab 17, p 488, [68]; Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 502, [52].

<sup>61</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 139, [35].

<sup>62</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 141, [49].

<sup>63</sup> Constitution, exhibit 5 (trial bundle), tab 10/11.

- [44] The Mother Church is a transnational church with a number of Districts worldwide. Within these Districts, there are a number of subdistricts which are divided according to their locality and region and within each subdistrict there are a number of parishes. The parishes are, generally, incorporated associations such as the Association.<sup>64</sup>
- [45] An “Elder Minister” oversees each subdistrict. A single Elder Minister is selected to be the Representative of the District in the Churches Ministerial Sub-Committee in Samoa.<sup>65</sup>
- [46] The Association was, for all intents and purposes, the Ipswich Parish of the Church. For this reason, the Association’s members are often called “Church Members”, and the Association is sometimes called “the Ipswich Congregation” or “the Ipswich Church”.<sup>66</sup>
- [47] Mr Faamate, the first applicant, and a past secretary of the Association, sets out the connection between the Association and the Mother Church:<sup>67</sup>
- a. the Association has regularly participated in the Law Preacher Circuit managed by the Mother Church. This is a rotating Preaching Circuit where Lay Preachers will travel to the various member Churches of the Mother Church to preach. The Association has historically hosted these Lay Preachers.
  - b. the Association has always sent delegates to participate at the Mother Church’s annual conference held in May, where all members Churches of the Mother Church gather (even where those churches are established outside of Samoa, such as in Australia, New Zealand, America and Fiji).
  - c. I recall that the Mother Church made an initial cash contribution of \$15,000.00 when the Association opened the Church Building and Minister’s Residence at 11 Bailee Street, Goodna;
  - d. the Association makes financial contributions annually to the Mother Church in the form of “Taulaga” contributions. This can be seen in the audited statements of the Association annexed to the Mr Kerita Reupena’s Affidavit sworn 6 February 2017 as follows:
    - i. the Non-Current Liability described as “*EFKS Toomaga*”. The EFKS Toomaga Fund (EFKS stands for “*Ekalesia Faapotopotoga Kerisiano Samoa*”) is administered and operated by the Mother Church. The Association is able to borrow funds and makes payments to the Mother Church through this fund.
    - ii. the expenses of the Association described as “*Offering to Samoa*”.
  - e. the winding-up clause of the constitution of the Association states that all distribution of surplus assets shall be given or transferred to the Mother Church.

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<sup>64</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 23, [11].

<sup>65</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 23, [13].

<sup>66</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 23, [15].

<sup>67</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 6, p 97, [56].

This clause is still present in the amended constitution (annexed to the Mr Kerita Reupena's Affidavit sworn 6 February 2017).

- [48] It is noted that Reverend Reupena, the second respondent, states that the Mother Church has never provided financial assistance to the Association.<sup>68</sup>

*Reverend Reupena*

- [49] The principal Minister (and Chair) of the Ipswich Church has been, since 1988, Reverend Kerita Reupena.<sup>69</sup>
- [50] Reverend Reupena was elected by the then members of the Ipswich Church in mid-1988 and formally appointed (a process known as being "sealed") as the Minister on 24 September 1998.<sup>70</sup>
- [51] Reverend Reupena provides guidance and teaching in matters of Christian faith and pastoral care to church members. Reverend Reupena states that as the leader of the church, he has ultimate responsibility and oversight of all administrative and financial matters.<sup>71</sup>
- [52] A Minister cannot be engaged in a ministerial post in the Mother Church without a wife<sup>72</sup> and Reverend Reupena is assisted by his wife Mrs Binary Reupena.<sup>73</sup> On the evidence, it is clear that Mrs Reupena plays an important part in the Association's affairs.
- [53] The Chief Justice of Samoa in *Reupena v Senara* [2016] WSSC 140 (at first instance) described the position of Minister for a congregation of the Samoan Mother Church (such as Reverend Reupena) in the following terms:<sup>74</sup>

"With Samoa, a minister of a village church is chosen and appointed by the congregation of that village. His remuneration is paid for by the congregation from voluntary donations by its members. There is no fixed remuneration, a minister's remuneration depends on what the members of the congregation can afford and are willing to donate. The congregation can also terminate the service of the minister if they want to any time without having to consult the Church [in Samoa] or its governing body. It is unheard of that a minister can sue a village in Court if his service as minister is terminated by whatever reason by the village congregation and many ministers have been terminated over the years. The church building where religious services are held is also built by the village congregation and belongs to the village and not the Church [in Samoa]. The residence of the minister is also built by the village congregation on village land and belongs to them. The use of the residence by the minister is rent free. A minister

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<sup>68</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 163, [13].

<sup>69</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 161, [1]; Exhibit 7 (list of agreed facts), [2].

<sup>70</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 162, [7].

<sup>71</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 162, [8].

<sup>72</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 134, [5].

<sup>73</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 134, [3]-[6].

<sup>74</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, a copy of the decision is annexed at TMF-5, p 58-83, see [56].

occupies a special position within a village and is accorded special treatment and the highest respect in accordance with Samoan customs and the Christian beliefs of the Samoan people. He is the spiritual father of the village. In such circumstances, there can be no contract between a minister and the Church [in Samoa]. The relationship is one between the minister and the village congregation and it is not contractual”.

- [54] There is evidence that in relation to the Association, it is not for the Mother Church to decide who the Minister should be of the Church<sup>75</sup> but rather it is a matter for the congregation to choose their Minister.<sup>76</sup>
- [55] It is clear from the evidence that Reverend Reupena effectively rules the Association with a dominating presence.
- [56] Not only was Reverend Reupena the pastor of the Church but during the life of the Association, he has been the Association’s President<sup>77</sup> and Chairman.<sup>78</sup>
- [57] Reverend Reupena was also one of a select number of pastors who, together, formed the Elders’ Committee of the Samoan Church.<sup>79</sup>

#### *The Association’s assets and funding*

- [58] The Association is solvent.<sup>80</sup>
- [59] The applicants initially contested the Association’s solvency, however, at the hearing<sup>81</sup> they ultimately conceded that the Association is solvent.<sup>82</sup> The applicants submit that whilst the Association is solvent the Association is still in a precarious position of being “cash poor”.<sup>83</sup>
- [60] The Association currently owns land<sup>84</sup> purchased in 2008 as an investment<sup>85</sup> and the church premises<sup>86</sup> comprising a manse (pastor’s residence), church hall (which seats about 1,000 people), the church building itself (which seats about 400 people), and a volleyball/basketball court, set over about 2 acres.<sup>87</sup>

<sup>75</sup> Transcript of hearing on 18 March 2019, p 67, line 37-38; To allow an outside body to choose the minister would be inconsistent with the contractual nature of the relationship between the members and the association – such a provision if expressed in the rules would be void: G E Dal Pont, *Law of Associations* (LexisNexis, 2018) [6.96].

<sup>76</sup> Transcript of hearing on 18 March 2019, p 68, line 5.

<sup>77</sup> Transcript of the hearing on 20 March 2019, p 60, line 39 (cross-examination of Binary Reupena); Transcript of the hearing on 21 March 2019, p 44, line 15-16 (cross-examination of Binary Reupena).

<sup>78</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 161, [1]; Exhibit 7 (list of agreed facts), [2].

<sup>79</sup> Transcript of the hearing on 26 March 2019, p 30, line 43-46 (cross-examination of Kerita Reupena).

<sup>80</sup> Exhibit 4 (expert report). The applicants have conceded the Association is solvent, see exhibit 29 (applicants’ final submissions), p 4, [1].

<sup>81</sup> Exhibit 8 (List of Agreed Issues as at 14 March 2019), p 3.

<sup>82</sup> Exhibit 29 (applicants’ final submissions), p 4, [1].

<sup>83</sup> Exhibit 29 (applicants’ final submissions), p 65, [151.(e)].

<sup>84</sup> Title Search for Lot 34 on SP 246354 and Title Search for Lot 44 on RP 199393, exhibit 5 (trial bundle), tabs 22 and 23.

<sup>85</sup> Exhibit 7 (list of agreed facts), [4]; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 184, [108]-[110].

<sup>86</sup> Exhibit 7 (list of agreed facts), [5].

<sup>87</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 184, [109].



- [61] The Ipswich Church acquired the vacant land and built the hall in 1999. The church building, manse (the residence for Reverend Reupena and Mrs Reupena) and car park were completed in 2011.<sup>88</sup>
- [62] Bingo is run from the church hall. The bingo receipts, donations, and fundraising activities form the Association's main income.<sup>89</sup> The members' voluntary contributions also paid for the pastor's salary.<sup>90</sup>
- [63] The Ipswich Church's financial statements at the end of 2018 recorded its land and buildings at \$2.78 million and its total assets at \$3.39 million. Mr Lucas, the independent expert, concluded it had net assets of \$2.576 million as at 31 December 2018.<sup>91</sup>
- [64] Reverend Reupena is the sole paid employee of the Association. His wages and superannuation contributions are funded by donations and offerings of the Association's members.<sup>92</sup>
- [65] As a charitable organisation, the members of the Ipswich Church are not entitled to a share in the net assets on winding up.<sup>93</sup>
- [66] If the Association is wound up then the constitution dictates that any surplus of assets shall be given or transferred to the funds in the Mother Church, or to donate to any parish or congregations of the Congregational Christian Church in Samoa – in Australia, being institutions having objects similar to the objects of the Association.<sup>94</sup>

#### *Disputes with the Mother Church*

- [67] The Association was, until late 2016, directly affiliated with the Mother Church; such an affiliation was recognised by the Association's constitution.
- [68] There have been ongoing disputes with Reverend Reupena and the Mother Church which underlie the disputes presently before the Court.
- [69] The members are now split into two groups euphemistically called "the Remainder Group" (named by virtue of their desire to "remain" as part of the Mother Church) and "the Reupena Group" (named after the second respondent who is the Church pastor and the Association's permanent President).
- [70] The applicants in the proceedings are the Remainder Group.
- [71] The second to fourth respondents form part of the Reupena Group. The third respondent was the Association's secretary<sup>95</sup> at the time the proceedings were

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<sup>88</sup> Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 140, [42].

<sup>89</sup> Exhibit 7 (list of agreed facts), [38]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 184, [113].

<sup>90</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 163, [13].

<sup>91</sup> Exhibit 4 (expert report), p 13, [3.2.3].

<sup>92</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 163, [13].

<sup>93</sup> Constitution, clause 29, exhibit 5 (trial bundle), tab 10/11.

<sup>94</sup> Constitution, clause 29, exhibit 5 (trial bundle), tab 10/11.

<sup>95</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 495, [6]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 167, [37].

commenced.<sup>96</sup> The fourth respondent was the Association's treasurer in 2017,<sup>97</sup> having been appointed on 11 December 2016 with a commencement date of 1 January 2017.<sup>98</sup> However, according to the minutes of general meeting on 20 December 2015<sup>99</sup> and the Office of Fair Trading Association extract records as at 17 November 2016,<sup>100</sup> Mrs Faamaau Moe was the treasurer at the time the proceedings were commenced.<sup>101</sup>

- [72] In March 2015, Reverend Reupena was dismissed from the Elders' Committee.
- [73] On 15 March 2015, Reverend Reupena attended a general meeting of the Association and informed attendees words to the effect that the Mother Church had purportedly decided to remove him as an Elder Minister and that he and Mrs Reupena were considering challenging the decision by Court proceedings.<sup>102</sup> Reverend Reupena and his wife asked the members if they could borrow \$50,000 to pursue that litigation.<sup>103</sup>
- [74] The Association lent Reverend Reupena and Mrs Reupena \$50,000 to pursue Reverend Reupena's litigation against the Samoan Church.<sup>104</sup> The final repayment for this loan occurred on 4 August 2017.<sup>105</sup>
- [75] Reverend Reupena commenced proceedings in Samoa against the Mother Church.
- [76] On 3 August 2016, in a published decision of the Samoan Supreme Court, Chief Justice Sapolu dismissed Reverend Reupena's proceedings against the Mother Church ("the Samoan Supreme Court decision").<sup>106</sup> However, this decision was overturned by Court of Appeal of Samoa on 31 March 2017.<sup>107</sup>
- [77] Some of the Association's members supported Reverend Reupena's challenge to the Mother Church's decision whilst others did not agree with him suing the Mother Church.
- [78] Mr Faamate (the first applicant) was part of the group that did not agree with Reverend Reupena's action against the Mother Church. The Reupena Group supported Reverend Reupena's challenge with the Mother Church's decision.
- [79] Subsequent to the Samoan Supreme Court decision, the Mother Church in Samoa also decided to remove Reverend Reupena as a Church Minister. The Ministerial Sub-Committee for Matters Concerning the Ministeries decided on 24 August 2016 to strip Reverend Reupena of his ministerial status and that he must leave the Association's

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<sup>96</sup> Originating Application filed 9 December 2016.

<sup>97</sup> Affidavit of Lolini Sakaio, exhibit 14 (respondents' book of affidavits), tab 13, p 456, [3]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 167, [37].

<sup>98</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents' book of affidavits), tab 1, p 67.

<sup>99</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents' book of affidavits), tab 1, p 51.

<sup>100</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 38. See also transcript of the hearing on 21 March 2019, p 6, line 4 to 14 (cross-examination of Binary Reupena: Mrs Reupena states Mrs Moe is the treasurer in 2016).

<sup>101</sup> Originating Application filed 9 December 2016.

<sup>102</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 362, [55].

<sup>103</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 362, [55].

<sup>104</sup> Exhibit 7 (list of agreed facts), [8].

<sup>105</sup> Exhibit 7 (list of agreed facts), [20].

<sup>106</sup> *Reupena v Senara* [2016] WSSC 140.

<sup>107</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 367, [75], a copy of the decision is annexed at KR-2, p 80-99.

premises because he was no longer a recognised ordained Minister of the Mother Church.<sup>108</sup>

- [80] On 3 September 2016 a District Emergency meeting (“the Inala meeting”) was held at the premises of the Inala Congregation.<sup>109</sup> At the Inala meeting, the Mother Church’s decision to remove Reverend Reupena as an ordained Minister and strip him of his ministerial duties was read out by Reverend Lauie Lupematasila of the Inala Congregation.<sup>110</sup>
- [81] Prior to the Inala meeting, on 31 August 2016, the Association’s secretary, Mr Tisema, called a meeting to be held after bingo finished that night to discuss the Inala meeting.<sup>111</sup>
- [82] After bingo finished on 31 August 2016 the members assembled for the meeting. The applicants submit that there were a larger than usual number of people attending this meeting and they were uncertain as to whether all of the people attending the meeting were in fact members of the Association.<sup>112</sup> There is evidence that for the first time an attendance roll was circulated.<sup>113</sup> Some present at the meeting refused to sign it.<sup>114</sup>
- [83] The issue to be discussed at this meeting was whether or not the Association’s members should attend the Inala meeting.<sup>115</sup> The majority of the Association’s members who were in attendance at this meeting voted against attending the Inala meeting.<sup>116</sup>
- [84] However, the first applicant, Mr Faamate, did attend the Inala meeting where the Mother Church’s decision, to remove Reverend Reupena as an ordained minister of the Mother Church and strip him of his ministerial duties, was read out.<sup>117</sup> Afterwards, Mr Faamate delivered a letter to Reverend Reupena which apparently informed him that two members of the Elders’ Committee would attend the Ipswich Congregation the following morning to read out the Mother Church’s decision.<sup>118</sup>

*After the Sunday service on 4 September 2016*

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<sup>108</sup> Exhibit 5 (trial bundle), tab 25.

<sup>109</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 27-28, [36]-[40].

<sup>110</sup> Exhibit 7 (list of agreed facts), [9].

<sup>111</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 496, [12]-[15]; Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 26, [30].

<sup>112</sup> See exhibit 29 (applicants’ closing submissions), p 7, [13]. Having regard to the submissions below regarding the requirements of membership and how a member may lose that status, it might be thought the uncertainty was warranted.

<sup>113</sup> Transcript of the hearing on 20 March 2019, p 78, line 9-10 (cross-examination of Seremao Teo); Transcript of the hearing on 26 March 2019, p 23, line 36-39 (cross-examination of Kerita Reupena).

<sup>114</sup> Transcript of the hearing on 18 March 2019, p 58, line 5 (cross-examination of Taua Faamate).

<sup>115</sup> See, e.g., Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 496, [17]; Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 26, [31]; Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 136, [13].

<sup>116</sup> See, e.g., Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 496, [18]; Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 26, [32]; Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 137, [17].

<sup>117</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 27-28, [36]-[37].

<sup>118</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 27-28, [38]-[39].

[85] After the Sunday morning service, the letter from the Mother Church was read to the Ipswich Congregation.<sup>119</sup>

[86] After the letter was read, either Mr Tisema,<sup>120</sup> or Reverend Reupena,<sup>121</sup> told those gathered that there would be a meeting at 4:00pm that day to discuss the letter.

#### *The 4pm meeting on 4 September 2016*

[87] At 4:00pm on 4 September 2016 people gathered in the hall. The hall was arranged with seating either side; the Reupena Group sat on one side and the Remainder Group sat opposite.<sup>122</sup>

[88] The 4 September 2016 meeting is of critical importance.

[89] The respondents' case is that all of the applicants as part of the Remainder Group resigned from the Association at the meeting. The applicants deny that they resigned from the Association.

[90] Mrs Tisema video-recorded the meeting at Reverend Reupena's request.<sup>123</sup> The meeting was conducted in Samoan, however, a translation is in the Trial Bundle tendered.<sup>124</sup> The video recording usefully captures the mood of the meeting whilst the translation is relied upon as to what was said at the meeting.

[91] Ultimately, the 4 September 2016 meeting ended with Reverend Reupena allowing the Remainder Group to use the Association's facility at 1.00pm on Sundays for the remainder of September 2016.<sup>125</sup> Reverend Reupena stated that "we are giving them a chance to submit a letter of resignation".<sup>126</sup>

[92] What was said, and who said what, at this meeting is important in determining whether there was a mass resignation by the Remainder Group at this meeting. If there was such a mass resignation then the applicants do not have standing to bring these proceedings.

[93] At the end of the meeting there was hugging, kissing, and crying between the two groups and then the Remainder Group left the hall.

#### *Events after the 4 September 2016 meeting*

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<sup>119</sup> Exhibit 7 (list of agreed facts), [10].

<sup>120</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 172, [63].

<sup>121</sup> Exhibit 7 (list of agreed facts), [10]; see, e.g., Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 27-28, [42]; Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 498, [27].

<sup>122</sup> See, e.g., Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 29, [45]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 175, [72]; Affidavit of Binary Reupena, exhibit 14 (respondents' book of affidavits), tab 7, p 138, [25].

<sup>123</sup> Transcript of the hearing on 22 March 2019, p 27, line 24 (cross-examination of Tipi Tisema); p 70, line 6 to 11 (cross-examination of Temukisa Tisema).

<sup>124</sup> Exhibit 5 (trial bundle), tab 12, p 114 to 125.

<sup>125</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 178 to 179, [87].

<sup>126</sup> Exhibit 5 (trial bundle), tab 12, p 121.

- [94] After the Remainder Group left, the Reupena Group had some discussions and it was agreed that the Association would amend the constitution to remove reference to the Mother Church.<sup>127</sup>
- [95] However, it is noted that, clause 29 of the constitution remained intact which states that if the Association is wound up then any surplus assets will be transferred to the Samoan Church, or to donate to any parish or congregation of the Samoan Church in Australia. This amended constitution was registered with Office of Fair Trading on 23 September 2016.<sup>128</sup>
- [96] On the evening of 9 September 2016, Mr Tisema, the secretary of the Association, delivered a letter to Mr Muliaga (the fifth applicant) from the management committee. This letter outlined the management committee's recollection of what transpired at the 4 September 2016 meeting.<sup>129</sup>
- [97] It is noted that the 9 September 2016 letter does not say that the Remainder Group had "resigned". However, the penultimate paragraph does say that "you have to give us your resignation letter" before the promised 1:00pm access on Sundays would be granted.<sup>130</sup>
- [98] Members of the Remainder Group arrived just before 1:00pm on 11 September 2016 to use the Church. They were refused entry by both Mr Tisema and Reverend Reupena.<sup>131</sup>
- [99] Reverend Reupena's recollection of his conversation with Mr Muliaga (a representative of the Remainder Group) was that if he did not have the letter confirming the agreement made at the 4 September 2016 meeting where they were leaving the Association and had resigned as members, then he should go and see a lawyer.<sup>132</sup>
- [100] An "invitation to reconcile" was extended by the applicants, via their lawyers, on 31 October 2016, asking to resolve their dispute peacefully and by way of open discussions in line with the ethos and objects of the Association as set out in the constitution.<sup>133</sup> However, according to Mr Tisema, the secretary of the Association, he had no intention of doing that.<sup>134</sup>
- [101] These proceedings were commenced on 9 December 2016.<sup>135</sup>

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<sup>127</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 179, [91].

<sup>128</sup> Exhibit 7 (list of agreed facts), [14].

<sup>129</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 499, [34] to [35].

<sup>130</sup> Exhibit 5 (trial bundle), tab 30, p 274 to 275.

<sup>131</sup> See, e.g., Affidavit of Taula Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 30 to 31, [54] to [57]; Affidavit of Maiava Muliaga, exhibit 13 (applicants' book of affidavits), tab 16, p 146, [6] to [8]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 180, [96]; Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 500, [39].

<sup>132</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 180, [96].

<sup>133</sup> Exhibit 23 (letter from Corney & Lind Lawyers dated 31 October 2016).

<sup>134</sup> Transcript of the hearing on 22 March 2019, p 41, line 46.

<sup>135</sup> Originating Application filed 9 December 2016.

[102] Members of the Remainder Group did not return to the Ipswich Church or participate in Association events. They set up their own church with ties to the Mother Church and the group:

- a. are communicant members<sup>136</sup> of a congregation affiliated with the Mother Church;<sup>137</sup>
- b. use a hall at Booval, near Ipswich, which had previously been used by another congregation, although initially used Mr Muliaga's home to hold services;<sup>138</sup>
- c. have a new minister,<sup>139</sup> Reverend Tavita;<sup>140</sup>
- d. holds their own fundraising events for the new church, because they "came with nothing" (to the new church);<sup>141</sup>
- e. make financial contributions to the new church<sup>142</sup> (and stopped making contributions to the Ipswich Church prior to 4 September 2016<sup>143</sup>);
- f. Mr Fanolua (the thirteenth applicant) described the Mother Church's contributions to the Booval congregation as including the funding for this proceeding<sup>144</sup> (of \$150,000); and
- g. Mr Muliaga<sup>145</sup> and Mr Setefano (the fourteenth applicant)<sup>146</sup> also confirmed that their congregation receives financial contributions from the Mother Church, including the \$150,000 in legal fees.

[103] The Reupena Group appeared to have carried on as normal and have run the Association since September 2016. A further nineteen new members and sixteen new

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<sup>136</sup> Transcript of the hearing on 18 March 2019, p 78, line 17 to 21 (cross-examination of Tauga Faamate); Transcript of the hearing on 19 March 2019, p 17, line 18 to 46 (cross-examination of Naumati Muliaga); Transcript of the hearing on 19 March 2019, p 26, line 1 to 13, 28 to 31 (cross-examination of Luatua Setefano) Transcript of the hearing on 19 March 2019, p 46, line 1 to 9, 20 to 22 (cross-examination of Ala Fanolua); Transcript of the hearing on 20 March 2019, p 13, line 19 to 26 (cross-examination of Maiava Muliaga); Transcript of the hearing on 20 March 2019, p 29, line 27 to 38 (cross-examination of Itagia Uaea).

<sup>137</sup> Transcript of the hearing on 19 March 2019, p 26, line 19 to 26 (cross-examination of Luatua Setefano); Transcript of the hearing on 20 March 2019, p 13, line 4 to p 14, line 4 (cross-examination of Maiava Muliaga). Mr Faamate said he attend[s] "our own church": transcript of the hearing on 18 March 2019, p 75, line 42 (cross-examination of Tauga Faamate).

<sup>138</sup> Transcript of the hearing on 20 March 2019, p 11, line 45 to p 12, line 8 (cross-examination of Maiava Muliaga).

<sup>139</sup> Transcript of the hearing on 18 March 2019, p 78, line 15 (cross-examination of Tauga Faamate).

<sup>140</sup> Transcript of the hearing on 19 March 2019, p 46, line 1 to 9, 20 to 22 (cross-examination of Ala Fanolua).

<sup>141</sup> Transcript of the hearing on 18 March 2019, p 78, line 3 to 8 (cross-examination of Tauga Faamate).

<sup>142</sup> Transcript of the hearing on 18 March 2019, p 78, line 19 (cross-examination of Tauga Faamate); Transcript of the hearing on 19 March 2019, p 26, line 19 to 26 (cross-examination of Luatua Setefano); Transcript of the hearing on 19 March 2019, p 46, line 1 to 9, 20 to 22 (cross-examination of Ala Fanolua).

<sup>143</sup> Transcript of the hearing on 18 March 2019, p 74, line 46; p 75, line 9 to 24 (cross-examination of Tauga Faamate).

<sup>144</sup> Transcript of the hearing on 19 March 2019, p 46, line 36 to 37 (cross-examination of Ala Fanolua).

<sup>145</sup> Transcript of the hearing on 20 March 2019, p 14, line 6 to 38 (cross-examination of Maiava Muliaga).

<sup>146</sup> Transcript of the hearing on 19 March 2019, p 26, line 33 to 47, p 27, line 1 to 13 (cross-examination of Luatua Setefano).

non-members joined the Association between 4 September 2016 and 6 February 2017.<sup>147</sup>

[104] According to Mrs Tepatasi Melila, who swore an affidavit in support of the respondents but who is not a party to the proceeding:<sup>148</sup>

“27. Since the Evening 4 September 2016 Meeting, CCCSA Ipswich has continued its church and community activities as usual, including:

- (a) two church services every Sunday;
- (b) Men’s and Women’s Fellowship meetings on Saturdays;
- (c) Sunday School;
- (d) choir;
- (e) bingo nights;
- (f) fundraising activities;
- (g) cleaning the church, property and facilities; and
- (h) preparing the Holy Communion.

28. The only real difference is we are no longer connected to CCC Samoa.”

[105] According to the respondents, the Association still provides a spiritual and community hub for many members of the Samoan community.<sup>149</sup> It is clear that for many, their lives and families’ lives are bound up in the Association. It has been a place for members of the Association and their families to worship, to learn, experience and practice the Samoan culture, speak in Samoan and provide guidance to others in need.<sup>150</sup>

[106] What has occurred has caused great distress for many of its members.

[107] The Remainder Group are distressed about being removed from their Association by the force of Reverend Reupena.<sup>151</sup>

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<sup>147</sup> Exhibit 7 (list of agreed facts), 12.

<sup>148</sup> Affidavit of Tepatasi Melila, exhibit 14 (respondents’ book of affidavits), tab 3, p 90, [27] to [28].

<sup>149</sup> Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 139, [35]; Affidavit of Tepatasi Melila, exhibit 14 (respondents’ book of affidavits), tab 3, p 90, [27]; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 181, [101]; Affidavit of Lolini Sakaio, exhibit 14 (respondents’ book of affidavits), tab 13, p 460, [40]; Affidavit of Michelle Seupule, exhibit 14 (respondents’ book of affidavits), tab 14, p 467, [25]; Affidavit of Temukisa Tisema, exhibit 14 (respondents’ book of affidavits), tab 17, p 488, [68]; Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 502, [52].

<sup>150</sup> Affidavit of Tepatasi Melila, exhibit 14 (respondents’ book of affidavits), tab 3, p 90, [29].

<sup>151</sup> See, e.g., Affidavit of Maiava Muliaga, exhibit 13 (applicants’ book of affidavits), tab 16, p 147, [12].

[108] The Reupena Group are distressed about the possibility of this Association being wound up and losing their place of worship and community.<sup>152</sup>

### **The hearing**

[109] The trial spanned nine days with eight days of evidence; the final morning was taken up with submissions.

[110] Many of the witnesses required a translator, which, on occasions, meant some witnesses' evidence was laborious. Often, questions had to be repeated and on occasions issues arose when there was no Samoan word for an English word.

[111] I acknowledge the difficulties in giving evidence via a translator and do not readily conclude that a witness is unresponsive or evasive in these circumstances.

[112] The use of a translator made assessing a witness' credit more difficult, however, not impossible.

[113] However, I make the general observation that both parties' witnesses were, at times, unimpressive.

[114] I found some of the applicants' and the respondents' witnesses deliberately non-responsive and evasive; I make this observation giving full allowance to the inherent difficulties in giving evidence via a translator.

### **Issues to be determined**

[115] The parties have agreed to the issues that need to be determined in this matter:<sup>153</sup>

#### **“The Applicants and their standing**

1.

(a) Were the applicants members of the Association as at the date of the commencement of the proceeding (such that they have standing to commence the proceeding) or had they resigned their membership on 4 September 2016 (such that they have no standing to commence the proceeding)?

(b) Who were members of the Association at the commencement of the meeting at around 4pm on 4 September 2016?

(c) Who were members of the Association at the time of the vote to amend the Constitution on 4 September 2016?

#### **The Association and its records**

3. Has the Association maintained an accurate register of members as required by clause 9(i) of its Constitution and s 69A(1)(d) of the Act:

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<sup>152</sup> See, e.g., Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 18, p 503, [58] to [59].

<sup>153</sup> List of Agreed Issues as at 28 March 2019, some issues had fallen away which explains the numbering.



- (a) from incorporation?
- (b) from October 2013?
- (c) until 5 September 2016?

Including whether the ‘church diaries’ constituted a register of members as required in the periods set out above?

6.
  - (a) Mr Reupena appointed the Association’s committee from October or November 2013 to 11 December 2016.
  - (b) Could Mr Reupena be authorised to appoint other members of the Association’s committee, at any time?
  - (c) Was Mr Reupena authorised to appoint other members of the Association’s committee:
    - (i) prior to 11 December 2016?
8. Did the applicants acquiesce to the irregularities alleged by them as to:
  - (a) the register of members?
  - (b) any appointments by Mr Reupena of committee members?
  - (d) the loan by the Association of \$50,000 to Mr Reupena?
  - (e) the non-compliance with time limits for auditing of financial statements and their presentation to general meetings?

### **The Association’s Constitution**

9. Did the resolutions said to have been passed at the meeting on 4 September 2016 validly amend the Association’s constitution notwithstanding the alleged non-compliance with:
  - (a) clause 24 of the Constitution;
  - (b) s 48(1) and 48(3) of the Act;
  - (c) s 3(1) and s 3(2) of the Act.
10. Should the Court exercise its discretion to declare the following acts valid pursuant to s 133 of the *Associations Incorporation Act 1981*, that is to say:
  - (a) the calling of the extraordinary general meeting at which the Association’s constitution was amended?
  - (b) the amendment to the Association’s constitution?”

[116] Two issues of standing have been raised:

- a. whether the seventeenth, eighteenth, nineteenth and twentieth applicants were members of the Association at the relevant time; and
- b. whether the applicants all resigned at the meeting on 4 September 2016.

[117] If the seventeenth, eighteenth, nineteenth and twentieth applicants were not members of the Association at the relevant time then they would have no standing to be applicants in these proceedings.

[118] If the applicants resigned at the 4 September 2016 meeting, then they would have no standing to bring these proceedings.

[119] The most efficient way to deal with these issues is in the following order:

- a. membership and accuracy of register;
- b. standing of the seventeenth, eighteenth, nineteenth and twentieth applicants; and
- c. resignation, or not, of the applicants at the 4 September 2016 meeting.

[120] The remaining issues are then dealt with when considering whether the Association, in the exercise of discretion, should be wound up.

[121] Ultimately the issues agreed by the parties feed into the issues relevant to the exercise of discretion when considering whether the Association should, or should not, be wound up pursuant to section 90 of the Act.<sup>154</sup>

[122] The issues relevant to the exercise of discretion for winding up the Association on the just and equitable ground have been summarised, and agreed to, by the parties:<sup>155</sup>

**“Is it just and equitable to wind up the Association?”**

Do the following matters (of which all save (h) and (l) are raised on the applicants’ case, and disputed) justify winding up on the just and equitable ground:

- (a) its failure to maintain an accurate membership register, at least until 5 September 2016 (on the Applicants’ case);
- (d) Mr Reupena’s unilateral appointment of the Association’s Committee since October 2013;
- (e) the Reupena Group’s exclusion of the Remainder Group from the Association’s affairs;

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<sup>154</sup> Section 90(1) of the *Associations Incorporation Act* 1981 (Qld) provides “(1) An incorporated association may be wound-up by the Supreme Court under the following circumstances, that is to say— (a) if the incorporated association suspends its operations for the space of a whole year; (b) if the members of the incorporated association are reduced in number to not constitute a quorum at a general meeting; (c) if the incorporated association is unable to pay its debts; (d) if the incorporated association carries on any operation whereby any member thereof makes any financial gain contrary to the provisions of this Act; (e) if the Supreme Court is of the opinion that it is just and equitable that the incorporated association should be wound-up.”

<sup>155</sup> List of Agreed Issues as at 28 March 2019, some issues had fallen away which explains the numbering.

(f) the Reupena Group's exclusion of the Remainder Group from the Association's premises;

(h) Mr Reupena's receipt of a loan of \$50,000 from the Association to pay for his legal fees in Samoa;

(i) the Reupena Group's use of Association's funds to defend this proceeding;

(j) the purported amendment to the Association's Constitution;

(k) the Association's failure, at least until 2017, to comply with its financial obligations as pleaded in paragraph 18 of the Statement of Claim (admitted at paragraph 17 of the Defence);

(l) the admission of 19 new members since 4 September 2016.

13. Do the following matters justify the Court refusing to wind up on the just and equitable grounds:

(a) Mr Reupena's defrocking by the Denomination (subsequent reinstatement and then further defrocking);

(b) Mr Reupena's repayment of the loan of \$50,000 from the Association;

(c) the events of 4 September 2016 relevantly the alleged resignations of the applicants (see above);

(d) the alleged 'deadlock issues' being whether or not Mr Reupena ought to remain employed or the minister of the Association, and whether or not the Association ought to remain affiliated with the Denomination;

(e) the admission of new members since 4 September 2016 to the Association;

(f) whether the applicants, since 4 September 2016 have:

(i) made any efforts or attempts to attend church services, meetings, functions or other activities regularly held by the first respondent?

(ii) contributed financial or other material forms of support to the Association?

(iii) been excluded from the Association and its premises;

(g) the alleged acquiescence by the applicants to the alleged irregularities (see above);

(h) the alleged actions by the Association since a date to be determined but not before 4 September 2016 to:

(i) translate records to English;

- (ii) have its accounts audited;
  - (iii) prepare a ‘stand alone’ complete register of members.
- (i) the conduct of the Association since 4 September 2016 in continuing to:
- (i) conduct weekly church services in Samoan;
  - (ii) conduct funerals in Samoan and following Samoan cultural traditions upon request;
  - (iii) conduct marriages in Samoan and following Samoan cultural traditions on request;
  - (iv) conduct Sunday school in Samoan;
  - (v) conduct its Women’s Ministry in Samoan;
  - (vi) conduct its Youth Ministry for young people from Samoan families;
  - (vii) hold ad hoc social events following Samoan cultural traditions;
  - (viii) host ad hoc lectures promoting Samoan cultural and family customs.”

### **Membership and termination of membership**

[123] The process of membership for the Association is set out in the constitution:<sup>156</sup>

#### “MEMBERSHIP

4. (i) The Association consists of ordinary members
  - (ii) The number of members shall be unlimited.
5. Every applicant for membership of the Association shall be proposed by one member and seconded by another member. Application for membership shall be in writing or verbal.
6. There are no membership fees or subscriptions payable to become a member.
7. (i) In the same general meeting for all members which an application for membership is received, the members shall determine upon the admission/rejection of applicant.
  - (ii) Any applicant who receives a majority of the votes of members present at the meeting at which such application is being considered, shall be accepted to become a member.

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<sup>156</sup> Constitution, exhibit 5 (trial bundle), tab 10/11.

(iii) A person whose application for membership has been rejected, shall be notified by secretary of reasons of rejection; has no right to appeal, but may apply at a later stage.”

[124] The issue of membership and termination of membership was one that loomed large in the evidence.

*Becoming a member of the Association*

[125] The constitution dictates a simple process for obtaining membership of the Association.

[126] An application for membership shall be in writing or verbal and every applicant for membership shall be proposed by one member and seconded by another member.<sup>157</sup>

[127] In practice, the process of membership for the Association involves more intricacy than the process as set out in the constitution.

[128] The evidence of Reverend Reupena was to the effect that there were two categories of members of Ipswich Congregation:<sup>158</sup>

- a. members; and
- b. non-members.

[129] When Reverend Reupena referred to members he meant those people who were/are members under the original constitution or amended constitution and have a right to vote at the Association’s meetings.<sup>159</sup>

[130] Members were called “communicants”, i.e. someone who was permitted to receive Holy Communion and who had voting rights.<sup>160</sup>

[131] Non-members participate in the activities of the Association but do not have a right to vote at meetings; they are also not communicants.<sup>161</sup>

[132] A person could become a communicant member either by being part of the congregation, being nominated (often by their parents), undergoing classes of instruction in matters of faith, and accepted by a meeting of members including by undergoing a religious ceremony or ritual,<sup>162</sup> or, if they were communicant members of another congregation that was part of the Mother Church, by “transferring” their

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<sup>157</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 5.

<sup>158</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [24] to [25].

<sup>159</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [24].

<sup>160</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [24].

<sup>161</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [25].

<sup>162</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [27] to [28]; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 12, p 448 to 449, [10]; Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 135 to 136, [7] to [10]; Transcript of the hearing on 21 March 2019, p 19, line 24 to p 20, line 5; p 21, line 37 to p 22, line 14 (cross-examination of Binary Reupena); Transcript of the hearing on 22 March 2019, p 15, line 11 to 35 (cross-examination of Tipi Tisema).

membership to the Ipswich Church<sup>163</sup> (e.g. Mr Teo,<sup>164</sup> and Mr Faamate and his family).<sup>165</sup>

[133] As a practical matter, the respondents submit,<sup>166</sup> a person would not be nominated or accepted if they did not themselves accept and profess the Christian faith and demonstrate a commitment to the Ipswich Church.<sup>167</sup>

[134] Although financial contributions to the Ipswich Church were normally given by those that could, it was not a compulsory requirement of membership.<sup>168</sup>

[135] There was evidence about members of the congregation who participated in church activities<sup>169</sup> but who are described as “non-members”; these members do not have voting rights.<sup>170</sup> Some witnesses described these members as “community members”,<sup>171</sup> or just members.<sup>172</sup>

[136] Only members of the Association can participate in meetings known as “Filifilga” which are held about once a month. Mrs Reupena stated that a Filifilga may relate to the following issues:<sup>173</sup>

“(a) Introducing new members.

(b) Any conduct issues which are causing concern amongst the members.

(c) Whether someone should be removed as a member due to misconduct.

(d) Any dealings between CCCSA Ipswich and the Mother Church, including any changes to spiritual rituals practiced at CCSA Ipswich or Subdistrict, District or Mother Church of CCC Samoa.

(e) Whether someone should be promoted within CCSA Ipswich (for example, appointment as a deacon or nomination to be a lay preacher, or theological student at Malua Theological College in Samoa).

(f) Who should be the minister of CCSA Ipswich or whether the minister should be removed for misconduct.”

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<sup>163</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 12, p 448 to 449, [10]; Transcript of the hearing on 22 March 2019, p 15, line 11 to 35; p 68, line 44 to 47; p 69, line 1 to 6 and 20 to 21 (cross-examination of Tipi Tisema).

<sup>164</sup> Transcript of the hearing on 21 March 2019, p 23, line 26 to 31 (cross-examination of Binary Reupena).

<sup>165</sup> Transcript of the hearing on 22 March 2019, p 66, line 32 to 34 (cross-examination of Tipi Tisema).

<sup>166</sup> Exhibit 30 (respondents’ closing submissions), p 13, [58].

<sup>167</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165 to 166, [28]; Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 135 to 136, [7] to [10].

<sup>168</sup> Transcript of the hearing on 25 March 2019, p 28, line 35 to 36 (cross-examination of Binary Reupena); Transcript of the hearing on 18 March 2019, p 54, line 34 (cross-examination of Tauga Faamate).

<sup>169</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165 to 166, [28].

<sup>170</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 165, [26]; Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 135, [7] to [10].

<sup>171</sup> Transcript of the hearing on 22 March 2019, p 15, line 11 to 35 (cross-examination of Tipi Tisema).

<sup>172</sup> Transcript of the hearing on 22 March 2019, p 15, line 17 to 21 (cross-examination of Setefano Tovio).

<sup>173</sup> Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 7, p 136, [10].

- [137] There is a clearly an overlay in becoming a member of the Association with the requirements of the constitution and the practices of the Mother Church.
- [138] The Ipswich Church is both an incorporated association operating under the auspices of the Act and a congregational church operating under the auspices of Christian faith and doctrine, including that promulgated by the Mother Church.
- [139] The respondents submit that given those circumstances, it is unsurprising that there is overlay between what some witnesses called the “church rules” (such as the rules regarding members living in de facto relationships<sup>174</sup>) and the “legal rules” contained in the Act and the constitution<sup>175</sup> and a level of misunderstanding about the source of the rules.<sup>176</sup>
- [140] The constitution does not refer to different classes or categories of members. The constitution makes no reference to “communicant member”,<sup>177</sup> or “non-member”,<sup>178</sup> or a “community member who was a family financial member” but not a “communicant member”.<sup>179</sup> The constitution expressly states that the Association shall consist of ordinary members and the number of members shall be unlimited.<sup>180</sup>
- [141] The respondents submit<sup>181</sup> that although the constitution does not expressly provide for the religious aspects of membership, it does contemplate acceptance or rejection by the members of those nominated for membership.<sup>182</sup>

### *Termination of membership*

- [142] The constitution provides, in clear terms, when a membership can be terminated:<sup>183</sup>

#### “TERMINATION OF MEMBERSHIP

- (i) A member may resign at any time by giving notice orally or in writing to Secretary or directly to any general meeting.
- (ii) If a member:
- (a) is convicted of an indictable offence
  - (b) fails to comply with any of the provisions of Rules

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<sup>174</sup> Transcript of the hearing on 21 March 2019, p 25, line 19 to 35; p 26, line 13 to 16 (cross-examination of Binary Reupena); Transcript of the hearing on 25 March 2019, p 25, line 32 to 35 (cross-examination of Tipi Tisema).

<sup>175</sup> Transcript of the hearing on 26 March 2019, p 58, line 16 to 17 (cross-examination of Kerita Reupena: “the constitution is mixed with the constitution of the mother church and in that constitution people are not allowed to live in de facto relationship”).

<sup>176</sup> Exhibit 30 (respondents’ closing submissions), p 12, [53].

<sup>177</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 5.

<sup>178</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 358, [41]

<sup>179</sup> Transcript of the hearing on 22 March 2019, p 15, line 33 to 43 (cross-examination of Tipi Tisema).

<sup>180</sup> Constitution, clause 5, exhibit 5 (trial bundle), tab 10/11, cl 4.

<sup>181</sup> Exhibit 30 (respondents’ closing submissions), p 13, [60].

<sup>182</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 7(i).

<sup>183</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 4.

(c) conducts himself in a manner considered to be injurious or prejudicial to the character or interests of the Association.

Members shall consider whether his membership shall be terminated, or suspend for a period of time they think fit, at any general meeting within such case is presented.

(iii) The member concerned shall be given a full and fair opportunity of presenting his case and if the meeting resolves to terminate his membership, the secretary shall advise the member accordingly. There is no right to appeal the decision of the members, but he may apply for membership later.”

[143] There is evidence that termination of membership occurred in a much more arbitrary and haphazard way than as required by the constitution. For example:

- a. if members “sinned” they would be deregistered.<sup>184</sup> Miss Seupule explained that deregistration was based on “the 10 commandments”.<sup>185</sup>
- b. Mr Moe deposed to being de-registered as a result of obtaining a traditional Samoan Tattoo.<sup>186</sup>
- c. during cross-examination, Mrs Melila deposed to her daughter Calista being deregistered when she had a boyfriend.<sup>187</sup>
- d. a person’s grandmother could unilaterally decide to remove a person’s membership.<sup>188</sup>
- e. Mrs Sakaio’s son was deregistered because he “got a fiancé”.<sup>189</sup>

[144] Plainly, terminating a person’s membership at a meeting for non-compliance with a church rule<sup>190</sup> (such as living in a de facto relationship) is not expressly provided for in the constitution; Mrs Reupena sensibly conceded as much.<sup>191</sup>

[145] The respondents submit that it is possible for the application of those rules to be within the terms of the constitution. For example, clause 8(ii)(c) of the constitution provides that a membership may be terminated at a general meeting where the member has conducted themselves in a manner considered to be injurious or prejudicial to the character or interests of the Ipswich Church. Although not specifically referred to in clause 8(ii)(c) of the constitution, the respondents submit that as a practical application

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<sup>184</sup> Transcript of the hearing on 25 March 2019, p 59, line 39 to p 60, line 1; p 60, line 17 to line 21 (cross-examination of Kerita Reupena).

<sup>185</sup> Transcript of the hearing on 27 March 2019, p 10, line 45 to 47 (cross-examination of Michelle Seupule).

<sup>186</sup> Affidavit of John Moe, exhibit 14 (respondents’ book of affidavits), tab 4, p 93, [5].

<sup>187</sup> Transcript of the hearing on 21 March 2019, p 99, line 34 to 38 (cross-examination of Tepatasi Melila).

<sup>188</sup> Transcript of the hearing on 25 March 2019, p 61, line 7 to 11 (cross-examination of Kerita Reupena).

<sup>189</sup> Transcript of the hearing on 22 March 2019, p 52, line 39 to 40 (cross-examination of Lolini Sakaio).

<sup>190</sup> Transcript of the hearing on 25 March 2019, p 61, line 5 (cross-examination of Kerita Reupena);

Transcript of the hearing on 27 March 2019, p 11, line 9 to 10 (cross-examination of Michelle Seuopule).

<sup>191</sup> Transcript of the hearing on 25 March 2019, p 25, line 35.



of that clause, a failure to comply with a church rule may well be considered by the members to fall within that category of conduct.<sup>192</sup>

[146] However clause 8(iii) of the constitution mandates the member be “given a full and fair opportunity of presenting his case”;<sup>193</sup> there is evidence that this did not occur.

[147] Miss Seupule, the Association’s current treasurer,<sup>194</sup> explained the process of de-registration:<sup>195</sup>

“Right. So if somebody breaks one of the 10 commandments they’re deregistered?---It is put forward to a vote first. They are not automatically deregistered.

So members vote and if members – how do the members vote on whether somebody’s deregistered?---People stand up and show their opinions. They offer advice and then it’s put to a vote of whether or not someone should be deregistered or not.

People put their hands up?---Yes.

And then Reverend Reupena says they’re deregistered or they’re not deregistered?---Based on the voting, yes.

Okay. And how are they then notified that they’re deregistered?---Their parents that brought it into the spiritual meeting will advise them.

So the first time they hear that they’re deregistered is from their parents; is that right?---Yes.”

[148] The constitution was clearly ignored when terminating their membership in these circumstances. There is evidence that on occasions no opportunity was given for the member to respond to any such allegation. The first time a member may know that their membership had been terminated was after their membership was terminated.

## **No list of membership**

*A list of members needs to be kept*

[149] Section 69A of the Act includes in the secretary’s functions a requirement to “maintain[ing] the association’s register of members”.

[150] Clause 9 of the constitution provides:<sup>196</sup>

“REGISTER OF MEMBERS

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<sup>192</sup> Exhibit 30 (respondents’ closing submissions), p 12, [54].

<sup>193</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 8.(iii).

<sup>194</sup> Affidavit of Michelle Seupule, exhibit 14 (respondents’ book of affidavits), tab 15, p 469, [1]; Transcript of the hearing on 27 March 2019, p 9, line 30 (cross-examination of Michelle Seupule).

<sup>195</sup> Transcript of the hearing on 27 March 2019, p 11, line 5 to 25 (cross-examination of Michelle Seupule).

<sup>196</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 9.

9. (i) A register is to be kept in which shall be entered the names and residential addresses of all members and dates of their admission.

(ii) The register shall be open for inspection at all reasonable times by any members who previously applies for such inspection.”

[151] The noun “register” is not defined in the Act nor in the Constitution. Further, it is not defined in the *Acts Interpretation Act 1954* (Qld).

[152] The Concise Oxford Dictionary defines “register” when used as a noun as “An official list or record of names or items”.

[153] It is noted that the term “register” is used in different legislative contexts, for example: the *Corporations Act 2001* (Cth) requires companies to maintain a register of members,<sup>197</sup> the freehold land register in Queensland records various instruments which create an interest in land.<sup>198</sup>

[154] The applicants submit that the way in which those legislative instruments require registers to be created and regularly updated and, further, how they treat what is recorded in the registers as prima facie evidence of their accuracy provides some context to the use of the word in the Act and the Constitution.<sup>199</sup> I agree.

[155] Prior to 4 September 2016, Reverend Reupena states that information about each person who joined or resigned as a member of the Association was recorded in church diaries kept by him.<sup>200</sup> These church diaries are in Samoan and also contain various notes relating to significant events relating to the Association. It is impossible for me to make any sense of these diaries because they are in Samoan and have not been fully translated.

[156] As at 4 September 2016, the Association kept no stand-alone list of membership. There was no single identifiable document which could be described as a contemporaneous list of members’ names, residential addresses and the date on which they became a member.

[157] Reverend Reupena states he recorded members in the church books or diaries. The respondents acknowledge that whilst these diaries were not a standalone register, they nevertheless adequately performed the function of a register and were never subject to complaint prior to these proceedings.

[158] These church diaries and books contained lists as well as narrative entries regarding the joining of new families and communicants and those that joined from other churches.<sup>201</sup>

[159] Since September 2016, going forward, the Association has maintained a separate register of members.

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<sup>197</sup> *Corporations Act 2001* (Cth), see particularly ss 168 and 169.

<sup>198</sup> *Land Title Act 1994* (Qld), see s 173.

<sup>199</sup> Exhibit 29 (applicants’ closing submissions), p 46, [104].

<sup>200</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 166, [30].

<sup>201</sup> Exhibit 30 (respondents’ closing submissions), p 14 to 15, [63], referring to Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 384 to 387.

*A re- created list of members*

[160] A list of members (“the re-created list”) was compiled by trawling through these books and minutes of meetings. The respondents submit that this is an accurate list of the members just prior to the 4 September 2016 meeting.

[161] The applicants submit that the respondents’ list is not accurate.<sup>202</sup> Mr Faamate was secretary of the Association for five years from January 2009 until December 2013.<sup>203</sup> During his time as secretary he cannot recall a register of members being discussed, maintained or updated. He said he has never seen a register of members.<sup>204</sup>

[162] Mr Faamate states:<sup>205</sup>

“31. From my experience as secretary of the Association, I do not believe this [the Congregation’s Minutes of Meetings Book and the Church Diary] would accurately show what the membership of the Church was at any given time. I say that because of the following matters:

a. The Minutes of Meetings Book was very large book which contains handwritten records that go back as far as 2005 (from my memory). I have not seen a Minutes of Meetings Book from before 2005.

b. The Minutes of Meetings Book only describes what occurred during the General Meetings. In particular, it records what decisions were made at the General Meetings, but not what decisions are made outside the General Meetings.

c. The Minutes of Meetings Book does not fully record who attended the Meetings.

d. There are other ways where a person attending the Association may become a member outside of the General Meeting, which would not be recorded in the Congregation’s Minutes of Meetings Book. One common example of this which frequently occurred during the life of the Association would be a person (or their family) approaching the secretary or the minister directly and requesting membership for them or their family. This would then be announced at the Sunday Church service, and sometimes at the General Meeting, but this does not always occur at the General Meeting and is therefore not recorded in the minute book. There was no absolute practice to approve an application for membership at General Meetings.

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45. I have been part of the discussions amongst the Remainders Group members recording these spreadsheets and lists. It is my opinion (and, it is

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<sup>202</sup> Exhibit 29 (applicants’ closing submissions), p 18, [42].

<sup>203</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 22, [3].

<sup>204</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 6, p 89, [26]. Transcript of the hearing on 18 March 2019, p 54, line 46 to p 55, line 2 (cross-examination of Taua Faamate); Transcript of the hearing on 19 March 2019, p 2, line 33 to 35 (cross-examination of Taua Faamate).

<sup>205</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 6, p 90 to 94, [31] to [45].

my understanding from those meetings that it is also the members of the Remainders Group understanding) that the spreadsheets and lists appear to be inaccurate for the following reasons:

a. Described in those lists as members of the Association are persons who have not exercised membership rights through conduct such as voting at General Meetings or contributing financially to the Association;

b. Described in those lists as members of the Association are persons who had not attended Church Gatherings or General Meetings for sometime, but whose membership was only reinstated around 4 September 2016. This includes Vagai Toloa (who says he has been a member of the Association since 1991 in his Affidavit in support of the Respondent sworn 5 February 2017), [redacted]

i. [redacted]

ii. [redacted]

iii. [redacted]

c. Described in those lists as members of the Association are persons who have family relations to active participants of the Association's Church activities (such as their children) but had not exercised membership rights through conduct such as voting at General Meetings or contributing financially to the Association.

d. The lists do not include a significant number of persons in the Remainders Group using the same methodology of assessing membership (for example, family members of the Remainders Group who are occasional attendees but not active participants of the Association's Church Activities). The Remainders Group have prepared a list of these additional persons. We have not annexed a copy of this list to this Affidavit, as we have 131 persons in the Remainders Group named using this methodology, and we do not consider this methodology to be the basis for membership. We are able to provide this list if required by this Honourable Court.

e. In any event, there is no Register of Members maintained prior to 4 September 2016 that is able to accurately verify whether these lists are correct.”

[163] Mr Faamate exhibits (to his first affidavit) the people he could remember as being members.<sup>206</sup> In his second affidavit, Mr Faamate's evidence is that there were 43 likely members of the Association as at 4 September 2016, including 21 members of the Faamate group, and 22 members of the Reupena group.<sup>207</sup> However, according to Miss Seupule, the current treasurer of the Association,<sup>208</sup> Mr Tulualuau (a member of

<sup>206</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 25, [17], p 57, TMF-4;

<sup>207</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 6, p 91 to 94, [40], [42].

<sup>208</sup> Affidavit of Michelle Seupule, exhibit 14 (respondents' book of affidavits), tab 15, p 469, [1]; Transcript of the hearing on 27 March 2019, p 9, line 30 (cross-examination of Michelle Seupule).

the Reupena group, according to Mr Faamate's list<sup>209</sup> passed away sometime in 2018.<sup>210</sup> Based on Mr Faamate's numbers, this means the Association's membership is split 50/50 across the Faamate and Reupena groups.

[164] The evidence of Reverend Reupena is that prior to the 4 September meeting, the Ipswich Church had 83 communicant or registered members (and 90 non-members, i.e. those who were part of the congregation but not communicant or registered members).<sup>211</sup> 53 of these communicant members were part of the Reupena Group, and 30 were part of the Faamate Group.<sup>212</sup>

[165] The re-created list<sup>213</sup> was prepared by consideration of the church books or diaries<sup>214</sup> and summarises which members were part of the Faamate group and which were part of the Reupena group.<sup>215</sup> The re-created list provides 30 members in the Faamate group;<sup>216</sup> which is nine more than the number suggested by Mr Faamate (who prepared his list by using his memory).<sup>217</sup>

[166] The respondents submit that Mr Faamate's reasons<sup>218</sup> for doubting Reverend Reupena's list are not sustainable in light of his own evidence, in particular where he said that the Reupena Group's list:

- a. contained persons who had not exercised membership rights through voting or contributing financially. However, Mr Faamate conceded that it was not compulsory to make financial contributions<sup>219</sup> and that it takes a meeting to decide whether someone should no longer be a member;<sup>220</sup>
- b. contained persons who had not attended church gatherings or meetings for some time. Mr Faamate conceded that it takes a meeting to decide that someone would lose their membership for that reason;<sup>221</sup>
- c. he said the list contained family members (of registered members) who have not exercised membership rights by voting or making contributions – but conceded as set out in (a) above;
- d. could not be accurately verified by reference to a register that existed prior to 4 September. However, Mr Faamate acknowledged that the diary entry for his family arriving in 1997<sup>222</sup> accorded with the date of them becoming members.<sup>223</sup>

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<sup>209</sup> Affidavit of Tauga Faamate, exhibit 13 (applicants' book of affidavits), tab 6, p 93.

<sup>210</sup> Transcript of the hearing on 27 March 2019, p 8, line 29 to 35 (cross-examination of Michelle Seupule).

<sup>211</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 416.

<sup>212</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 416.

<sup>213</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 416.

<sup>214</sup> Exhibits 17 and 25.

<sup>215</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 357 to 358, [38].

<sup>216</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 416.

<sup>217</sup> Transcript of the hearing on 19 March 2019, p 2, line 29 to 31 (cross-examination of Tauga Faamate).

<sup>218</sup> Affidavit of Tauga Faamate, exhibit 13 (applicants' book of affidavits), tab 6, p 94 to 95.

<sup>219</sup> Transcript of the hearing on 18 March 2019, p 54, line 34 (cross-examination of Tauga Faamate).

<sup>220</sup> Transcript of the hearing on 18 March 2019, p 65, line 1 to 5 (cross-examination of Tauga Faamate).

<sup>221</sup> Transcript of the hearing on 18 March 2019, p 65, line 1 to 5 (cross-examination of Tauga Faamate).

<sup>222</sup> Exhibit 15.

<sup>223</sup> Transcript of the hearing on 18 March 2019, p 53, line 40 to 41 (cross-examination of Tauga Faamate).

Transcript of the hearing on 19 March 2019, p 3, line 38 (cross-examination of Tauga Faamate).

[167] The evidence, taken as a whole, is not sufficient to determine with accuracy a list of members of the Association, i.e. those members who satisfy the process and requirements of the constitution. This is especially so when the primary documents are in Samoan and there is no translation available.

[168] The respondents' re-created list was prepared from all of the diaries that included cross-references to the diary pages of all the members and relevant details about them<sup>224</sup> and the re-created list was then prepared and contained the name, date and address of the members.<sup>225</sup>

[169] I note that the detail contained in the diaries is rather vague. For example, the respondents state that the diary entry for Mr Faamate's family arriving in 1997 accorded with the date of them becoming members. Mr Faamate was shown a book, that he states he had never seen before, and was asked to translate an entry:<sup>226</sup>

“MR O’HIGGINS: Mr Faamate, could you just for us please translate those words into English?---Highlighted ones?

Yes please?---It's, new family. So [indistinct] .

And you understand that to mean, talking about you and your wife?---Yes.

.....

MR O’HIGGINS: The book I should say. Mr Faamate, I should ask you, that's consistent, isn't it, with you having joined the church in 1997?---Yes.”

[170] Such evidence, by itself, could not satisfy clause 9 of the constitution.

[171] A spreadsheet was created by Mrs Tisema, whose husband was secretary of the Association for the 2016 and 2017 calendar years,<sup>227</sup> from a list given to her by the Reupena Group's lawyers. This process involved Mrs Tisema being given a list and then having to look at “two books” (exhibit 17 and a red book) to find those names determining for herself when they became members and if they were deregistered.<sup>228</sup>

“So how did you know what you were looking for in the books?---It was a record that was given by the previous lawyers, that I had to find.

Okay. So the previous lawyers gave you a list of names; is that right?---Yes.

And from that – and then you took that list of names and started looking in the books for that – for those names, did you?---Yes.

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<sup>224</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 414 to 416.

<sup>225</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 357 to 358; 417 to 418.

<sup>226</sup> Transcript of the hearing on 18 March 2019, p 53, line 13 to 18; line 40 to 42 (cross-examination of Taua Faamate).

<sup>227</sup> Affidavit of Tipi Tisema (respondents' book of affidavits), tab 19, p 495, [6].

<sup>228</sup> Transcript of the hearing on 22 March 2019, p 63, line 11 to 22; p 64, line 7 to 14 (cross-examination of Temukisa Tisema).

And that's how the spreadsheet was created, was it?---Yes.

And when you're talking about the previous lawyers – was that Results Legal? Was it?---That's correct.

...

... [W]hat did you do with the list of names when you were sitting at the computer?---So the list of names were given. I then had to go in the books, the ministry book, the church diaries, to find when they became members or when did they deregistered and when their registration was re-instated.

And when you went in – how many books were you given?---I know there was one big book and a red book ...”.

[172] Mrs Tisema's evidence was to the effect that she was the one who tagged and highlighted the diaries in creating the list of members<sup>229</sup> and it was she who prepared a spreadsheet of members by identifying when “they became members or when did they deregistered and when their registration was re-instated”.<sup>230</sup> The respondents submit that the re-created list reflected that task and the document immediately preceding that document in the affidavit included cross-references to the part of the church diaries.<sup>231</sup>

[173] However, I accept that the accuracy of Mrs Tisema's compilation may be compromised as she was already given the list of names she was supposed to be searching for.

[174] Reverend Reupena, Mr Tisema and Mrs Tisema were each, in some way, involved in the creation of a “revised schedule” which is annexed to Reverend Reupena's affidavit.<sup>232</sup>

[175] There are some inconsistencies between the witnesses as to the creation of the spreadsheet. For example:

- a. Mrs Tisema said that she was only given two books.<sup>233</sup>
- b. Mr Reupena said that he gave her “three to four books”.<sup>234</sup> Four books were identified by him in re-examination.<sup>235</sup>
- c. Mr Tisema's evidence was that all of the names were in just one book.<sup>236</sup>

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<sup>229</sup> Transcript of the hearing on 22 March 2019, p 64, line 26 to 27; p 65, line 22 to 26 (cross-examination of Temukisa Tisema).

<sup>230</sup> Transcript of the hearing on 22 March 2019, p 64, line 8 to 11 (cross-examination of Temukisa Tisema).

<sup>231</sup> Additional submissions of the respondents, p 2, [4], referring to Affidavit of Temukisa Tisema, exhibit 14 (respondents' book of affidavits), tab 17, p 487, [59]; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 414 to 416.

<sup>232</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 414 to 416.

<sup>233</sup> Transcript of the hearing on 22 March 2019, p 64, line 13 to 14 (cross-examination of Temukisa Tisema).

<sup>234</sup> Transcript of the hearing on 25 March 2019, p 70, line 1 (cross-examination of Kerita Reupena).

<sup>235</sup> Transcript of the hearing on 26 March 2019, p 69, line 22 to 44 (re-examination of Kerita Reupena).

<sup>236</sup> Transcript of the hearing on 22 March 2019, p 21, line 14 to 15 (cross-examination of Tipi Tisema).

- d. Mrs Tisema's evidence was that she was given a list provided by the respondents' then lawyers.<sup>237</sup>
- e. Mr Reupena's evidence was that he just gave her three or four books with the direction that the Association's members were "in those books" and, that he provided no help apart from "checking" the spreadsheet.<sup>238</sup> But, in any event, the only names on the spreadsheet were those that she "was given".<sup>239</sup>
- f. Both Mrs Tisema<sup>240</sup> and Reverend Reupena<sup>241</sup> rejected any input from Reverend Reupena in the creation or compilation of the spreadsheet apart from his checking her work.
- g. However, Mrs Reupena stated that "My husband worked with Mrs Tisema on composing the spreadsheet for the register of the ... association of the church".<sup>242</sup> No further clarification was given or sought as to the particulars of this work.
- h. Mr Tisema's evidence was to the effect that he created the spreadsheets with little or no assistance from Reverend Reupena (who was sitting next to him because he was "the Chairman") and Mrs Tisema assisted by typing for him.<sup>243</sup>
- i. The "revised schedule" includes the name of a person Reverend Reupena admits of a person who died "many years ago"; but he included her name as it is listed on the attendance roll for 4 September 2016. Reverend Reupena says he does not know the Maria Tutaia who signed the attendance roll for the meeting on 4 September 2019.<sup>244</sup>

[176] The applicants submit<sup>245</sup> that Reverend Reupena's evidence was that members would be included (or excluded them as the case may be) on the following bases:

- a. they were to be included as members on the criteria that they had participated in the communicant ritual. Indeed, Reverend Reupena's evidence was that he did not tell Mrs Tisema to "look for people who had been nominated and seconded in the books", and he only asked Mrs Tisema to find in the books people who had participated in "who had participated in the communicant ceremony" are "the members of the association";<sup>246</sup>
- b. they were also included if they were already a communicant member of another Congregational Church in Samoa congregation;<sup>247</sup> and

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<sup>237</sup> Transcript of the hearing on 22 March 2019, p 63, line 11 to 22; p 64, line 7 to 14 (cross-examination of Temukisa Tisema).

<sup>238</sup> Transcript of the hearing on 25 March 2019, p 71, line 13 to 17 (cross-examination of Kerita Reupena).

<sup>239</sup> Transcript of the hearing on 22 March 2019, p 67, line 16 to 17 (cross-examination of Temukisa Tisema).

<sup>240</sup> Transcript of the hearing on 22 March 2019, p 62 to 63 (cross-examination of Temukisa Tisema).

<sup>241</sup> Transcript of the hearing on 25 March 2019, p 71, line 13 to 17 (cross-examination of Kerita Reupena).

<sup>242</sup> Transcript of the hearing on 21 March 2019, p 29, line 52 to 31 (cross-examination of Binary Reupena).

<sup>243</sup> Transcript of the hearing on 22 March 2019, p 19, line 23 to p 20, line 24 (cross-examination of Tipi Tisema).

<sup>244</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 357, [37].

<sup>245</sup> Exhibit 29 (applicants' closing submissions), p 19, [46].

<sup>246</sup> Transcript of the hearing on 21 March 2019, p 71, line 33 to 46 (cross-examination of Kerita Reupena).

<sup>247</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), p 448 to 449, [10].



- c. if any member sinned then they would lose their membership.<sup>248</sup>

[177] It is noted that there are some minor discrepancies with some of the respondents' evidence of when they believed they became a member of the Association and the details included in the list, for example:

- a. in his affidavit, Mr Seremao Teo (also known as Afamasaga Teo<sup>249</sup>) says that he became a member with voting rights in September 2013.<sup>250</sup> He is recorded in the spreadsheet as being admitted as a member on 26 October 2014.<sup>251</sup> The only event of significance he deposes to during cross-examination in 2014 was his becoming a pianist;<sup>252</sup>
- b. Mrs Tuluauau says she became a member in around 2001;<sup>253</sup> however, she is recorded in spreadsheet as being admitted as a member on 4 August 1996.<sup>254</sup>
- c. Mr Tovio deposes to becoming a member with voting rights in late 2011.<sup>255</sup> During cross-examination, he deposes to becoming a "registered" member in 2011 by:
- i. being taken to the church;
  - ii. then the subdistrict; and
  - iii. being confirmed by Mr Kerita Reupena and Mr Lance Tuatiepa (who was not a member of the Association).<sup>256</sup>

[178] The respondents' re-created list required an analysis of material including diaries and minutes of meetings. I accept that his material may contain:

- a. the names and perhaps the addresses and date of membership of certain of the Association's members; and
- b. information sufficient enough to compile an "official list or record" the members and their relevant details.

[179] However, this re-created list was a time consuming and a prolonged exercise which took Mr Tisema from January 2016 until December 2016 to be in a position (according to him) to start creating the spreadsheet.<sup>257</sup>

[180] The material in the church books could not be said to be a register of members pursuant to clause 9 of the constitution.

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<sup>248</sup> Transcript of the hearing on 25 March 2019, p 59, line 39 to p 60, line 1; p 60, line 17 to p 60, line 21 (cross-examination of Kerita Reupena).

<sup>249</sup> Transcript of the hearing on 20 March 2019, p 34, line 37.

<sup>250</sup> Affidavit of Seremao Tao, exhibit 14 (respondents' book of affidavits), tab 16, p 474, [3].

<sup>251</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 19, p 512.

<sup>252</sup> Transcript of the hearing on 20 March 2019, p 35, line 9 to p 36, line 29 (cross-examination of Seremao Teo).

<sup>253</sup> Affidavit of Paepae Tuluauau, exhibit 14 (respondents' book of affidavits), tab 22, p 525, [3].

<sup>254</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 19, p 510.

<sup>255</sup> Affidavit of Setefano Tovio, exhibit 14 (respondents' book of affidavits), p 520, [4].

<sup>256</sup> Transcript of the hearing on 22 March 2019, p 57, line 21 to 27 (cross-examination of Setefano Tovio).

<sup>257</sup> Transcript of the hearing on 22 March 2019, p 19, line 23 to p 20, line 24 (cross-examination of Tipi Tisema); Affidavit of Tipi Tisema, exhibit 14 (respondents' book of affidavits), tab 19, p 506, [4].

[181] I accept that it is a stretch of the word “register” to suggest that such a thing might be contained across a disparate number of books which contained information irrelevant to the information that the register was required to record.

[182] Further, in all of the circumstances I have concerns about the accuracy of the re-created list.

[183] Membership is integral to an association. Members are entitled to vote on certain matters and participate in the management of the Association as set out in the constitution. The rights of members are enshrined in the Act:

**“71 Rights of members**

(1) Upon incorporation the rules of the association shall constitute the terms of a contract between the members from time to time and the incorporated association.

(2) Where a member of an incorporated association is deprived by a decision of that association of a right conferred on the member by the rules of that association as a member thereof, the Supreme Court shall have jurisdiction to adjudicate upon the validity of that decision under the rules.

(3) An incorporated association shall be bound by the rules of natural justice in adjudicating upon the rights of its members conferred by the rules of such association on its members.”

[184] The rules of an association are essential. Membership of an association can only be derived in accordance with the rules of constitution of an association.

[185] This Association had various categories of membership that is not recognised by the constitution.

[186] The members of this Association are only those that obtained membership in accordance with the constitution.

[187] I am not satisfied, on the evidence, that the lists produced by either parties list accurately record such members. Part of the problem is that the records are in Samoan and they are impossible for me to interpret.

[188] The respondents submit that there was no evidence by the applicants that they were unaware of the church rules or the effect on membership. However, this ignores the standing issue of the seventeenth, eighteenth, nineteenth and twentieth applicants who gave evidence that they were members of the Association, although Reverend Reupena’s position is that they are not.

**Standing of Junior Papua (the seventeenth applicant), Senia Pato (the eighteenth applicant), Aso Aukuso (the nineteenth applicant) and Tiana Afaese (the twentieth applicant)**

- [189] Reverend Reupena asserts that Junior Papua (the seventeenth applicant), Senia Pato (the eighteenth applicant), Aso Aukuso (the nineteenth applicant) and Tiana Afaese (the twentieth applicant) were not members of the Association at the relevant time.<sup>258</sup>
- [190] Reverend Reupena states that the seventeenth, eighteenth, nineteenth and twentieth applicants were “non-members” of the Association until they resigned on 4 September 2016. The reason they were “non-members” was that they were not married and therefore ineligible to be nominated as communicants.<sup>259</sup>
- [191] Junior Papua,<sup>260</sup> Senia Pato,<sup>261</sup> Aso Aukuso<sup>262</sup> and Tiana Afaese<sup>263</sup> all state they were members of the Association as at 4 September 2016. They were not cross-examined as to this issue.
- [192] Obviously these applicants need to members of the Association to have standing in this proceeding.
- [193] The applicants acknowledge that as a matter of legal principle an applicant would have to prove they had standing to seek the relief as set out in section 90(2) of the Act.<sup>264</sup>
- [194] In relation to whether these persons were members of the Association at the relevant time, for the reasons discussed above, no clarity can be gained by reference to the register of members (as required by clause 9 of the constitution).
- [195] I have no confidence that the lists put forward by either party accurately records all members of the Association.
- [196] Junior Papua states say that he became a member in September 2007 when he regularly attended Church gatherings and meetings, and started to contribute to the Associate financially. He states, in about 2008, he made an oral application for membership in the Association, to the secretary of the Association at that time and his membership was not opposed at that General Meeting.<sup>265</sup> It is noted, that in the summary of the Association’s income and expenses included in Reverend Reupena’s affidavit, that in January and February 2016, Mr Papua made financial contributions to the Association.<sup>266</sup> Mr Papua was actively involved in the Association. In 2012, Reverend Reupena appointed him as Secretary for Youth.<sup>267</sup>
- [197] Junior Papua’s partner, Senia Papua, states that she has been a member since September 2007. She states she became a member for the same reasons as her partner Junior Papua and they became members on the same day, through the same process.<sup>268</sup>

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<sup>258</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 358, [40].

<sup>259</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 358, [41].

<sup>260</sup> Affidavit of Junior Paupa, exhibit 13 (applicants’ book of affidavits), tab 22, p 173, [10] to [11].

<sup>261</sup> Affidavit of Senia Pato, exhibit 13 (applicants’ book of affidavits), tab 23, p 178, [11].

<sup>262</sup> Affidavit of Aso Aukuso, exhibit 13 (applicants’ book of affidavits), tab 2, p 9, [11].

<sup>263</sup> Affidavit of Tiana Afaese, exhibit 13 (applicants’ book of affidavits), tab 1, p 4, [11].

<sup>264</sup> Applicants’ submissions received 2 August 2019, p 1, [2].

<sup>265</sup> Affidavit of Junior Paupa, exhibit 13 (applicants’ book of affidavits), tab 22, p 173, [11].

<sup>266</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 247 to 248.

<sup>267</sup> Affidavit of Junior Paupa, exhibit 13 (applicants’ book of affidavits), tab 22, p 173, [12].

<sup>268</sup> Affidavit of Senia Pato, exhibit 13 (applicants’ book of affidavits), tab 23, p 178, [11].

- [198] This process of obtaining membership, described by Mr Papua, is generally consistent with the process required by the constitution. Importantly, the issue of their membership was put to the General Meeting and not opposed.
- [199] In the circumstances, I accept that that Junior and Senia Papua were members of the Association.
- [200] Tiana Afaese states that she has been a member of the Association since 9 October 2011.<sup>269</sup>
- [201] She states that this is the date that she, her partner (Aso Aukuso also known as Luaaso Aukuso), and their children attended the White Sunday service. She states that from that time on they attended every church related functions and fundraisings and she considered herself a church member because she was always included in every activities.<sup>270</sup> Tiana Afaese was an active participant in the Association's life<sup>271</sup> and made weekly monetary gifts during the weekly offering as part of the Weekly Worship.<sup>272</sup>
- [202] Tiana Afaese's partner, Aso Aukuso, states he has been a member since 16 October 2011.<sup>273</sup>
- [203] He states that he became a member on this date because on 9 October 2011, he, his partner Tiana Afaese and their three children attended the White Sunday Service. This service is specifically for the children of the world, which is always celebrated on the second Sunday of October every year. From that time on, he states that they started attending the church functions as members which required money or donations and they were welcomed by friends, members of the church, including Mr Kerita and Binary Reupena without any hesitation.<sup>274</sup>
- [204] It is noted that in the summary of the Association's income and expenses included in Reverend Reupena's affidavit that in January and February 2016, Mr Aukuso made financial contributions to the Association.<sup>275</sup>
- [205] None of these applicants were required for cross-examination. Further their membership was not challenged with any of the other applicants' witnesses.<sup>276</sup>
- [206] In relation to Tiana Afaese and Aso Aukuso, they believed and behaved as if they were members of the Association; they were never informed they were not. However, the respondents now contest their membership.
- [207] In relation to Tiana Afaese and Aso Aukuso, there is no evidence of the requirements of the constitution were complied with.

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<sup>269</sup> Affidavit of Tiana Afaese, exhibit 13 (applicants' book of affidavits), tab 1, p 4, [11].

<sup>270</sup> Affidavit of Tiana Afaese, exhibit 13 (applicants' book of affidavits), tab 1, p 4, [11].

<sup>271</sup> Affidavit of Tiana Afaese, exhibit 13 (applicants' book of affidavits), tab 1, p 4, [13].

<sup>272</sup> Affidavit of Tiana Afaese, exhibit 13 (applicants' book of affidavits), tab 1, p 4, [15].

<sup>273</sup> Affidavit of Aso Aukuso, exhibit 13 (applicants' book of affidavits), tab 2, p 9, [11].

<sup>274</sup> Affidavit of Aso Aukuso, exhibit 13 (applicants' book of affidavits), tab 2, p 9, [11].

<sup>275</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 247 to 248.

<sup>276</sup> *Browne v Dunn* (1893) 6 R 67.

[208] There is no evidence that their membership was voted on by members of the Association at a General Meeting. It is difficult, in the circumstances, to determine whether they have standing. There is insufficient evidence to conclude they were made members of the Association pursuant to the constitution. For that to occur would require an investigation solely focussed on this issue.

[209] There is insufficient evidence to determine whether Tiana Afaese and Aso Aukuso were members of the Association at the relevant time. I am not satisfied that they were members of the Association. Accordingly, they have no standing to be a part of these proceedings.

[210] The issues that arises here is indicative of the membership problems that plague the Association.

### **Termination of membership**

[211] Membership and any termination of membership of the Association is of critical importance to this trial.

[212] A central plank of the respondents' case is that the applicants resigned at the meeting on 4 September 2016. If that is the case, then the applicants have no standing to commence the proceeding.

[213] If, however, the applicants did not resign their membership, then it is argued that the respondents have excluded the applicants from participation in the Association and the management of the Association since 4 September 2016.

[214] Inherent in the concept of an association is that it is formed by mutual agreement and, in the context of an incorporated association, the Act confirms that the rules of the association operate contractually between the members from time to time and the incorporated association.<sup>277</sup>

[215] However, the concept of mutuality does not translate to any general requirement that resignation rests on agreement.<sup>278</sup> Instead, a member ordinarily has a unilateral right to resign, which does not depend on acceptance by the Association or its management committee.<sup>279</sup>

[216] The issue of becoming a member or resignation or termination of membership of an incorporated association is one to be determined by reference to the Act, the Association's rules and the general principles of law applicable to such membership.<sup>280</sup>

[217] McMillan J in *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc*<sup>281</sup> (“*Imam Ali*”) discussed how questions regarding membership of an association are to be resolved:

#### **“Membership**

<sup>277</sup> *Associations Incorporation Act* 1981 (Qld) s 71(1).

<sup>278</sup> G E Dal Pont, *Law of Associations* (LexisNexis, 2018) p 122.

<sup>279</sup> G E Dal Pont, *Law of Associations* (LexisNexis, 2018) p 122.

<sup>280</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [503] per McMillan J; G E Dal Pont, *Law of Associations* (LexisNexis, 2018) p 121.

<sup>281</sup> [2018] VSC 413.

503 The central task in the Membership proceeding is identifying the members of IAIC Australia throughout its existence. The questions regarding the membership of IAIC Australia are to be resolved by reference to the legislation governing an incorporated association, the rules adopted by that association and the general principles of law relating to the membership of such an association.

### ***General principles***

#### *Commencement of membership*

504 Subject to any legislation that provides to the contrary, the procedures for a person to assume membership in an incorporated association are governed by that association's rules. An association's rules cannot impose membership upon a person unilaterally; there must be an agreement between the association and the person. A procedure commonly adopted under rules of an association is for a prospective member to lodge an application form and pay a fee. In other scenarios, the management of the association must approve an application for membership."

#### *Membership and the constitution*

[218] Clauses four to seven of the constitution sets out the process of membership for the Association.

[219] In *Imam Ali*, McMillan J explained the nature of the association's rules as a statutory contract between the association and its members which, at common law, are mandatory and an "estoppel cannot operate to preclude an association from relying upon its rules to determine the validity of the association's membership".<sup>282</sup>

[220] Associations are often formed as community organisations and McMillan J was not indifferent to the difficulties faced by organisations when genuinely attempting to comply with difficult legal concepts and technicalities inherent in creating and maintaining an association. However, her Honour concluded that "the Court is nonetheless required to assess the management and operation of the organisation by reference to its statutory source, informed by any relevant general law".<sup>283</sup>

[221] In *Re Australian Public Service Association v Robin Peter Isaac Lawrence*<sup>284</sup> Toohey J explained that:

"... it is well established that the rules of an organisation are mandatory and that estoppel cannot operate to preclude an organisation from relying upon its rules to determine validity of membership: *Bielski v. Oliver* (1958) 1 F.L.R. 258".

<sup>282</sup> [506] relying upon, at footnote [157] *Bielski v Oliver* (1958) 1 FLR 258, 260 (Spicer CJ, Dunphy and Morgan JJ); *Australian Public Service Association (Fourth Division Officers) v Lawrence* (1982) 2 IR 166, 168 (Toohey J) Cf *Kavourakis v Waverley Bowling and Recreation Club Ltd* [2010] NSWSC 439 (12 May 2010) [23] to [36], where Barrett J considered and dismissed an allegation that the association be estopped from denying the membership of the plaintiff.

<sup>283</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [523] per McMillan J.

<sup>284</sup> *Australian Public Service Association (Fourth Division Officers) v Lawrence* (1982) IR 166, 168 (Toohey J).

### *Termination of membership and the constitution*

[222] The Association’s constitution specifically deals with how a membership is taken to have “terminated”.

[223] Clause 8 of the constitution provides that “a member may resign at any time by giving notice orally or in writing to Secretary [sic] or directly at any general meeting”.<sup>285</sup>

### *The relevant principles on resignation from an association*

[224] A member has a unilateral right to resign at any time.<sup>286</sup>

[225] Whether a member “resigns” is a question of fact based on a member’s expression of intention.<sup>287</sup> That intention may be inferred from conduct.<sup>288</sup> The relevant inquiry in determining whether a person has resigned requires evidence of resignation by words or conduct.<sup>289</sup>

[226] The existence of a clause in the constitution providing for resignation by way of notice to the secretary or to a general meeting does not preclude resignation on any other basis.<sup>290</sup>

[227] There is no right to withdraw a resignation.<sup>291</sup>

[228] The relevant principles relevant to the question of resignation of an association can be relevantly summarised as:

- a. whether or not a person has “resigned” is a question of fact based upon a member’s intention;<sup>292</sup>
- b. the essence of the matter is whether the member has sufficiently manifested his or her decision to be a member no more. The only question is whether the member’s decision has been adequately conveyed by words or deeds;<sup>293</sup>

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<sup>285</sup> Constitution, exhibit 5 (trial bundle), tab 10/11, cl 8.(i).

<sup>286</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *Finch v Oake* [1896] 1 Ch 409.

<sup>287</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997).

<sup>288</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 (Megarry J).

<sup>289</sup> G E Dal Pont, *Law of Associations* (LexisNexis, 2018) p 124 citing *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 (Megarry J).

<sup>290</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [625] per McMillan J citing *Finch v Oake* [1896] 1 Ch 409, *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 per Megarry J.

<sup>291</sup> *Finch v Oake* [1896] 1 Ch 409 at 415 per Lindley LJ, quoted in G E Dal Pont, *Law of Associations* (LexisNexis, 2018) p 122.

<sup>292</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997).

<sup>293</sup> *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997) per Williams J citing *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 per Megarry J 62 to 63.

- c. the intention to resign can be inferred from conduct including a long standing lack of involvement, a continuing failure to participate in the association's affairs, or a voluntary disregard of the obligations of membership over continuous period of years;<sup>294</sup> and
- d. a former member can only become a member again by re-joining the association in the usual way.<sup>295</sup>

*The applicants state that they didn't resign at the meeting*

[229] A member of an association has a unilateral right to resign.<sup>296</sup>

[230] The applicants' position is that they did not resign their membership of the Association.

[231] None of the applicants depose to having resigned at the 4pm meeting.

[232] Accordingly, it needs to be determined whether they have by, words or, deeds manifested a decision to be a member no more.

[233] If they have, then there is no right to withdraw their resignation.

[234] The applicants bear the burden of proving that they were members in order to seek relief.<sup>297</sup> That is, the legal onus is and remains with the applicants to prove that they were members and entitled to seek the relief set out in section 90 of the Act.<sup>298</sup>

[235] However, the respondents acknowledge that, in the circumstances of the pleadings and evidence led at trial, the respondents bear the evidential burden of resignation on 4 September 2016.<sup>299</sup>

*The respondents' contentions*

[236] The respondents submit that the applicants did resign by oral notice either to the secretary or to the general meeting on 4 September 2016.<sup>300</sup>

[237] Alternatively, it is submitted by the respondents that the applicants sufficiently expressed the objective intention to resign by their conduct at that meeting (whether it was a "general meeting" within the meaning of the constitution or not).<sup>301</sup> The respondents submit that the conduct following 4 September, including the starting of their new church, confirms the resignation.<sup>302</sup>

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<sup>294</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J.

<sup>295</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J.

<sup>296</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *Finch v Oake* [1896] 1 Ch 409.

<sup>297</sup> The respondents refer to *Australian Competition and Consumer Commission (ACCC) v Air New Zealand Ltd; ACCC v PT Garuda Indonesia Ltd* (2014) 319 ALR 388; [2014] FCA 1157 at [488] per Perram J as an example.

<sup>298</sup> Applicants' submissions received 2 August 2019, p 1, [1] to [2].

<sup>299</sup> Respondents' submissions received 2 August 2019, p 2, [4].

<sup>300</sup> Exhibit 30 (respondents' closing submissions), p 15, [69].

<sup>301</sup> Exhibit 30 (respondents' closing submissions), p 15, [69].

<sup>302</sup> Such conduct, like conduct consistent with termination of a commercial contract, is relevant to determining whether there was a resignation



[238] However, the respondents acknowledge that the language used at the meeting is not clear.<sup>303</sup>

“MR O’HIGGINS: - - - that your Honour has seen in the video, no doubt your Honour will form your own view, but in my submission, the language used by everyone, even allowing for the usual vagaries of translation, is in some respects difficult. It is possible with an eye keenly attuned, to borrow a phrase, to pick out bits of the transcript that support one or the other sides. In my submission, many of the matters that were said in the meeting need to be understood in the context of what was happening at the time and what happened - - -

HER HONOUR: Yes.

MR O’HIGGINS: - - - afterwards. The emotional farewells at the end of the meeting speak volumes, in my respectful submission. There wouldn’t be a need for an emotional farewell unless there was a dividing of the ways or a parting or a resignation. The long emotional discussion that occurred by those who were left behind, that occurred for many hours afterwards, is indicative of the same thing. I accept that’s not obviously the applicants’ state of mind, but that’s the state of mind of the – those who gave evidence about that aspect of things.

The use of the church at 1 pm on Sundays. One may ask rhetorically, your Honour, how could that have worked, other than as a temporary arrangement, to allow those who were leaving time to start the new congregation?”

[239] The respondents submit the events leading up to the meeting on the afternoon of 4 September 2016 provide relevant context to the meeting on 4 September 2016 and its conclusions.<sup>304</sup>

[240] The respondents submit that the evidence supports the following findings:<sup>305</sup>

- a. at least as early as 31 August 2016, members of the Association knew that the Mother Church elders had written a letter about Reverend Reupena,<sup>306</sup>
- b. the members of the Association at the meeting on 31 August 2016 were divided in their loyalty to Reverend Reupena, as demonstrated by the vote and resolution passed at the 31 August 2016 meeting about whether members should attend the Inala Meeting in which the Mother Church’s letter about Reverend Reupena was to be read out. Those who did not sign the roll of attendees were those that wanted to attend the meeting and who, subsequently, were the “Faamate Group”.<sup>307</sup> The minutes of that meeting<sup>308</sup> confirm that divide and the view taken

<sup>303</sup> Transcript of the hearing on 1 April 2019, p 45 line 43 to p 46, line 16.

<sup>304</sup> Exhibit 30 (respondents’ closing submissions), p 16, [72].

<sup>305</sup> Exhibit 30 (respondents’ closing submissions), p 16, [72].

<sup>306</sup> Transcript of the hearing on 18 March 2019, p 57, line 28 to 33 (cross-examination of Taua Faamate); Transcript of the hearing on 19 March 2019, p 14, line 27 (cross-examination of Naumati Muliaga).

<sup>307</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 171 to 172, [60], p 240 to 242.

<sup>308</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 55 to 57.

that it was up to the congregation to decide whether they wanted to remove their pastor (minister). The minutes also noted that it was at the conclusion of that meeting that Mr Faamate provided the secretary with the letter requesting a copy of the constitution (on behalf of his and nine other families);<sup>309</sup>

- c. Mr Muliaga, the fifth applicant, knew that the Ipswich Church’s committee took the view that it was up to its congregation – not the Mother Church – to determine who should be Minister of the Ipswich Church,<sup>310</sup> and that the Ipswich Church asked for a copy of the written decision of the Mother Church so the allegations could be understood.<sup>311</sup> Mr Faamate was of the view that it was for the members of the congregation to decide who their Minister ought to be;<sup>312</sup>
- d. many of those in the Faamate group went to the Inala Meeting on 3 September 2016 and heard the letter being read out;<sup>313</sup>
- e. many of what became the Faamate group did not attend the usual morning service, and some of them turned up with the elders<sup>314</sup> leading at least the treasurer to conclude that they were going to leave the congregation;<sup>315</sup>
- f. at the meeting on 4 September 2016, it was clear that the “numbers” were in favour of Reverend Reupena (as they had been on 31 August 2016<sup>316</sup>) such that a vote or ballot on the election of Reverend Reupena would have resulted in his re-election, in particular:
  - i. Mr Faamate’s suggestion that his group was not in the minority<sup>317</sup> is not sustainable in circumstances where neither he or anyone else in his group asked for a count or poll or a vote of any kind<sup>318</sup> and the video played during the trial showed the significant difference in numbers;<sup>319</sup>
  - ii. Mr Faamate’s assertion that the numbers were inflated because they included people who had not been active in the church and attending services at the time,<sup>320</sup> was contrary to his acceptance that it took a meeting for a member to lose their membership on the basis that they had not been attending;<sup>321</sup>
- g. the English transcript of the meeting reveals that Reverend Reupena spoke about similar situations in other congregations which had resulted in those wanting to

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<sup>309</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 57.

<sup>310</sup> Letter of 1 September 2016, exhibit 5 (trial bundle), tab 27, p 269 to 270.

<sup>311</sup> Letter of 1 September 2016, exhibit 5 (trial bundle), tab 27, p 269 to 270.

<sup>312</sup> Transcript of the hearing on 18 March 2019, p 67, line 33 to 38 (cross-examination of Taua Faamate).

<sup>313</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, p 27, [36].

<sup>314</sup> Transcript of the hearing on 18 March 2019, p 59, line 6 to 7 (cross-examination of Taua Faamate); Transcript of the hearing on 19 March 2019, p 24, line 46 (cross-examination of Luatua Setefano); p 42, line 36 (cross-examination of Faalaa Fanolua); Transcript of the hearing on 27 March 2019, p 18, line 46 to p 19, line 2 (cross-examination of Faletolu Seupule).

<sup>315</sup> Transcript of the hearing on 27 March 2019, p 19, line 1 to 2 (cross-examination of Faletolu Seupule).

<sup>316</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 59.

<sup>317</sup> Transcript of the hearing on 18 March 2019, p 63, line 7 to 8 (cross-examination of Taua Faamate).

<sup>318</sup> Transcript of the hearing on 18 March 2019, p 64, line 3 to 19 (cross-examination of Taua Faamate).

<sup>319</sup> Exhibit 16.

<sup>320</sup> Transcript of the hearing on 18 March 2019, p 64, line 17 to 19 (cross-examination of Taua Faamate).

<sup>321</sup> Transcript of the hearing on 18 March 2019, p 65, line 1 to 5 (cross-examination of Taua Faamate).

stay aligned to the Mother Church leaving their congregations and forming new ones<sup>322</sup> and he expressed his opinion<sup>323</sup> that it was desirable for those who supported the elders' decision to go and develop their own church, to leave Reverend Reupena's church in order to maintain a good relationship;

- h. Mr Faamate (on behalf of the group<sup>324</sup>) suggested that they be given access to the Ipswich Church facilities as they would be following the congregation (of the Mother Church) to prepare for their new venture and vision moving forward,<sup>325</sup> and although he said "we are not leaving", that must be understood in light of his suggestion (or request) that they have access to the church facilities;
- i. Mr Iatiga spoke out against leaving, arguably about leaving the Mother Church (hence the reference to EFKS) and not the Ipswich Church;<sup>326</sup>
- j. Mr Muliaga spoke (for his group<sup>327</sup>) and asked for "some time to start our church from here"<sup>328</sup> – which was agreed to by Reverend Reupena and the Ipswich Church;
- k. there was discussion about the use of the name of the Ipswich Church and the fact that the same name could not be used by those leaving<sup>329</sup> – a discussion that would not have been had or been relevant if the Faamate group were not leaving to form their own church;
- l. at the request of Mr Faamate and Mr Muliaga, those who were leaving the Ipswich Church, were given time in which to develop a new church and, in the interim, use of the Church facilities at 1pm on Sundays<sup>330</sup> – if the Faamate group were not leaving to form their own church, why would they not attend the normal Sunday services in the morning? The 1pm arrangement is consistent with the Faamate group leaving to form their own church but being given a place and time to find alternative premises;
- m. faced with the reality of the numbers being against them, and the desire on all sides to avoid conflict, a compromise was reached – a compromise where those that did not want to support Reverend Reupena would leave to develop their own church that would remain part of the Mother Church. Although some spoke against leaving, e.g. Mr Fanolua,<sup>331</sup> Mr Muliaga seemed to have the final say;<sup>332</sup>

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<sup>322</sup> Exhibit 5 (trial bundle), tab 12, p 114 to 115.

<sup>323</sup> Exhibit 5 (trial bundle), tab 12, p 116.

<sup>324</sup> Transcript of the hearing on 19 March 2019, p 16, line 9 to 15 (cross-examination of Naumati Muliaga); p 25, line 23 to 33 (cross-examination of Luatua Setefano); p 44, line 17 to 20 (cross-examination of Faalaa Tanolua).

<sup>325</sup> Exhibit 5 (trial bundle), tab 12, p 118.

<sup>326</sup> Exhibit 5 (trial bundle), tab 12, p 119.

<sup>327</sup> Transcript of the hearing on 19 March 2019, p 16, line 9 to 15 (cross-examination of Naumati Muliaga); p 25, line 23 to 33 (cross-examination of Luatua Setefano); p 44, line 17 to 20 (cross-examination of Faalaa Tanolua).

<sup>328</sup> Exhibit 5 (trial bundle), tab 12, p 120.

<sup>329</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>330</sup> Exhibit 5 (trial bundle), tab 12, p 118 to 120.

<sup>331</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>332</sup> Exhibit 5 (trial bundle), tab 12, p 123.

- n. it was clear to Mr Setefano that his group was leaving the Ipswich Church to develop their own church;<sup>333</sup>
- o. Reverend Reupena asked for a letter<sup>334</sup> in order to formalise the arrangement and to confirm the resignation of those leaving the Ipswich Church;
- p. the meeting ended with a traditional farewell to those leaving, involving a hymn, hugs and kisses and many people in tears – a farewell that would not have been necessary unless the Faamate group were leaving the Ipswich Church;
- q. the minutes of the meeting<sup>335</sup> are consistent with those events; and
- r. the letter sent by the management committee to the elders on 7 September 2016<sup>336</sup> is also consistent with those events and in which the Ipswich Church notified the Mother Church that it had “conclude[d] its connection” to the Mother Church.

*No one knew attended this meeting thinking that the congregation would be divided*

[241] The only information that was provided to anyone prior to the 4pm meeting, was the announcement after the Sunday service whereby Mr Tisema, or Reverend Reupena, stated that there would be a meeting at 4pm that day to discuss the letter from the Elders Committee.

[242] The Association’s secretary, Mr Tisema, thought he was attending the afternoon meeting for the sole purpose of “discussing the letter” from the Samoan Church withdrawing Reverend Reupena’s pastor credentials.<sup>337</sup>

[243] Mr Tisema was not aware that Reverend Reupena was going to tell those who supported the Samoan Church’s decision should “go and form a new church”.<sup>338</sup>

[244] The most compelling evidence about the lack of notification and the element of surprise as to what occurred at the meeting comes from Reverend Reupena’s wife. Mrs Reupena, described by herself as “the mother of the church”,<sup>339</sup> is also a public officer of the Association.<sup>340</sup>

[245] Out of all the witnesses, I found Mrs Reupena to be the most familiar with the rules and regulations governing the Association.

[246] Mrs Reupena obviously shares a close personal relationship with her husband and was clearly an integral part of his work with the Association. It is noted that she sat with her husband in the morning when the Elders read the letter out effectively removing him as Minister of the congregation.<sup>341</sup>

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<sup>333</sup> Transcript of the hearing on 19 March 2019, p 25, line 35 to 38 (cross-examination of Luatua Setefano).

<sup>334</sup> Exhibit 5 (trial bundle), tab 12, p 121, 123.

<sup>335</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 58 to 62.

<sup>336</sup> Exhibit 5 (trial bundle), tab 28, p 271 to 272.

<sup>337</sup> Transcript of the hearing on 22 March 2019, p 72, line 19 to 23.

<sup>338</sup> Transcript of the hearing on 22 March 2019, p 28, line 27 to 35; p 29, 22 to 23.

<sup>339</sup> Transcript of the hearing on 25 March 2019, p 32, line 11 to 13 (cross-examination of Binary Reupena).

<sup>340</sup> Affidavit of Binary Reupena, exhibit 14 (respondents’ book of affidavits), tab 9, p 149, [1].

<sup>341</sup> Transcript of the hearing on 25 March 2019, p 31, line 24 to 26 (cross-examination of Binary Reupena).

[247] In relation to members of the Association leaving, she states:<sup>342</sup>

“So was there a conversation before the 4th of September that you had with other members of the association about the – in your words – possibility of leaving the mother church? Oh, no.

No? No. It was more on me, my husband and I to leave the congregation. That was the – a big issue for the people, is us as leader, as parents, leaving their – our fellowship or our church.”

[248] Mrs Reupena gave evidence that she did not know what her husband was going to tell the congregation at the 4pm meeting on 4 September 2016:<sup>343</sup>

“So did your husband tell you before the meeting in the afternoon on the 4th of September that he was going to tell the remainder group to go and start their own congregation? No. No.

So that was a complete surprise to you when he said that during the meeting? Yes.”

[249] Reverend Reupena even gave evidence that he did not even know before the meeting that he was going to tell the members to “go away and start their own church”.<sup>344</sup>

[250] An exception to this lack of forewarning as to the applicants leaving the Association at this meeting was Miss Seupule, current treasurer of the Association,<sup>345</sup> who states she had made a “resolution” to herself that “they were going to leave”.<sup>346</sup>

*Tensions between the two groups had been brewing*

[251] It is clear that tensions between the two groups had been brewing for some time. The congregation was divided between those who showed loyalty to the Mother Church and thus who showed loyalty to Reverend Reupena.

[252] When the congregation gathered at the hall that afternoon they divided along their loyalty lines. The hall had been set up with tables and chairs facing each other. On one side of the church sat the Reupena Group. On the other side the Remainder Group gathered.

[253] There may have been more people sitting on the Reupena Group side, however, it was questioned whether all who sat with this group were members of the Association.<sup>347</sup>

[254] Like the meeting on 31 August 2016, a roll was distributed for members to sign their names.<sup>348</sup> Some members of the Remainder Group refused to do so.<sup>349</sup>

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<sup>342</sup> Transcript of the hearing on 25 March 2019, p 34, line 15 to 23 (cross-examination of Binary Reupena).

<sup>343</sup> Transcript of the hearing on 25 March 2019, p 31, line 1 to 5 (cross-examination of Binary Reupena).

<sup>344</sup> Transcript of the hearing on 26 March 2019, p 35, line 30 to 38 (cross-examination of Kerita Reupena).

<sup>345</sup> Exhibit 27 (Affidavit of Michelle Seupule sworn 26 March 2019), p 1, [1].

<sup>346</sup> Transcript of the hearing on 27 March 2019, p 19, line 1 to 2 (cross-examination of Faletolu Michelle Seupule).

<sup>347</sup> Transcript of the hearing on 18 March 2019, p 64, line 17 to 19 (cross-examination of Taua Faamate).

<sup>348</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 243 to 245.

*Few people spoke at the meeting*

[255] Reverend Reupena dominated this meeting.

[256] Reverend Reupena determined what was to be discussed and how it was to be discussed. This is not surprising in the circumstances. He is clearly a dominating presence in the life of the Association. He is respected, given leadership adulation and is rarely questioned by his congregation. The Remainder Group's loyalty to the Mother Church over him was a crack to his unquestioning dominance within the Association.

[257] Only he and Mrs Reupena spoke from the Reupena Group at the meeting.

[258] Only four members of the Remainder Group spoke at this meeting.<sup>350</sup>

*Authority to speak on behalf of others*

[259] It was Reverend Reupena, the leader of the Reupena Group, who first suggested that the congregation should split and the Remainder Group leave the church.

[260] There is no evidence that any person gave him authority to speak on their behalf in suggesting such a drastic and divisive step. Indeed, there is evidence that Mrs Reupena and Mr Tisema were surprised at such a suggestion.<sup>351</sup>

[261] At no time did the four speakers from the Remainder Group express directly or indirectly that they were speaking on behalf of all of the other of the Remainder Group.

[262] It may be that all of the applicants had given some form of authority to those speakers before the meeting to pledge their "lot" in favour of whatever was said by the speakers.<sup>352</sup>

[263] However, it is noted that only six of the applicants were required for cross-examination.

[264] Of those who were called:

- a. Mrs Muliaga said that her husband spoke on behalf of the group<sup>353</sup> and that she supported what her husband and Mr Faamate said,<sup>354</sup> but she denied that "a number of people spoke on behalf of [her] group".<sup>355</sup>

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<sup>349</sup> See, e.g., Transcript of the hearing on 18 March 2019, p 58, line 5 (cross-examination of Taua Faamate); transcript of the hearing on 19 March 2019, p 14, line 35 (cross-examination of Naumati Muliaga); transcript of the hearing on 19 March 2019, p 24, line 6 (cross-examination of Luatua Setefano);

<sup>350</sup> Mr Faamate; Mr Muliaga; Mr Iatiga; Mr Fanolua.

<sup>351</sup> Transcript of the hearing on 25 March 2019, p 31, line 1 to 5 (cross-examination of Binary Reupena); Transcript of the hearing on 22 March 2019, p 28, line 27 to 35; p 29, 22 to 23 (cross-examination of Tipi Tisema).

<sup>352</sup> However, it is noted that this is not the case that is pleaded by the respondents. What is pleaded is that Messrs Faamate and Muliaga said "words to the effect they were authorised to speak" on the balance of the applicants' behalf, see Amended Defence, exhibit 5 (trial bundle), p 37, [22.(b)(iii)].

<sup>353</sup> Transcript of the hearing on 19 March 2019, p 16, line 9 to 15 (cross-examination of Naumati Muliaga).

<sup>354</sup> Transcript of the hearing on 19 March 2019, p 16, line 17 to 22 (cross-examination of Naumati Muliaga).

<sup>355</sup> Transcript of the hearing on 19 March 2019, p 16, line 7 (cross-examination of Naumati Muliaga).

- b. Mr Setefano agreed that that the “few people” who spoke did so on his behalf and on behalf of the group.<sup>356</sup>
- c. Mr Muliaga’s answer to the question to the question whether he spoke “on behalf of your group” was that “Yes. He did say a statement and plus other people that wanted to speak”.<sup>357</sup> He was not pursued any further for clarification.

[265] To resign from an association you must decide to do so, i.e. to sufficiently manifest your decision to be a member no more.

[266] To allow someone to tender your resignation, on your behalf, would require some knowledge or forethought of your resignation.

[267] Accordingly, it could not be considered that the Remainder Group had invested any of the speakers from the Group with the authority to “resign” on their behalf when it is not clear that there was any foreknowledge that their resignation might be a subject which might arise in the meeting.

*What was not said at the meeting*

[268] I have considered the respondents’ pleadings and the particulars with the transcript of the meeting and it is clear that the following things were not said whether in direct speech or “words to their effect”:

- a. “the first and fifth applicants told the meeting words to the effect that they were authorised to and did speak on behalf of the group of 30 members”;<sup>358</sup>
- b. “the first and fifth applicants said, on behalf of the group of 30 members, words to the effect that the 30 members considered they could not continue to participate along with the 53 members in church activities in the knowledge that the 53 members remained aligned with a spiritual leader who had been defrocked by the Denomination”;<sup>359</sup>
- c. “the first and fifth applicants said, on behalf of the group of 30 members, words to the effect that the 30 members would be leaving their membership of the first respondent’s congregation with immediate effect”;<sup>360</sup>
- d. “[the Remainders Group] would not continue to participate in the affairs of the Association ... ”;<sup>361</sup>
- e. “they conceded that since they intended to operate separately, they would need to use a different part of the property at a different time to the Association”.<sup>362</sup>

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<sup>356</sup> Transcript of the hearing on 19 March 2019, p 25, line 23 to 33 (cross-examination of Luatua Setefano).

<sup>357</sup> Transcript of the hearing on 19 March 2019, p 61, line 37 to 41 (cross-examination of Maiava Muliaga).

<sup>358</sup> Amended Defence, exhibit 5 (trial bundle), p 37, [22.(b)(iii)].

<sup>359</sup> Amended Defence, exhibit 5 (trial bundle), p 37, [22.(b)(iv)(B)].

<sup>360</sup> Amended Defence, exhibit 5 (trial bundle), p 37, [22.(b)(iv)(C)].

<sup>361</sup> Response to Notice dated 13 April 2018 requiring further and better particulars, exhibit 5 (trial bundle), p 84, [8.(b)(i)].

<sup>362</sup> Response to Notice dated 13 April 2018 requiring further and better particulars, exhibit 5 (trial bundle), p 84, [8.(b)(ii)].

[269] Nor did Reverend Reupena:

- a. “invite[] general discussion regarding whether:
  - i. the second respondent should remain in his role as minister; and
  - ii. the first respondent should dissolve its affiliation with the Denomination”.<sup>363</sup>

*The words spoken at the meeting*

[270] No one from the Remainder Group uttered the word resignation or termination that afternoon.

[271] However, there is no magic in the words “resignation” or “termination”;<sup>364</sup> whether a member “resigns” is a question of fact based on a member’s expression of intention.<sup>365</sup>

[272] The essence of the matter is whether the member has sufficiently manifested his, or her, decision to be a member no more. The only question is whether the member’s decision has been adequately conveyed to the Association by words or deeds.<sup>366</sup>

[273] It is abundantly clear that Reverend Reupena wanted the Remainder Group to leave and set up their own church. He first raised this in the following terms:<sup>367</sup>

“Therefore, you honourable group, leave us to continue our commitment with the congregation members who supports us to be an independent. We let you go, to create another congregation church which could lead to better relationship. We could help each other in the future, if we would continue to cause friction, we would continue on with trouble until the end comes. That is the purpose for you and us is peace. Do not get in fights, this is simple.

If you have supported the decision by the church elders men, it is desirable you find your own church, you go and develop a church and leave me and partner, to continue our mission/ contract until I die.....”

[274] This was the first mention of the congregation splitting.

[275] The first person from the Remainder Group who addressed this idea of two churches was Mr Faamate:<sup>368</sup>

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<sup>363</sup> Amended Defence, exhibit 5 (trial bundle), p 37, [22(a)].

<sup>364</sup> *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 (Megarry J), as quoted in *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997).

<sup>365</sup> *Imam Ali Islamic Centre v Imam Ali Islamic Centre Inc* [2018] VSC 413 at [505] per McMillan J citing *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997).

<sup>366</sup> *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997) per Williams J citing *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 per Megarry J 62 to 63.

<sup>367</sup> Exhibit 5 (trial bundle), tab 12, p 116.

<sup>368</sup> Exhibit 5 (trial bundle), tab 12, p 117 to 118.



“... As you mentioned in your speech Reupena, I am opinionated based on your speech. I feel happy thank you today is not easy it is not easy for you as leader, while we are working together like today you are not biased, but God is providing us a message of peace, support this, no one is her to cause conflict, we are guided by God’s name. ...

Mr Reupena, the message from the Church elders men, according to the Mother Church, you are fully aware, undoubtedly we agree with the Mother Church. However you said, divide our congregation in two, If we are having these conflicts who knows these are God's planning for you and us, we blamed each other who was good and who was bad, no one knows that God developed his long term plan for us, like tonight. It was a joy, if your decision as per say, none words could bring peace. We would obey, and do as it is, doing as it is.

... We the congregation are continuing and following the mother church, through the Puleaga (suburb) and Matagaluega (district). These are God's given guides and our thoughts. I thought we were going to court, thought we were having a war, though we are not, God has already given his good deeds for us. ... We declared we are attending the Pulega, and Matagaluega. If you agree to have peace and good relationship, we are happy to go ahead.

I have a suggestion, as we are following and continuing the congregation, It means we should be given an opportunity to use the hall, to prepare us with our venture and our vision to moving forward as we are looking at the success to the planning. That has been my suggestion as we all know the resources are owned by us. And if we are to have peace from God, these are our suggestions. We are not leaving we are not leaving, we pray, we can have access to these resources, same time with you, you use the church, and we have here (hall), and dispersed happily. Never made tonight a cause to a poor relationship...”

[276] It is clear Mr Faamate considered that all members of the Association owned the resources of the Association and should be able to use them accordingly.

[277] His words were not a manifestation of resigning from the Association.

[278] Reverend Reupena cited council regulations as to why the Church and the Hall could not be used at the same time by the different Groups. Further, he stated that if one group used the Church whilst the other used the Hall there would be ongoing conflict between the two groups.<sup>369</sup>

[279] Mr Iatiga from the Remainder Group then spoke. Mr Iatiga was not required for cross-examination. At the meeting he stated:<sup>370</sup>

“... In my history, I made a commitment to my mother, father and family born from the EFKS Fatausi Faasaleleaga, I could not change the mission I was firstly introduced into to grow, learn, and shape. Kerita Reupena, the good news of the EFKS, is the good news of Jesus Christ. ... I am hearing

<sup>369</sup> Exhibit 5 (trial bundle), tab 12, p 119.

<sup>370</sup> Exhibit 5 (trial bundle), tab 12, p 119.

that there are changes, declared I am not going to any other church as I said previously. Obviously I heard many times you said, we the congregation would not be affected by the issues of court proceedings. It is your issue between the elders' men and the mother church. Therefore we are affected for no good reason. We were waiting for the results of your case with the elders men. The decision was made, and then we need to talk with our church minister. Ultimately, the decision has been made, you are deregistered as a church minister which I agreed and supported. How could I come to listen to a minister who is deregistered? That is how I feel. Why? I refused to listen to anyone, The lay preachers are not affected, I am telling you, I am not leaving, I am not changing my church, I am all for the EFKS, with respect thank you.”

[280] This could not be said to be words amounting to a resignation from the Association.

[281] Mr Muliaga renews his request to use the church to “give us some time to start our church from here, due to immediacy of occurrences and while we are trying to make progress. It is not a place for the church, we are suggesting, with respect and being humble, give us times or days to access”.<sup>371</sup>

[282] There was some suggestion from Reverend Reupena that Mr Muliaga was renegeing on an alleged agreement which was already reached. Reverend Reupena replies:<sup>372</sup>

“You are suggesting now, after an agreement in the beginning to be divided, for our safety. ... We wanted to find out, we need not argue over resources, you said and we agreed we are another family. However we do not agree on some levels, we have different views, perceptions on what is happening. As we said you go ahead and does your church, leave us we would do ours, we already register in Australia, and we will return to the EFKS after the court case. It would be time; where we are coming back, therefore the new church, ok Malava. The meeting is ending. You are given 3 months to do your services then we would farewell. Prepare a nice cup a tea for the farewell then move on to develop a new church, and leave us with a saying, not to fight over these resources. Ok it is accepted, it is accepted. We are giving next week in the evening, you know our usual planning. What time of the evening?”

[283] Mr Muliaga suggests 1pm to which Reverend Reupena accedes to. He allows the Remainder Group the use of the Church at 1pm:<sup>373</sup>

“You would be here and we would be leaving, we would be moving to the hall for the meeting, and would let you use the church until you find something for worshipping. Your request is highly respected, as of today”.

[284] Mrs Reupena then addresses the congregation. She is concerned about access to the assets and the name of any new Church:<sup>374</sup>

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<sup>371</sup> Exhibit 5 (trial bundle), tab 12, p 120.

<sup>372</sup> Exhibit 5 (trial bundle), tab 12, p 120.

<sup>373</sup> Exhibit 5 (trial bundle), tab 12, p 120.

<sup>374</sup> Exhibit 5 (trial bundle), tab 12, p 120 to 121.

“... As we are putting forward, the majority of the Ipswich church would continue the work. EFKS Ipswich is registered. If this intention is a guide to a future success, they could change their name, freedom to select but not to duplicate the name, because what has happened previously have evidence to prove, then we could end up with a flaw. The assets must be identified, we know the elders’ men’s orders, but the court case is not completed. If the court is successful, the name would be cleared without punishment. We would all return to the EFKS as no one is willing not to be returned. But the issue is, not allowed to have 2 EFKS Ipswich. They could select another name but to be aware for your knowledge, the original parts/identities of the river, Is here, where the river starts, are there, the sub parts of the river, to be clearly labelled by tonight. In addition, the men need to express their thoughts, if they have agreed. If the assets are to be alternate, we need to understand clearly because there are multi groups as we all know.”

[285] It is clear that Mrs Reupena is raising concerns about the distribution of the assets and the name. She is raising the possibility that after the dispute with the Mother Church they can be one congregation again.

[286] At the time of this meeting, the Association was tied to the Mother Church by their constitution. Upon the Association’s incorporation in 1991, its members adopted and were bound together to the Association by the provisions of its constitution. The Association’s first and paramount object was that it was part of the Mother Church.

[287] The constitution’s objects declared that the Association was part of the Mother Church and that Mother Church “holds that the Bible in its Old and New Testaments is the fountain of the christian life”.<sup>375</sup> Any departure from the Mother Church could be said to be a departure from the Association’s paramount object as set out in the constitution.

[288] Mrs Reupena makes it clear she does not want any contact with those that support the Mother Church and thus challenge her husband. Her speech is important because, in the appointed role of “the Mother of the Church”, she states that:<sup>376</sup>

“... [I]f the assets are to be alternate we need to understand early because there are multi groups as we all know. Here are my requests with respect. I am happy to praise and bless you all, however I do not wish to have face to face access which leads to becoming hypocrites, which God does not approve. ...”

[289] After Mrs Reupena’s speech, the word “resignation” is mentioned for the first time.

[290] It does not come from any of the Remainder Group. It is Reverend Reupena who raises the issue of resignation.

[291] He says that “we are giving them a chance to submit a letter of resignation and they have given up to September to use the resources for their service, followed by the ending”.<sup>377</sup> And that he is “waiting for the letter to state that you are leaving ...”.<sup>378</sup>

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<sup>375</sup> Constitution, exhibit 5 (trial bundle), tab 10, cl 2.

<sup>376</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>377</sup> Exhibit 5 (trial bundle), tab 12, p 121.

[292] At this point in time, in my view, no words from anyone from the Remainder Group manifested their decision to resign. Reverend Reupena is giving them a chance to submit a letter of resignation.<sup>379</sup> It is interesting to note that Reverend Reupena uses the term “we” in circumstances when he alone is speaking and in circumstances where the splitting of the Association and any “resignation” of the Remainder Group was a surprise to almost all at the meeting.

[293] Reverend Reupena declares that the issue is now settled but reinforces the need for the letter:<sup>380</sup>

“We are giving them a change to submit a letter of resignation, and they have given up to September to use the resources for their service, followed by the ending. These are to be recorded.

Letting them go but not to take the name (Ipswich EFKS); we have the name, we have everything. Maiava, Taua and their side understand, however it the peace making. It is not acceptable to have flights on this God’s day, but to make peace. The Issue is now settled. We offered to give Maiava and their group to use the church at 1 this month, followed that they would develop their new church. A happy relationship is the most significant thing of all. What happens within the church here, could affect the families. I and my brother in that side do not have a good relationship anymore due to church matters. We do not promote poor relationship. We need to support each other. We worked and do things together, however it is important for you to develop another church, continue on, when comes the time to return, the church is well developed and success. Maiava and Taua, we would be waiting for the letter to state that you are leaving. Develop a new church and you are given this month to use the church at 1pm. When we finished in the morning, we came to the hall in the evening. We need to follow the policy according to the law. And using the 2 houses at once, meaning we will come back and use it at 5pm. It is minor changes, it could all be fit we could still fit our 2 services, and would let you use it, and we could use it in some mornings.”

[294] Later on, Reverend Reupena seems to restrict further debate on this issue:<sup>381</sup>

“Faalaa, forgive, and forget

You are now released. Faalaa says give me a chance. The decision is made, and Toleafoa was denied, Toleafoa had been wanting to say something if I allow you to speak, it would be unfair to Toleafoa, if we are to give another chance to talk, the matter would be conflictual, however we need the blessing. You go with the blessings us staying behind with the blessings. God bless you Maiava and continue with your role as a decon elder, if you need help come to us, blessings.”

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<sup>378</sup> Exhibit 5 (trial bundle), tab 12, p 122.

<sup>379</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>380</sup> Exhibit 5 (trial bundle), tab 12, p 121 to 122.

<sup>381</sup> Exhibit 5 (trial bundle), tab 12, p 122.

[295] Mr Fanolua, a member of the Remainder Group, states:<sup>382</sup>

“Kerita, I am not liable to say your name,

Me personally as a church member, I do not understand, I am hearing we are released to go, we are going. But look, church minister, the decision/verdict was made by the mother church; you are “deregistered as a church minister”. What else? We have the right to stay in the church, but you told us to leave, what is the right thing?”

[296] This could not be said to be words, by Mr Fanolua, amounting to a resignation from the Association. Indeed he is seeking assistance. Reverend Reupena responds “if we are open for an election, were you going to win against the majority here? Were you going to win the majority? Look how many in the majority group?”.<sup>383</sup>

[297] Mr Muliaga then thanks the Reverend for being knowledgeable “your God’s wisdom has brought peace to this issue. You are our fathers who take us as refuge”.<sup>384</sup>

[298] Reverend Reupena then declares the issue settled. Reverend Reupena states that “we are waiting for the letter, and the progress, we are giving you up to the end of the month to find something for your group and continue your roles”.<sup>385</sup>

[299] Reverend Reupena closes the meeting with a prayer but not before saying “we would wait for the letter”.<sup>386</sup>

[300] Reverend Reupena states that there were 20 members and nine non-members of the Remainder Group at the meeting;<sup>387</sup> only four members spoke from the group.

[301] Reverend Reupena also states that there were 43 members and 10 non-members of the Reupena Group at the meeting;<sup>388</sup> only the Reverend and his wife spoke from this group. There is no evidence that Reverend Reupena consulted with any person before raising the issue of division or resignation.

[302] This is a meeting where moments of importance happened without notice, quickly and without fulsome debate.

[303] Despite their differing views, the meeting was conducted with great respect by all members of the congregation.

[304] I do not accept that any member’s silence indicates agreement, or not, with any expressed view. Rather, I see it as a sign of respect for the church elders and leaders.

*An emotional farewell*

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<sup>382</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>383</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>384</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>385</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>386</sup> Exhibit 5 (trial bundle), tab 12, p 124.

<sup>387</sup> Exhibit 5 (trial bundle), tab 12, p 123.

<sup>388</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), p 176, [76].

[305] After the meeting finished the two groups embraced each other, shook hands and clearly some members were distressed; it was an emotional end to the meeting. The respondents submit that such an emotional farewell would not be necessary unless the Remainder Group were leaving the Association.<sup>389</sup>

[306] There is no doubt that at the end of the meeting both groups realised that they were a divided congregation; there were those who supported the Mother Church and there were those who supported Reverend Reupena.

[307] Reverend Reupena occupies a special position within the congregation and he is accorded special treatment and the highest respect in accordance with Samoan customs and the Christian beliefs of the Samoan people. It was Reverend Reupena who first declared that the congregation needed to be split. To be told in no uncertain terms by the “spiritual father of the village” (as described by the Samoan Chief Justice)<sup>390</sup> that the congregation can no longer be one would be distressing.

[308] The question is, was their departure a mass resignation, or the declaration of Reverend Reupena that the congregation needed to be split?

*The Remainder Group leaves the hall and the constitution is amended*

[309] After the Remainder Group left the hall the Reupena Group stayed and discussed what happened. It was clearly a distressing meeting for all and the group who stayed in the hall expressed their emotions about how they felt about the days’ events.

[310] Then the Group voted on amending their constitution to take out any reference to the Mother Church; this was done with the exception of the winding up clause which remained in the constitution.

*A letter seeking the Remainder Group’s resignation*

[311] During the meeting, Reverend Reupena stated that “we are giving them a chance to submit a letter of resignation, and they have given up to September to use the resources for their service, followed by the ending”.<sup>391</sup>

[312] However, no member availed themselves of this “chance to submit a letter of resignation”. At no time has any member signed any letter of resignation.

[313] Accordingly, on 9 September 2016, a letter, signed by the management committee,<sup>392</sup> was delivered to Mr Muliaga (the sixth applicant) and provided a summary of the meeting on 4 September 2011:<sup>393</sup>

“1. You and your side, 10 families we have noted on your letter are requesting the constitution on 31 August 2016;

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<sup>389</sup> Exhibit 30 (respondents’ closing submissions), p 19, [72.(p)].

<sup>390</sup> Affidavit of Taua Faamate, exhibit 13 (applicants’ book of affidavits), tab 5, a copy of the decision is annexed at TMF-5, p 58-83, see [56].

<sup>391</sup> Exhibit 5 (trial bundle), tab 12, p 121 to 122.

<sup>392</sup> Reverend Reupena, Mr Tisema and Mr Moe.

<sup>393</sup> Exhibit 5 (trial bundle), tab 30, p 274 to 275.

2. The majority of this Church support the Minister, 20 families that were there sitting on our side at the Millennium Hall.

There was no voting that was taken because it was clear that we hold the majority and you hold the minority. You have rejected the raw call and we feel that the protection of peace is in accordance with what we have done that evening, so the split of our congregation only one reason, because of the resolution that was brought in by Elder lance and Elder Lauie that morning. You have accepted the resolution from Samoa, but the majority of our Congregation upholds that we should still maintain our Minister and therefore we reject the resolution because its reasons for removal of the Minister is irrelevant, so therefore we have rejected the resolution of the Church in Samoa (EFKS)

3. Although it is hard that we have let you go in your own free will and we wish you peace and to continue your relationship with the Church in Samoa (EFKS). We have also told you to start up your new church in a new name, because it is still our wish that we will go back to the Church in Samoa (EFKS) after the Minister's punishment.

4. The Minister and this side boast the majority of the congregation, we still maintain with the property and the registration of the church with the Queensland Government. We continue with the induction of Kerita as the Minister of this Congregation CCCSA (Ipswich Congregation). We are well protected under the Government laws, Queensland Australia, if we do reject our contractual relationship with the Minister we will go against what the Queensland Government Australia has laid down. We have breached our contractual duties.

5. You Maiava Muliaga has Taua Meauli Faamate have asked us to allow you to use the church building.

6. We have accepted your wish to conduct your service on Sundays at 1pm for a month of September only and then you can go and look for your own church property, but you have to give us your resignation letter.”

[314] This summary of the meeting in no way conveys that the Remainder Group resigned at the meeting on 4 September 2011. Rather the request to conduct their services on Sundays at 1pm for a month was conditional on giving the management committee “your resignation letter”.

[315] Reverend Reupena stated that the reason he asked for the resignation letter was because:<sup>394</sup>

“89. The reason why I asked for the letter referred to in paragraph 87(b)(iii) above, is because it is the normal practice of CCSA Ipswich to require any external group wishing to use the church facilities to make such a request in writing. This is so we have the relevant records in place for insurance purposes or if there is any damage caused by external groups.

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<sup>394</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 179, [89] to [90].

90. Further, in the case of the Faamate Group, even though it was clear to me from what had been discussed, their conduct in the meeting, and how the meeting ended that they had resigned and were leaving to form their own new church, I wanted CCCSA Ipswich to have a written record of their resignation, again, for insurance purposes.”

[316] Reverend Reupena is adamant that the letter he asked for was not a letter of resignation (which he says had already occurred on the evening of 4 September 2016 meeting).<sup>395</sup>

#### *A confrontation at the Church*

[317] On 11 September 2016, members of the Remainder Group came to the Church around 1pm.

[318] The secretary of the Association, Mr Tisema, states that the management committee agreed to lock the gates.<sup>396</sup>

[319] Reverend Reupena states that he was aware that the gates were locked,<sup>397</sup> a car was parked across the front of the gates.<sup>398</sup> Reverend Reupena did not agree that he told Mr Tisema not to let anybody in without a letter of resignation, stating that “that was subject to the decision made by the committee”.<sup>399</sup> It is noted that Reverend Reupena was the Chair of the management committee.

[320] Reverend Reupena and Mr Muliaga had a conversation to the following effect:<sup>400</sup>

“After this, Reverend Reupena (who lives on the church premises) came out to the front gate and spoke to Mr Muliaga in my presence. They had a conversation to the following effect.

(a) Maiava Muliaga: *Can we use the church?*

(b) Kerita Reupena: *You need to provide the letter.*

(c) Maiava Muliaga: *We own the premises.*

(d) Kerita Reupena: *You can go find a lawyer.”*

[321] The Remainder Group did seek a lawyer and communication between the two groups since 11 September 2016 has been conducted via solicitors.

[322] On 10 October 2016, the applicants’ solicitors sent a letter to Reverend Reupena, stating, relevantly:<sup>401</sup>

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<sup>395</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 181, [97].

<sup>396</sup> Transcript of the hearing on 22 March 2019, p 36, line 9 to 27 (cross-examination of Tipi Tisema).

<sup>397</sup> Transcript of the hearing on 26 March 2019, p 51, line 17 to 20 (cross-examination of Reverend Reupena).

<sup>398</sup> Transcript of the hearing on 26 March 2019, p 51, line 27 to 30 (cross-examination of Reverend Reupena).

<sup>399</sup> Transcript of the hearing on 26 March 2019, p 52, line 1 to 4 (cross-examination of Reverend Reupena).

<sup>400</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 501, [42].

<sup>401</sup> Exhibit 21 (Letter from Corney & Lind Lawyers dated 10 October 2016).



“We act for Taua Faamate, a representative of certain members of the Congregational Christian Church in Samoa-Australia (Ipswich Congregation), and the Congregational Christian Church in Samoa-Australia (Queensland – Brisbane West Subdistrict). We have been instructed that those members have been refused access to the church facility at 11 Bailee Street, Goodna.

Our client reserves their rights in relation to:

- 1) Their ongoing membership of the incorporated association Congregation Christian Church in Samoa-Australia (Ipswich Congregation);
- 2) The actions taken by Mr Kerita Reupena and those who purport to hold office in the management committee.

While there is a dispute on foot, our clients request that no decisions are made on behalf of the church which would result in the church incurring additional financial liability above and beyond what is necessary for the everyday operational costs of the church

We are currently taking our clients [sic] instructions and will be in contact shortly

...”.

[323] Solicitors for the respondents wrote to the solicitors for the applicants on 14 October 2016 in the following terms:<sup>402</sup>

“ ...

We are instructed that a Mr Fa’amate and members of ten families formally resigned from the above Congregation on the 4 September 2016, of their own freewill and have since, ceased participating in any church services conducted by Reverend Kerita Reupena, and ceased to make any form of contribution to the Congregation, as expected of members. We are instructed that Mr Fa’amate and others resigned verbally.

We are instructed that Mr Fa’amate and others returned to the church properties on Sunday the 11<sup>th</sup> September 2016 at mid-day and attempted to break in to the church properties claiming that they have the right to conduct their own services at a time that suits them. We are instructed that Mr Fa’amate’s group were abusive and hostile towards the Congregation members.

We give notice that Mr Fa’amate himself has formally resigned from the above Congregation, and he has no legal claim to the facilities of the church. He has no authority to return to demand a right to use the Church facilities. There is no such legal term as “ongoing membership” of a person who resigns through his/her own freewill.

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<sup>402</sup> Exhibit 22.

...”

[324] It is noted that this letter included an allegation that members of the Remainder Group attempted to break into the church properties. There is no evidence to substantiate such an allegation.

[325] In cross-examination, Mr Tisema acknowledged the following with respect to this letter:<sup>403</sup>

“And having regard to that paragraph, you didn’t expect to see anybody from the remainders group turn up again. Did you? I expecting them on 11 – on September.

Yes, but after they received this letter, they weren’t just going to turn up to church services again. Were they? No.”

[326] On 31 October 2016, an “invitation to reconcile” was extended by the applicants, via their solicitors: “our clients wish is that the members resolve their dispute peacefully and by way of open discussions in line with the ethos and objects of the Association as set out in the Constitution”.<sup>404</sup>

[327] Mr Tisema, the then secretary of the Association,<sup>405</sup> acknowledges that he had no intention of resolving their dispute peacefully and by way of open discussion in line with the ethos and objects of the Association as set out in the constitution.<sup>406</sup>

[328] The Repeuna Group made it clear that the Remainder Group were not welcome and it is no surprise that they never attended any functions or services at the Association premises again.

[329] At the meeting on 4 September 2016, Mrs Reupena had made her views clear about the thought of seeing the Remainder Group on Association premises; “[h]ere are my requests with respect. I am happy to praise and bless you all, however I do not wish to have face to face access with which leads to becoming hypocrites, which God does not approve”.<sup>407</sup>

[330] Not surprisingly, in the circumstances, the Remainder Group did not set foot on the Association premises, or provide donations to the Association, again. This is not evidence of their resignation but rather the circumstances that had developed; hostility would await them if they tried to attend upon the Association’s premises. The Remainder Group’s absence from the Association is not evidence that they had voluntarily abandoned their membership.

[331] The Remainder Group was forced to develop their own church and this litigation ensued.

### *The Remainder Group did not resign*

<sup>403</sup> Transcript of the hearing on 22 March 2019, p 39, line 39 to 43 (cross-examination of Tipi Tisema).

<sup>404</sup> Exhibit 23 (letter from Corney & Lind Lawyers dated 31 October 2016).

<sup>405</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 18, p 495, [6]; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 10, p 167, [37].

<sup>406</sup> Transcript of the hearing on 22 March 2019, p 41, line 36 to 46.

<sup>407</sup> Exhibit 5 (trial bundle), tab 12, p 121.

- [332] The respondents’ submit that the applicants resigned by oral notice either to the secretary or to the general meeting on 4 September 2016 at 4:00pm.<sup>408</sup>
- [333] Alternatively, the respondents submit that the applicants sufficiently expressed the objective intention to resign by their conduct at that meeting (whether it was a “general meeting” within the meaning of the constitution or not).<sup>409</sup>
- [334] Prima facie, for any member of the Association to resign it needs to be done in compliance with clause 8(i) of the constitution; this was not done.
- [335] The Reupena Group plead that the second respondent “said to those in attendance at the service words to the effect there would be an extraordinary general meeting of the first respondent that evening at 4:00pm (‘the extraordinary general meeting’).<sup>410</sup>
- [336] There is no provision for an extraordinary general meeting in the constitution, nor is there in the Act.
- [337] The constitution provides for a “special general meeting” but requires such a meeting to be called by the secretary after being directed to do so by the management committee, or on requisition in writing; this did not occur.<sup>411</sup> Moreover, it was not referred to as such by the secretary who opened the meeting, or by Reverend Reupena before the meeting was held, and it is not referred to in those terms at any time during the meeting.
- [338] The evidence of the Association’s secretary, Mr Tisema, is that he thought he was attending the afternoon meeting for the sole purpose of “discussing the letter” from the Samoan Church withdrawing Reverend Reupena’s pastor credentials.<sup>412</sup>
- [339] It is clear that this meeting was not a general meeting, extraordinary or special general meeting for the purposes of the constitution.
- [340] However, it is noted that the existence of a clause in the constitution providing for resignation by way of notice to a general meeting does not preclude resignation on any other basis.
- [341] The real issue is whether the members have sufficiently manifested their decision to be a member no more, i.e. has the member’s decision been adequately conveyed to the Association by words or deeds.<sup>413</sup>
- [342] Only four members spoke from the Remainder Group at the meeting: Mr Faamate, Mr Muliaga, Mr Iatiga and Mr Fanolua.<sup>414</sup>
- [343] None of these members by their words resigned from the Association.

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<sup>408</sup> Exhibit 30 (respondents’ closing submissions), p 15, [69].

<sup>409</sup> Exhibit 30 (respondents’ closing submissions), p 15, [69].

<sup>410</sup> Exhibit 5 (trial bundle), tab 2, p 37, [21A].

<sup>411</sup> Exhibit 5 (trial bundle), tab 10, p 103, cl 20.(iii).

<sup>412</sup> Transcript of the hearing on 22 March 2019, p 72, line 19 to 23.

<sup>413</sup> *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997) per Williams J citing *In re Sick and Funeral Society of St John’s Sunday School, Golcar* [1973] Ch 51, 62 per Megarry J 62 to 63.

<sup>414</sup> Exhibit 5 (trial bundle), tab 12, p 114 to 125.

[344] For the others to resign, it had to occur by bulk resignation in circumstances where members attended a meeting where they did not know that they would be called on to resign and they did not speak.

[345] Nobody from the Remainder Group used any language consistent with resignation.

[346] At no time did any of the speakers, on behalf of themselves or the entire Remainder Group, say that they were “leaving” and that “they did not want to” be members anymore.

[347] Indeed, at times both Mr Faamate said “we are not leaving”<sup>415</sup> and Mr Iatiga said “I am not leaving”.<sup>416</sup>

[348] And, Mr Fanolua appears to be confused by Mr Reupena’s command to leave when he says, “We have the right to stay in the church, but you told us to leave, what is the right thing?”

[349] At no time did any of the speakers refer to their membership or the others’ memberships in the context of their being removed from the Association’s membership.

[350] From the concern expressed that if the Remainder Group continued to use the Association’s premises then conflict would be ongoing,<sup>417</sup> it appeared that the Remainder Group was no longer welcome at the Association’s premises. In Mrs Reupena’s words, that condemns all of them to being “hypocrites, which God does not approve”.<sup>418</sup> Reverend Reupena was a little more forgiving, he said that using the facilities together would create “ongoing conflicts, [and] our children would get involved”.<sup>419</sup>

[351] The Remainder Group did leave the meeting but this did not amount to a manifestation of leaving the Association.

[352] Even Reverend Reupena seemed to be unconvinced that Mr Muliaga and Mr Faamate’s remarks would be enough to satisfy the requirement of resignation; so he gave them a “chance to submit a letter of resignation”.<sup>420</sup>

[353] None of the Remainder Group speakers accepted that they would bring the letter when they came back on 11 September 2016.

[354] It is clear that there were some members of the Association who did not want Reverend Reupena to be the pastor of their congregation anymore. It is acknowledged that the congregation chooses their pastor or Minister and a number of members may have wanted him to stay. However, the pastor or Minister is not the Association. There was much more complexity to this issue. The objects of the Association, at the time of the meeting, dictated that the Association was part of the Mother Church. The

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<sup>415</sup> Exhibit 5 (trial bundle), tab 12, p 118.

<sup>416</sup> Exhibit 5 (trial bundle), tab 12, p 119.

<sup>417</sup> Exhibit 5 (trial bundle), tab 12, p 119.

<sup>418</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>419</sup> Exhibit 5 (trial bundle), tab 12, p 119.

<sup>420</sup> Exhibit 5 (trial bundle), tab 12, p 121.

Remainder Group was loyal to the Mother Church as enshrined in the objects of the Association; the Reupena Group was not.

[355] Reverend Reupena determined that the congregation should be split; that the Remainder Group should leave. His position and status in the congregation meant that he was a dominating presence and force. Mr Faamate and Mr Muliaga was trying throughout the meeting to ensure they would have a place to worship. Reverend Reupena and Mrs Reupena, appeared to not want them to continue to use the Association's facilities and thus set a time limit for how long they could stay. At one stage Reverend Reupena allowed them three months,<sup>421</sup> then later limited it for the rest of the month<sup>422</sup> after his wife did want "face to face access which leads to becoming hypocrites".<sup>423</sup>

[356] The applicants were effectively told to leave the church and Reverend Reupena gave them a chance to submit their letter of resignation. If they gave their letter of resignation then they could access the Association's premises for a limited time. They did not provide a letter of resignation and they were then effectively excluded from the Association's premises.

[357] On the evidence before me, I am not satisfied that the applicants resigned from the Association. Neither their words nor their deeds manifested their decision to be a member of the Association no more.<sup>424</sup> The applicants did not sufficiently express the objective intention to resign by their conduct at this meeting.

[358] Accordingly, as the applicants did not resign from the Association, they are members of the Association and have standing to bring this proceeding.<sup>425</sup>

### **Winding up on the just and equitable grounds**

[359] The applicants contend that the Court should find the following matters of conduct, taken in isolation or in combination, sufficient to wind up the Association on the just and equitable grounds:<sup>426</sup>

- a. the Remainder Group were expelled from the Association on 4 September 2016;
- b. the Reupena Group acted in such a way as to exclude the Remainder Group, after 4 September 2016, from participation in the affairs of the Association;
- c. the historical departure from the regulatory requirements of the Associations' Act and the Constitution, at least, before early December 2016 is a sufficient ground to wind up the Association;

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<sup>421</sup> Exhibit 5 (trial bundle), tab 12, p 120.

<sup>422</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>423</sup> Exhibit 5 (trial bundle), tab 12, p 121.

<sup>424</sup> *Elmawey v Adelaide Mosque Islamic Society of South Australia Inc* (unreported, Supreme Court of South Australia, Williams J, 3 December 1997) per Williams J citing *In re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51, 62 per Megarry J 62 to 63.

<sup>425</sup> Except for the nineteenth and twentieth applicants.

<sup>426</sup> Exhibit 29 (applicants' closing submissions), p 55 to 56, [136].

- d. the use of the Association's funds whether by loan or pledge for the personal use of the Chairman, Mr Reupena, is conduct warranting the winding up of the Association;
- e. the historical non-compliance with its financial reporting obligations is sufficient to wind up the Association;
- f. the admission of 19 members after the 4 September 2016 meeting was an attempt by the Reupena Group to dilute the Remainder Group's proportion of the Association's membership and was, therefore, oppressive.

[360] The parties have produced an agreed list of issues that are relevant when considering whether the circumstances justify making an order to wind up of the Association on the just and equitable grounds.

### **Matters justifying the winding up of the Association on the just and equitable grounds.**

#### *The failure to maintain an accurate membership register, at least until 5 September 2016*

[361] I accept that the Association failed to maintain an accurate membership register at least until September 2016. I note that the failure to maintain an accurate membership register prior to September 2016 is largely a historical allegation.

[362] Importantly, since this time, the Association has kept a separate list of members.<sup>427</sup> However, I accept that the historical hangover of a failure to maintain an accurate register of members may infect the accuracy of the current list of members.

[363] The respondents submit that the applicants have not shown any willingness to consider that the issue of membership could be resolved other than by a winding up.<sup>428</sup>

[364] The respondents submit that it would be a simple matter for a receiver or similar independent person to audit the list of members.

[365] The applicants submit that in the absence of agreement, the determination of the members of the Association borders on the impossible. That is particularly so given the Association's historical departure from the constitution's requirements.

[366] The respondents state that if it became necessary to do so in the context of an appointment of a receiver, the respondents would concede that all of the applicants<sup>429</sup> were members (plus those on their list for which Mr Faamate did not account and which appear on the respondents' list), for the purpose of a receiver convening a general meeting to determine the Ipswich Church's future.<sup>430</sup>

[367] In my view, it would be a difficult but not an impossible task to determine the membership of the Association.

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<sup>427</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 10, p 211 to 235.

<sup>428</sup> Exhibit 30 (respondents' closing submissions), p 23, [92], citing Transcript of the hearing on 19 March 2019, p 4, line 14 to 17; p 7, line 25 to 27 (cross-examination of Taula Faamate); Transcript of the hearing on 20 March 2019, p 18, line 26 to p 19, line 1 (cross-examination of Maiava Muliaga).

<sup>429</sup> Save for Junior Papua and Segia Papua, Aso Aukuso and Tiana Afaese (see Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 358, [40]).

<sup>430</sup> Exhibit 30 (respondents' closing submissions), p 29, [137].

[368] Any disputed membership can only be determined by reference to the constitution.

[369] I accept, that even where there may be some difficulties with some of the historical records, a properly informed and assisted (probably by a translator) receiver is well able to determine any disputed questions of membership.

*Reverend Reupena unilaterally appointed the management committee between October 2013 and December 2016*

[370] The originating application, as further amended by leave on 26 March 2019, pleads at paragraph 9:

“9. Since October 2013:

...

(c) There has been no nomination or election of the Association’s committee by the Association’s members in accordance with:

(i) clauses 11 and 12 of the Association’s Constitutions;

(ii) section 62 of the Act;

...”

[371] Minutes of a general meeting held on 26 January 2014 record the appointment of secretary and treasurer for the 2014 calendar year:<sup>431</sup>

“Today is the day we carry out the resolution of the meeting on the 20<sup>th</sup> day of October 13. On the minister’s return from holidays, the church minister and chairperson would select the secretary and treasurer for 2014 – Secretary chosen for 2014 Mr Tuluauau Sanini Tuluauau. Treasurer is Mr Maiava Muliaga. They are selected officers for this year 2014, to replace the ones from 2013”.

[372] Further and more relevantly, the minutes of a general meeting held on 20 December 2015 record the appointment of the whole management committee for the 2016 calendar year:<sup>432</sup>

“Next is to select the management committee for 2016:

Secretary – Ofagamalefa Tipi Tisema

Treasurer – Akenese Faamau Moe

Chairperson – Still Pr (Kerita Reupena)

Accepted and passed.”

<sup>431</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 47.

<sup>432</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 51.

[373] The applicants contend that the Court should find:<sup>433</sup>

- a. Reverend Reupena unilaterally appointed the management committee from October or November 2013 until early December 2016; and
- b. an Association, by itself or its members cannot “authorise” a person whether that person is a Chairperson of a meeting or otherwise, to perform an act which is inconsistent with the Constitution and/or the Act on the basis that no estoppel can operate against express provisions to the contrary.

[374] The applicants accordingly seek an order that:<sup>434</sup>

- a. the purported undocumented amendment to clauses 11 and 12 of the first respondent’s constitution which is alleged to have occurred on or about 20 October 2013 is invalid; and
- b. the appointment of the second, third and fourth respondents as the first respondent’s committee is invalid.

[375] It is noted that this unilateral appointment of the management committee by Reverend Reupena is also a historical allegation.

[376] The procedure and authorisation to appoint the Association’s committee is found in the Act and the constitution. Sections 60, 61 and 62 of the Act provides:

**“60 Management Committee**

- (1) Subject to this Act, the business and operations of an incorporated association shall be controlled by a management committee.
- (2) Every member of the management committee and any manager duly appointed by the management committee acting in the business or operations of the incorporated association shall be deemed to be the agent of the incorporated association for all purposes within its objects.
- (3) The acts of a member of the management committee shall be valid notwithstanding any defect that may afterwards be discovered in the member’s appointment or qualifications.

**61 Membership of management committee**

- (1) An incorporated association must have a management committee.
- (2) All members of the management committee must be adults.
- (3) The management committee must have at least 3 members of whom—
  - (a) 1 holds the office of president; and
  - (b) another holds the office of treasurer.

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<sup>433</sup> Exhibit 29 (applicants’ closing submissions), p 48, [113].

<sup>434</sup> As amended by leave on 26 March 2019.



...

## 62 Election of management committee

(1) The members of the management committee shall be elected at the annual general meeting or any general meeting of the incorporated association in accordance with its rules.

(2) Notwithstanding the provisions of subsection (1) the rules of an incorporated association may permit the management committee to fill a casual vacancy on the management committee.

(3) In this section—

*casual vacancy*, on a management committee, means a vacancy that happens when an elected member of the management committee resigns, dies or otherwise stops holding office”.

[377] Clauses 10 to 13 of the constitution set out the requirements for elections of the Association’s management committee and provides:<sup>435</sup>

### “MEMBERSHIP OF MANAGEMENT COMMITTEE

10. (i) Management committee shall consist of chairman [sic], secretary, treasurer, all of whom shall be members of the Association.

11. At the last general meeting for the year, the members shall elect offices for the new year coming. Current officers shall continue their service until the financial year has ended. Current officers shall be eligible upon nomination for re-election.

12. The election of offices of the management committee shall take place in the following manner;

(a) Secret ballot shall be held to fulfil all vacancies of the management committee.

(b) Nominee shall be of members of the Association [sic].

13. Any member of management committee may resign from management committee at any time [sic] by giving notice orally or in writing to any general meeting of all members. The question of removal shall be determined by vote of members [sic] present at such a meeting”.

[378] Prior to the late November 2013, the management committee was elected by ballot in accordance with the constitution.

[379] However, in late 2013, the process changed.

[380] The minutes of a general meeting held on 20 October 2013 record the following:<sup>436</sup>

<sup>435</sup> Exhibit 5 (trial bundle), tab 10/11.

<sup>436</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 44.

“There will be no more ballot for the Secretary and the Treasurer of the church, instead they will be elected on a roster basis by the Elder Reverend starting from the Officers of 2014”.

[381] Mr Faamate’s evidence of what occurred is:<sup>437</sup>

“I recall in or about late November 2013, the members assembled to, amongst other things, elect new committee members for 2014. There was a dispute at the meeting regarding the role of Kerita Reupena’s wife in the Association during Kerita Reupena’s absences. The details of the dispute are not relevant to this Application, save to the extent that during the meeting, Kerita Reupena said words to the effect that:

*“From now on I will appoint the committee members, because it seems to me the longer you are in the committee the more likely you are to challenge me”*”.

[382] Mrs Reupena did not know her husband was going to suggest a change to the appointment of the management committee; the first she knew of such a change was during the meeting.<sup>438</sup> Mrs Reupena gave evidence about what occurred. According to Mrs Reupena, her “understanding” of the constitution was:<sup>439</sup>

“... at that time that the – the chairman or the management committee can make changes if there was a – a need, if there was an issue. So that was my – the – what the – the tension coming about was a good enough reason for me, in my mind for the management committee or the chairman to override what was in the constitution”.

[383] Mrs Reupena was the only person in the meeting that, she knew, had read the constitution.<sup>440</sup>

[384] When Mr Faamate was challenged about there being any opposition to Reverend Reupena’s statement that, henceforth, he was going to appoint the Association’s management committee members on a rotating basis, Mr Faamate agreed (that there was no opposition). And, explained, “Like I said, no one opposes him. No one said anything”.<sup>441</sup>

[385] Some of the respondents’ witnesses alleged there was some sort of “vote” to sanction Reverend Reupena’s future appointments. However, that proposition was never put to Mr Faamate in cross examination.

[386] Mrs Reupena was clear in her evidence that “I knew there was no voting on that meeting [sic]”.<sup>442</sup>

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<sup>437</sup> Affidavit of Kerita Reupena, exhibit 13 (applicants’ book of affidavits), p 25, [23].

<sup>438</sup> Transcript of the hearing on 21 March 2019, p 15, line 9 to 13 (cross-examination of Binary Reupena).

<sup>439</sup> Transcript of the hearing on 21 March 2019, p 15, line 18 to 23 (cross-examination of Binary Reupena).

<sup>440</sup> Transcript of the hearing on 21 March 2019, p 15, line 15 to 16 (cross-examination of Binary Reupena).

<sup>441</sup> Transcript of the hearing on 18 March 2019, p 57, line 15 to 16.

<sup>442</sup> Transcript of the hearing on 21 March 2019, p 15, line 40 to 42 (cross-examination of Binary Reupena).

- [387] Indeed, her understanding at the time was: “if there was any strong objections they should – people should speak up, but if it’s no objections then it’s taken as it’s agreed upon”.<sup>443</sup>
- [388] The respondents accept that there was a period in which there were no ballots for positions on the committee. Rather, Reverend Reupena nominated individuals to various positions and they, in effect, were elected unopposed.<sup>444</sup>
- [389] The respondents submit that procedure was endorsed at general meetings and not the subject of any complaint until this proceeding.<sup>445</sup>
- [390] Reverend Reupena’s announcement and subsequent act of unilaterally appointing the Association’s management committee is contrary to the provisions of both the Act and the constitution.
- [391] The members cannot agree to a breach of the constitution or the Act.
- [392] It is true that the constitution is a statutory contract between the members and the Association.<sup>446</sup> It also true that, ordinarily parties to a contract can agree to vary its terms.
- [393] However, it is well established that “the rules of an organisation are mandatory and that estoppel cannot operate to preclude an organisation from relying upon its rules to determine validity of membership”.<sup>447</sup>
- [394] Nor can there be any estoppel in the face of a statute.<sup>448</sup>
- [395] Reverend Reupena, either by himself, or by some tacit compact with others of the Associations’ members, could not lawfully act in defiance of the constitution and the Act. Any putative authority is unlawful and, therefore, invalid.
- [396] Any appointment to the Association’s management committee, not in compliance with clauses 11 to 13 of the Association’s constitution, was invalid.
- [397] The respondents submit that since November 2016, the Association reinstated the election of all committee members, including Reverend Reupena.<sup>449</sup>
- [398] The respondents state that to the extent that the previous procedure may have been contrary to the terms of the constitution, it is no longer operative and does not justify winding up of the Ipswich Church.<sup>450</sup>

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<sup>443</sup> Transcript 4-16.1-3

<sup>444</sup> Exhibit 30 (respondents’ closing submissions), p 23, [95].

<sup>445</sup> Exhibit 30 (respondents’ closing submissions), p 23, [95].

<sup>446</sup> *Associations Incorporation Act* 1981 (Qld) s 71.

<sup>447</sup> *Australian Public Service Association (Fourth Division Officers) v Lawrence* (1982) IR 166, 168 per Toohey J.

<sup>448</sup> See *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440, [48]; *Overmyer Industrial Brokers Pty Ltd v Campbells Cash & Carry Pty Ltd* [2003] NSWCA 305, [51].

<sup>449</sup> Exhibit 30 (respondents’ closing submissions), p 23, [96].

<sup>450</sup> Exhibit 30 (respondents’ closing submissions), p 23, [99].

[399] Members are (and have been since November 2016) free to exercise their membership rights as to the election of the committee. However, it is noted that the Remainder Group has not exercised their membership rights since their exclusion.

[400] The respondents submit that this ground does not justify winding up the Association. I agree.

[401] This is largely a historical allegation and by itself, is of little weight when considering the winding up of the Association on the just and equitable grounds.

[402] The receiver could supervise the election of the Association's management committee.

*Reupena Group's exclusion of the Remainder Group from the Association's affairs and property*

[403] The Remainder Group did not resign on 4 September 2016.

[404] The Reupena Group have excluded the Remainder Group from the Association's affairs and property since.

[405] They have done so in circumstances in which they were clearly on notice from the applicants' lawyers that the Remainder Group did not accept they had resigned and that the applicants "would like to see the current dispute resolved by way of mediation in the hope that a mediated compromise can be reached".<sup>451</sup>

[406] The respondents refused such an olive branch.

[407] The Remainder Group have had to set up their own church. It is not a case they walked away from the Association. They were forced into making their own arrangements.

[408] I have found on the evidence that the applicants did not resign and are members of the Association.

[409] I accept that an appropriate way to deal with these circumstances is to provide an opportunity for appropriate meetings in which all the members can exercise their democratic rights under the constitution including, for example, on the election of the management committee or amendments to the constitution. Winding up is not necessary in order to remedy these circumstance.

*The Reverend Group's \$50,000 loan*

[410] The applicants submit that the use of the Association's funds whether by loan or pledge for the personal use of the Chairman, Reverend Reupena, is conduct warranting the winding up of the Association.<sup>452</sup>

[411] The applicants refer to Reverend Reupena's receipt of a loan of \$50,000 from the Association to pay for his legal fees in Samoa.

[412] After the Mother Church removed Reverend Reupena from the Elders Committee, Reverend Reupena requested a \$50,000 loan for legal costs to challenge that decision

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<sup>451</sup> Exhibit 23 (letter from Corney & Lind Lawyers dated 31 October 2016).

<sup>452</sup> Exhibit 29 (applicants' closing submissions), p 56, [136.(e)].

by Court proceedings in Samoa at a general meeting of the Association on 15 March 2015.<sup>453</sup> It appears that this request was done without notice and both Reverend Reupena and Mrs Reupena stayed in the meeting whilst it was discussed. Reverend Reupena translated the church diary which records the matters discussed at the meeting.<sup>454</sup>

“ ...

A lot of speeches made by members and revealed two sides (i) those who support and (ii) those who reject. Another side of issue was raised to find out first if this matter should be taken to Court. A raise of hands to decide on these two things;

(i) If to take the matter to Court. Resolution: accepted.

(ii) If to accept \$50,000 loaned to Kerita & Binary Reupena. Resolution: accepted.

Resolution: Kerita & Binary Reupena will pay back \$100 per month, starting March 2015.

Thanksgiving to the Church in supporting us in our pains and plan, in accepting our plea. Thank you in helping and being very kind. Blessed the Day of the Lord.”

[413] The Association, at this meeting, agreed to lend Reverend Reupena and his wife \$50,000.<sup>455</sup>

[414] The loan was again raised at the 20 December 2015 general meeting<sup>456</sup> whereby Reverend Reupena stated that \$25,000 had been repaid and the rest of the loan would be repaid in the new year.<sup>457</sup>

[415] The applicants submit that this loan was contrary to clause 26(x) of the constitution.<sup>458</sup>

“(x) The income and property of the Association whencesoever derived shall be used and applied solely in promotion of its objects and in the exercise of its powers as set out herein and no portion thereof shall be distributed, paid or transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to or amongst the members of the Association provided that nothing herein contained shall prevent the payment in good faith of interest to any such member in respect of moneys advanced by him to the Association or otherwise owing by the Association

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<sup>453</sup> Affidavit of Nuualii Afele (translator), exhibit 14 (respondents’ book of affidavits), p 84; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 364, [57]. See also transcript of the hearing on 18 March 2019, p 55, line 33 to 34 (cross-examination of Tauga Faamate).

<sup>454</sup> Affidavit of Nuualii Afele (translator), exhibit 14 (respondents’ book of affidavits), p 84; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 364, [57].

<sup>455</sup> Affidavit of Nuualii Afele (translator), exhibit 14 (respondents’ book of affidavits), p 84; Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 364, [57].

<sup>456</sup> Transcript of the hearing on 18 March 2019, p 55, line 45 (cross-examination of Tauga Faamate).

<sup>457</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 365, [64].

<sup>458</sup> Exhibit 5 (trial bundle), tab 10/11.

to him or of remuneration to any officers or servants of the Association or to any member of the Association or other person in return for any services actually rendered to the Association provided further that nothing herein contained shall be construed so as to prevent the payment or repayment of any member of out of pocket expenses, money lent, reasonable and proper charges for goods hired by the Association or reasonable and proper rent for premises demised or let to the Association.”

[416] The loan was not an insignificant amount and was used to fund Reverend Reupena’s personal litigation against the Mother Church.

[417] The respondents submit that whether the loan is contrary to the constitution is not clear. It would depend upon if the members took the view that the continuation of their Minister was essential to their congregation and the provision of their spiritual care.<sup>459</sup>

[418] The loan was agreed to by the members who attended the meeting.<sup>460</sup>

[419] Reverend Reupena has repaid the loan in full<sup>461</sup> with interest,<sup>462</sup> despite some members, such as Mr Faamate<sup>463</sup> suggesting that part of it should be forgiven.<sup>464</sup> The minutes of the general meeting on 20 December 2015 state:

“Topic 3. Pr Kerita said they have now paid \$25,000 towards their debt, but will finish it in the new year. One of the deacons got up and requested that the Pastor should not pay any more, what he has given now is enough. Pastor replied no, he would still try to pay it all back”.<sup>465</sup>

[420] According to Reverend Reupena,<sup>466</sup> the minutes of the general meeting on 13 March 2016 recorded another member questioning the debt:<sup>467</sup>

“One member asked the Management Committee about the debt being mentioned, from what he heard this debt has been forgiven. Chairperson clarified that there is no such thing read out in minutes, we already discussed this in a meeting some time ago; leave it to us to pay it off till finished”.

[421] Reverend Reupena states that this “one member” refers to Faalaa Fanolua.<sup>468</sup>

[422] The applicants submit that as the Association’s President and permanent Chairman and one of only a handful of the members to have read the constitution, Reverend Reupena ought not to have requested the loan in the first place. And even in

<sup>459</sup> Transcript of the hearing on 1 April 2019, p 54, line 39 to 42.

<sup>460</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 364, [57].

<sup>461</sup> Affidavit of Michelle Seupule, exhibit 14 (respondents’ book of affidavits), p 470, [4].

<sup>462</sup> Transcript of the hearing on 27 March 2019, p 8, line 46 to p 7, line 3 (cross-examination of Michelle Seupule).

<sup>463</sup> Transcript of the hearing on 18 March 2019, p 55, line 44 to p 56, line 6 (cross-examination of Reverend Reupena).

<sup>464</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 365, [65]. See also transcript of the hearing on 18 March 2019, p 56, line 1 to 7 (cross-examination of Taua Faamate).

<sup>465</sup> Affidavit of Nuualii Afele, exhibit 14 (respondents’ book of affidavits), tab 1, p 51.

<sup>466</sup> There is no translation of these minutes from a certified translator such as Nuualii Afele.

<sup>467</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 366, [70].

<sup>468</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 366, [70].

circumstances where he had requested the loan, he should not have remained present in the Association meeting that considered it, let alone presided over that meeting as Chairman.<sup>469</sup>

[423] The Samoan legal proceeding concerned Reverend Reupena's ordination as a Minister of the Mother Church.

[424] Members in attendance at the general meeting on 15 March 2015 debated the idea of a loan for legal fees and there were two sides to the debate with two matters being decided, first whether Reverend Reupena should "take the matter to court" and secondly whether the Ipswich Church should lend \$50,000 for legal fees for that proceeding; both resolutions were accepted.<sup>470</sup>

[425] No complaint was made about this loan until this proceeding.

[426] Rather, as noted, there were some members who thought that the debt ought to be forgiven.

[427] The respondents submit that the existence of this (past and repaid with interest) loan to the Minister does not justify winding up the Ipswich Church.<sup>471</sup> I agree that this issue, in isolation, is of little weight, when considering the winding up of the Association on the just and equitable grounds.

*The Reupena Group's use of Association's funds to defend this proceeding*

[428] The Association borrowed \$220,000 from the Reupena's superannuation fund to defend this proceeding.<sup>472</sup>

[429] The applicants submit that the use of company funds to finance a dispute between members can be sufficient to make a finding of oppression.<sup>473</sup> In *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 2)*,<sup>474</sup> Dodds-Stretton J stated:<sup>475</sup>

"[111] The plaintiffs nevertheless contended that the company is the proper plaintiff to sue for relief for the recently alleged breaches. The questions arise whether the allegations against Ms McAlister and other defendants require the company as an active plaintiff in this litigation, and if so, whether, it should be represented separately from the other plaintiffs.

[112] It is well established that in the context of oppression proceedings and derivative actions primarily involving a dispute between members inter se, the company's funds should not be applied in the litigation save to the extent necessary to protect its own valid interests. The outcome of the litigation could, however, ultimately entitle particular members to an indemnity from the company for their costs."

<sup>469</sup> Exhibit 29 (applicants' closing submissions), p 67, [154.(b)].

<sup>470</sup> Affidavit of Nuuialii Afele (translator), exhibit 14 (respondents' book of affidavits), p 84; Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 11, p 364, [57].

<sup>471</sup> Exhibit 30 (respondents' closing submissions), p 24, [105].

<sup>472</sup> Transcript of the hearing on 26 March 2019, p 66, line 27 to 42 (cross-examination of Kerita Reupena).

<sup>473</sup> Exhibit 29 (applicants' closing submissions), p 63, [150].

<sup>474</sup> [2010] FCA 1342.

<sup>475</sup> [2010] FCA 1342 at [111] to [112].

[430] The applicants submit that:<sup>476</sup>

- a. from 4 September 2016 to date, the dispute has consistently been between those who support Reverend Reupena and those who do not;
- b. the Association had no interest in the proceeding until, because of the Reupena Group's consistent borrowing for legal expenses, there was evidence the Association was likely insolvent;
- c. the Association is solvent, however, the Association may be "property rich" but it is clearly "cash poor" and its income relies almost entirely upon donations, bingo and fundraising; and
- d. the Reupena Group's borrowing from Reverend Reupena and Mrs Reupena's self-managed superannuation fund has condemned the Association to years of additional repayments of that debt and a damoclean threat of insolvency five times every year where it must beg further indulgencies from the Reupenas for the extensions of its loans.

[431] The applicants submit that the management committee has acted, at least on one occasion in direct contradiction to the general body of members' rejection of a motion to enter into the fifth "investment contract" with Reverend and Mrs Reupena's superannuation fund.<sup>477</sup>

[432] The respondents contend that the Association is entitled to use its own funds to defend an application for its winding up (either on the just and equitable ground, or on the ground that it cannot pay its debts).<sup>478</sup>

[433] The application is principally for that relief and when filed was solely on the ground of insolvency.<sup>479</sup> The alternative relief sought was for the appointment of a receiver because of the alleged difficulties with the events of 4 September 2016 and the alleged irregularities with the Church's proceedings including the resolution to amend the constitution.<sup>480</sup>

[434] The respondents contend that the Association has a direct interest in protecting the validity of its corporate actions.<sup>481</sup> This is not a dispute between shareholders – none of the members have any financial interest in the Ipswich Church either in its current state or on liquidation.<sup>482</sup>

[435] The respondents submit that the report of Mr Lucas<sup>483</sup> demonstrates that despite the unusual costs associated with the litigation, the Ipswich Church is plainly solvent on any of the relevant bases.<sup>484</sup>

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<sup>476</sup> Exhibit 29 (applicants' closing submissions), p 65, [151.(e)].

<sup>477</sup> Transcript of the hearing on 22 March 2019, p 45, line 30 to p 46 line 46 (cross-examination of Tipi Tisema).

<sup>478</sup> Exhibit 30 (respondents' closing submissions), p 24, [107].

<sup>479</sup> Originating Application filed 9 December 2016.

<sup>480</sup> Exhibit 30 (respondents' closing submissions), p 24, [107].

<sup>481</sup> Citing *Power v Ekstein* (2010) 77 ACSR 302; [2010] NSWSC 137 at [120] per Austin J (and see also at [111]-[119]).

<sup>482</sup> Exhibit 30 (respondents' closing submissions), p 24, [107].

<sup>483</sup> Exhibit 4.



[436] The respondents further submit that there is nothing to suggest that Reverend Reupena and Mrs Reupena would not continue to allow the superannuation fund to extend the loans; in fact Mrs Reupena says that she can see no reason why they would not continue to provide such support for the foreseeable future.<sup>485</sup> As to loan number five, its renewal was accepted and passed by the general meeting in June 2018.<sup>486</sup>

[437] I accept the respondents' submissions on this issue.

[438] It is noted that the members of the Ipswich Congregation have on a number of occasions held fundraising events where the money has gone towards the funding of legal fees for this proceeding.<sup>487</sup>

### *Amending the constitution*

[439] The applicants submit that the Reupena Group sought to further alienate the Remainder Group by amending the constitution within hours of them being told to leave the hall on the night of 4 September 2016.<sup>488</sup>

[440] The applicants seek a declaration that the purported amendment to the first respondent's constitution which is alleged to have occurred on 4 September 2016 is invalid.<sup>489</sup>

[441] The applicants seek an order that the first respondent take all reasonable steps to register with the Office of Fair Trading Queensland the document exhibited as TMF-2 to Mr Taua Meauli Faamate's affidavit as the first respondent's constitution.<sup>490</sup>

[442] The constitution mandates the circumstances when it can be amended.<sup>491</sup>

#### “ALTERATION OF RULES

24. Subject to the provisions of the Association Incorporation Act 1981-1988, these rules may be amended, rescinded or added to from time to time by a special resolution carried at any general meeting. Provided that no such amendment, rescission or addition shall be valid unless the same shall have been previously submitted to and approved by the Director-General, Department of Justice and Corrective Services, Brisbane.”

[443] The applicants had not resigned from the Association and were members of the Association at the time when the constitution was amended to remove any reference to the Mother Church (except in the winding up clause).

[444] This meeting was done without reference to the applicants. They were not on notice of this meeting.

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<sup>484</sup> Exhibit 30 (respondents' closing submissions), p 24, [108].

<sup>485</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), p 143, [6].

<sup>486</sup> Exhibit 19 (Book of Church General and Special Meetings), p 100.

<sup>487</sup> Transcript of the hearing on 27 March 2019, p 21, line 1 to 2 (cross-examination of Michelle Seupule). See also exhibit 19 (book of church general and special meetings (in English)) tab 8, p 16, tab 11, p 26.

<sup>488</sup> Exhibit 29 (applicants' closing submissions), p 65, [151.(f)].

<sup>489</sup> Further Amended Originating Application, as amended by leave on 26 March 2019, p 3, [5(b)(i)].

<sup>490</sup> Further Amended Originating Application, as amended by leave on 26 March 2019, p 3, [6(c)(i)].

<sup>491</sup> Exhibit 5 (trial bundle), tab 10/11.

[445] The respondents' counsel concedes that in such circumstances the amendment is invalid.<sup>492</sup>

“HER HONOUR: Now, what about this point: if they were members, the constitution's been amended, then would that mean that the amendment to the constitution is invalid because they were members and they weren't a part of that vote, and therefore the constitution actually is as it was on the 4th of September?”

MR O'HIGGINS: I think I would have to concede that that's right, your Honour.”

[446] In any event, the Reupena Group, in amending the constitution on 4 September 2016, failed to comply with the constitution and the Act.

[447] The resolution on 4 September 2016 did not comply with the formal requirements for the purpose of amending the constitution because the proposed amendments were not, in accordance with the Association's constitution, submitted to and approved by the Director-General of the Department of Justice and Corrective Services, Brisbane.<sup>493</sup> The constitution, in its amended form, was later lodged with the Office of Fair Trading.<sup>494</sup>

[448] Section 48(1) of the Act provides that “An incorporated association may, by special resolution, decide to amend its rules”.

[449] Section 3 of the Act relevantly provides:

**“Special resolutions**

(1) Written notice of a proposed special resolution, and of the time and place of the general meeting at which it is proposed to move the resolution, must be given, as required under the association's rules, before the general meeting to each member of the association who has a right to vote on the resolution.

(2) The notice must state the terms of the proposed special resolution.

(3) A special resolution about which notice has not been given under this section has no effect.”

[450] There was no written notice of a “proposed special resolution” given to Reupena Group before the meeting in the evening of 4 September 2016.

[451] During cross-examination Miss Seupule deposed to the resolution being raised by Mrs Reupena.<sup>495</sup>

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<sup>492</sup> Transcript of the hearing on 1 April 2019, p 52, line 1 to 6.

<sup>493</sup> Exhibit 5 (trial bundle), tab 10/11.

<sup>494</sup> List of Agreed Facts, [14]; exhibit 5 (trial bundle), tab 21, p 259 records the date of “resolution of Association rules” as being lodged on 22 September 2016.

<sup>495</sup> Transcript of the hearing on 27 March 2019, p 19, line 23 to 24 (cross-examination of Michelle Seupule).

[452] Mrs Tisema said it was raised by Taua.<sup>496</sup> If that is a reference to Taua Faamate then that cannot be accurate, as he is the first applicant.

[453] Section 3(3) of the Act clearly states that the amendment “has no effect”.

[454] The amendment to the constitution is invalid. The first respondent’s constitution is the document exhibited as TMF-2 to Mr Faamate’s affidavit.<sup>497</sup>

[455] The respondents refer to section 133 of the Act:

**“133 Irregularities in proceedings**

(1) No proceeding under this Act shall be invalidated by any defect, irregularity or deficiency of notice or time unless the court is of opinion that substantial injustice has been or may be caused thereby which cannot be remedied by an order of the court.

(2) The court may if it thinks fit make an order declaring that such proceeding is valid notwithstanding any such defect, irregularity or deficiency.

(3) Without affecting the generality of subsections (1) and (2) or of any other provision of this Act, where any omission, defect, error or irregularity (including the absence of a quorum at any meeting of the incorporated association or of the management committee) has occurred in the management or administration of an incorporated association incorporated under this Act (whether or not such omission, defect, error or irregularity occurred before or after the passing of this Act and whether it occurred before or after the incorporated association became incorporated under this Act) whereby any breach of any of the provisions of this Act has occurred or whereby there has been default in the observance of the rules or constitution of the incorporated association or whereby any proceedings at or in connection with any meeting of the incorporated association or of the management committee thereof or any assemblage purporting to be such a meeting have been rendered ineffective, the court—

(a) may, either of its own motion or on the application of any interested person, make such order as it thinks fit to rectify or cause to be rectified or to negative or modify or cause to be modified the consequences in law of any such omission, defect, error or irregularity, or to validate any act, matter or thing rendered or alleged to have been rendered invalid by or as a result of any such omission, defect, error or irregularity; and

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<sup>496</sup> Transcript of the hearing on 22 March 2019, p 73, line 40 to 43 (cross-examination of Temukisa Tisema).

<sup>497</sup> Affidavit of Kerita Reupena, exhibit 13 (applicants’ book of affidavits), p 41 to 56.

(b) shall before making any such order satisfy itself that such an order would not do injustice to the incorporated association or to any member or creditor thereof; and

(c) where any such order is made, may give such ancillary or consequential direction as it thinks fit; and

(d) may determine what notice or summons is to be given to other persons of the intention to make any such application or of the intention to make such an order, and whether and how it should be given or served and whether it should be advertised in any newspaper.

(4) The court may enlarge or abridge any time for doing any act or taking any proceeding allowed or limited by this Act or any rules or regulations made thereunder upon such terms (if any) as the justice of the case may require and any such enlargement may be ordered although the application for the same is not made until after the time originally allowed or limited.”

[456] The respondents submit that there is no injustice to any party should the Court relieve the Ipswich Church of the effect of the invalidity.<sup>498</sup> I do not accept this argument.

[457] The Association’s constitution was amended when the applicants were members of the Association, but not part of the meeting when the amendment of the constitution occurred. The amendment of the constitution was not minor. The removal of a connection with the Mother Church was a significant amendment and it was done without the applicants. In such circumstances I would not exercise my discretion in accordance with section 133 of the Act.

[458] The respondent submits even if the Court finds the amendment invalid, nothing would change as to the operation of the Ipswich Church. The evidence is to the effect that the “church rules” that apply remain those espoused by the Mother Church, including e.g. the liturgy for new communicants.<sup>499</sup>

[459] The respondent submits that the reinstatement of the opening words in clause I of the “Objects” would have no immediate practical effect as the Mother Church is unlikely to want to accept the Ipswich Church as long as Reverend Reupena is the congregation’s chosen minister.<sup>500</sup>

[460] The respondents submit that the amendment of the constitution does not provide any proper support for a winding up of the Ipswich Church. But rather, the amendments and affiliation are matters of “domestic policy” of the Ipswich Church, akin to choosing which particular religious denomination within the Christian faith ought to be the one to which the Ipswich Church is affiliated.<sup>501</sup> The respondents submit that is not a substantive question upon which the Court should intrude.<sup>502</sup>

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<sup>498</sup> Exhibit 30 (respondents’ closing submissions), p 25, [115].

<sup>499</sup> Exhibit 30 (respondents’ closing submissions), p 25, [113].

<sup>500</sup> Exhibit 30 (respondents’ closing submissions), p 25, [114].

<sup>501</sup> Exhibit 30 (respondents’ closing submissions), p 26, [116].

<sup>502</sup> Citing *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105 at [118] per Hasluck J.

[461] However, the issue that arises here goes beyond merely the domestic policy of the Association.

[462] In this case there is a constitution that states that the Association is part of the Mother Church.<sup>503</sup> However, the present relationship between the Mother Church and Reverend Reupena and his loyal congregation is not consistent or in accordance with clause I of the constitution.

[463] The Mother Church has disavowed Reverend Reupena and the Reupena Group has disavowed the Mother Church. This ultimately is a matter for the members of the Association and the Mother Church to resolve.

[464] The respondents submit that the appointment of a receiver to identify the eligible members and to supervise an election would no doubt facilitate the resolution of any remaining issues concerning constitutional amendments.<sup>504</sup> I agree.

[465] The first respondent, at the first opportunity, should cause the constitution to be lodged with the appropriate authorities.

*The Association's failure, at least until 2017, to comply with its financial obligations*

[466] The Association consistently (and admittedly) failed to comply with its statutory and constitutional obligations with respect to the creation, maintaining and submitting of its annual financial reports.

[467] There is no complaint that the financial statements have been properly prepared and audited; the complaint that is made about the auditing concerns only the timing.<sup>505</sup>

[468] The respondents accept that the Association failed to arrange for the timely auditing of its financial statements for the years 2012-2015.<sup>506</sup>

[469] Mrs Reupena did sign as "acting secretary" on the basis that there "must have been a good reason".<sup>507</sup>

[470] Mrs Reupena was, in any event, the bookkeeper<sup>508</sup> and took responsibility for the MYOB records.<sup>509</sup> She frankly conceded that the lodgements (at least for the 2013 financial records) were very overdue.<sup>510</sup> Reverend Reupena explained that, in part, this is due to the reliance on volunteers to assist.<sup>511</sup>

[471] The respondents submit that although the Church ought to have complied with its obligations in a timely way, it has complied with the obligations to have the financial

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<sup>503</sup> Exhibit 5 (trial bundle), p 98, cl I.

<sup>504</sup> Exhibit 30 (respondents' closing submissions), p 26, [117].

<sup>505</sup> List of Agreed Issues as at 28 March 2019, p 2, [8.(d)].

<sup>506</sup> Exhibit 30 (respondents' closing submissions), p 26, [120].

<sup>507</sup> Transcript of the hearing on 21 March 2019, p 34, line 42 to p 35, line 10 (cross-examination of Binary Reupena).

<sup>508</sup> Transcript of the hearing on 26 March 2019, p 13, line 38.

<sup>509</sup> Transcript of the hearing on 21 March 2019, p 44, line 28 (cross-examination of Binary Reupena).

<sup>510</sup> Transcript of the hearing on 21 March 2019, p 35, line 22 (cross-examination of Binary Reupena).

<sup>511</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents' book of affidavits), tab 12, p 366, [72].

statements audited.<sup>512</sup> The audited statements for 2016 and 2017 were lodged in March 2017 and March 2018 respectively,<sup>513</sup> and for 2018, in or around February 2019.<sup>514</sup>

[472] The respondents submit that there is no evidence that that past non-compliance caused any injustice or otherwise adversely affected the Ipswich Church or its members. There is no evidence the Office of Fair Trading took any regulatory or other action in response. It does not justify now, some years later, winding up of the Ipswich Church.<sup>515</sup>

[473] The respondents submit that these grounds concern aspects of the running of the Ipswich Church, particularly having regard to its obligations under the Act and its record keeping obligations under the *Associations Incorporation Regulation 1999* (Qld). The respondents contend that none of those grounds (either individually or collectively) justify winding up.<sup>516</sup> None of the allegations have resulted in the records of the Ipswich Church being what is sometimes termed an “irretrievable mess”.<sup>517</sup>

[474] This is largely a historical allegation and in my view, by itself, is of little weight, when considering the winding up of the Association on the just and equitable grounds.

#### *Admission of new members*

[475] Nineteen new members have been admitted to the Association since 4 September 2016.<sup>518</sup> Ten members were admitted on a single day within a month of the expulsion.<sup>519</sup>

[476] Miss Seupule, current treasurer of the Association,<sup>520</sup> denied that this was an attempt to dilute the Remainder Group’s membership should they return to the Association.<sup>521</sup>

[477] The applicants submit that in light of the proximity of the 4 September 2016, where Reverend Reupena split the Association, it ought to be viewed as nothing more than a callous attempt to further alienate the Remainder Group, foreclosing any future chance of a reconciliation.<sup>522</sup>

[478] The respondents submit that whilst new members have been admitted to the Church since September 2016, it is difficult to understand why this can be legitimately criticised by the applicants, and rely on the following to make that submission.<sup>523</sup>

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<sup>512</sup> Exhibit 30 (respondents’ closing submissions), p 26, [121].

<sup>513</sup> Exhibit 5 (trial bundle), tab 16, at p 217 to 226, 227 to 236.

<sup>514</sup> Exhibit 5 (trial bundle), tab 16, at p 237 to 239. See also exhibit 4 (expert’s report of Mr Lucas), annexure C. see also tab 15, annexure C to the report of Mr Lucas, exhibit 4)

<sup>515</sup> Exhibit 30 (respondents’ closing submissions), p 25, [122].

<sup>516</sup> Exhibit 30 (respondents’ closing submissions), p 22, [86].

<sup>517</sup> *Gregor and Another v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [139].

<sup>518</sup> Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 12, p 360, [48].

<sup>519</sup> Affidavit of Tipi Tisema, exhibit 14 (respondents’ book of affidavits), tab 19, p 513 to 514; Transcript of the hearing on 27 March 2019, p 11, line 46 to p 12, line 6 (cross-examination of Michelle Seupule).

<sup>520</sup> Exhibit 27 (Affidavit of Michelle Seupule sworn 26 March 2019), p 1, [1].

<sup>521</sup> Transcript of the hearing on 27 March 2019, p 14, line 27 to 29 (cross-examination of Michelle Seupule).

<sup>522</sup> Exhibit 29 (applicants’ closing submissions), p 65, [151.(h)].

<sup>523</sup> Exhibit 30 (respondents’ closing submissions), p 26 to 27, [123] to [125].

- a. the evidence of Miss Seupule was that two new families joined in October 2016,<sup>524</sup> and one new family in March 2018;<sup>525</sup>
- b. the suggested reason for admission of new members – to dilute the applicants’ interests – is not supported by the evidence and is mere assertion; and
- c. fluctuations in membership in an organisation such as the Ipswich Church is to be expected and an ordinary part of its operation.

[479] The respondents submit that the addition of new members does not justify winding up and is in fact a factor directly contrary to winding up as the addition of new members shows that the Ipswich Church continues to operate and grow and provide a place of worship and community for new members.<sup>526</sup>

[480] In my view, the admission of new members demonstrates the ongoing relevance of the Association to some members of the Samoan community.

[481] I do not regard the admission of these new members as a callous attempt to further alienate the applicants nor as an act of oppression on behalf of the respondents.

*Submissions as to whether these matters justify the winding up of the Association*

[482] The applicants position is that:

- a. the expulsion and subsequent exclusion would be sufficient to support the order for a winding up on the just and equitable ground;<sup>527</sup>
- b. the remaining uncertainty as to the rules of membership, the continued acts of the committee who seem to act regardless of what is said at general meetings, the historical financial (especially the funding of the Reupena Group’s defence) and reporting mismanagement and the amending of the constitution with utter disregard for the law are matters which of themselves might be sufficient;<sup>528</sup> and
- c. the combined effect of this conduct leads to the inevitable submission that “if there was going to be an association in this State that needed to be wounded up on the just and equitable grounds, this is it”.<sup>529</sup>

**Matters relevant to the refusal of the winding up of the Association on the just and equitable grounds**

*Mr Reupena’s defrocking by the Denomination (subsequent reinstatement and then further defrocking)*

[483] It is submitted by the applicants that Reverend Reupena’s credentials were not “subsequently reinstated”.<sup>530</sup>

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<sup>524</sup> Transcript of the hearing on 27 March 2019, p 21, line 13 to 19 (re-examination of Michelle Seupule).

<sup>525</sup> Transcript of the hearing on 27 March 2019, p 21, line 21 to 23 (re-examination of Michelle Seupule).

<sup>526</sup> Exhibit 30 (respondents’ closing submissions), p 27, [125].

<sup>527</sup> Exhibit 29 (applicants’ closing submissions), p 66, [153].

<sup>528</sup> Exhibit 29 (applicants’ closing submissions), p 66, [153].

<sup>529</sup> Transcript of the hearing on 18 March 2019, p 7, line 18 to 19.

<sup>530</sup> Exhibit 29 (applicants’ closing submissions), p 66, [154.(a)].

[484] It is noted that Mrs Reupena says the following:<sup>531</sup>

“Now, where it says “then the ordained minister”, well, since 4th of September 2016 Mr Reupena hasn’t been an ordained minister, has he? Ordain of a person doesn’t get removed. Once you’re ordained you are ordained.

Well, but his pastor credentials were withdrawn by the Samoan church, weren’t they? Yeah, that means they don’t recognise him in their system, but an ordain is a Godly thing.

Okay. So which system is he recognised in, if it’s not the congregational Church of Samoa? God’s.”

[485] I regard Reverend Reupena’s position with the Mother Church as a matter between Reverend Reupena, the congregation and the Mother Church.

*Mr Reupena’s repayment of the loan.*

[486] This issue has already been canvassed above.

*The resignation of the applicants*

[487] The applicants did not resign.

*Deadlock issues*

[488] The alleged “deadlock issues” are particularised as whether or not Reverend Reupena ought to remain employed or the Minister of the Association, and whether or not the Association ought to remain affiliated with the denomination.<sup>532</sup>

[489] Presently the constitution states that the congregation is part of the Mother Church.

[490] As for any of the other issues, they are matters between Reverend Reupena, the Mother Church and the members of the Association.

*The admission of new members*

[491] This issue has already been canvassed above.

*The exclusion of the applicants*

[492] This issue has already been canvassed above.

*The acquiescence by the applicants to alleged irregularities and clean hands*

[493] The respondents submit that the applicants have not come to the Court with clean hands, and make the following contentions in support of such a submission:<sup>533</sup>

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<sup>531</sup> Transcript of the hearing on 21 March 2019, p 21, line 24 to 33.

<sup>532</sup> Exhibit 8 (List of Agreed Issues as at 14 March 2019).

<sup>533</sup> Exhibit 30 (respondents’ closing submissions), p 9 to 10.



- a. the applicants raise a number of complaints about the historical procedural and financial management of the Ipswich Church in circumstances where many of the applicants were themselves responsible as they held positions such as secretary within the Ipswich Church;
- b. those procedural or financial matters, to the extent that it was necessary to do so, have been rectified;
- c. of the applicants who were cross-examined,<sup>534</sup> other than Mr Faamate (the first applicant), it was plain that they were not aware of or nor did they understand the basis upon which they ask this Court to wind up the Ipswich Church;<sup>535</sup>
- d. applicant witnesses freely admitted that they want the Ipswich Church wound up so that its assets would go back to the Mother Church or to another congregation in Australia<sup>536</sup> and it would provide a massive windfall (in anyone's language) to the Mother Church;<sup>537</sup>
- e. the Mother Church is providing significant funding (of \$150,000) for the applicants' legal fees in this proceeding. In order to justify that intermeddling with another party's litigation, it must be the case that the Mother Church pursues what it sees as a legitimate interest in this litigation, which could only be, from its point of view, winding up. No other relief could justify its interference in the proceeding. The applicants' approach to this litigation is consistent with the Mother Church's desire to wind up the Ipswich Church and obtain the net assets for itself or for another of its congregations (presumably the applicants' Booval congregation); and
- f. even allowing for difficulties occurring with the use of a translator, some of the applicants' witnesses did not give their evidence in a straightforward way and were often non-responsive.<sup>538</sup>

[494] Accordingly, it is submitted on behalf of the respondents,<sup>539</sup> that it is open for the Court to conclude that the applicants do not come to the Court with clean hands in asking that the Court exercise its jurisdiction to wind up on just and equitable grounds. I am not so satisfied.

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<sup>534</sup> Mr Muliaga (fifth applicant), Mr Fanolua (twelfth applicant), Mrs Muliaga (sixth applicant), Mr Setefano (fourteenth applicant), Mrs Uaea (fourth applicant).

<sup>535</sup> The respondents cite the transcript of the hearing on 20 March 2019, p 16 to 18 (cross-examination of Maiava Muliaga).

<sup>536</sup> The respondents cite the transcript of the hearing on 19 March 2019, p 7, line 13 to 14 (cross-examination of Taua Faamate); transcript of the hearing on 19 March 2019, p 29, line 1 to 4 (cross-examination of Luatua Setefano); transcript of the hearing on 19 March 2019, p 48, line 34 to 38 (cross-examination of Faalaa Fanolua); transcript of the hearing on 20 March 2019, p 16, line 6 and 10, line 13 to 17 (cross-examination of Maiava Muliaga).

<sup>537</sup> The respondents cite the transcript of the hearing on 19 March 2019, p 28, line 25 to 28 (cross-examination of Luatua Setefano); transcript of the hearing on 20 March 2019, p 16, line 6 and 10 (cross-examination of Maiava Muliaga) as examples.

<sup>538</sup> The applicants cite transcript of the hearing on 18 March 2019, p 60, line 45 to 47; p 61, line 1 to 2; p 61, line 41 to 42; p 69, line 20 to 21; p 74, line 6 to 9 (cross-examination of Taua Faamate); transcript of the hearing on 20 March 2019, p 18 to 20 (cross-examination of Maiava Muliaga) as examples.

<sup>539</sup> Exhibit 30 (respondents' closing submissions), p 11, [46].

[495] It must be noted that this issue was not pleaded by the respondents and was not raised as an issue at the trial. The applicants sought leave to amend their particulars after their case closed. The respondents, despite cross-examining some of the applicants on their motivation for winding up the Association, never sought leave to amend their particulars.

[496] The respondents state that some of the matters raised in support of their submission was evidence that came out of cross-examination; therefore, they are matters that I can properly take into account in the exercising of judicial discretion in order to be persuaded that it is just and equitable to do wind up the Association.<sup>540</sup>

[497] It is, however, difficult to do so when the applicants were not given notice of such an allegation. The applicants' counsel states he did not re-examine any of his witnesses about their state of mind when it was alleged they were trying to get their hands on the assets of the Association.<sup>541</sup>

[498] Further, the bold allegation that the Mother Church is using this application as a stalking horse for the Mother Church to get its hands on the significant assets of the Ipswich Church, despite it not have contributed in any meaningful way to the accumulation of those assets, is simply that, an allegation. There is no compelling evidence to this effect.

[499] There is clear evidence that the Mother Church is donating money to the applicants for their legal fees. However, none of the witnesses were cross-examined as to what was said to the Mother Church to provide such funding. The Mother Church is not a party to this application. No questions were asked about the Mother Church's motivation.

[500] In all of the circumstances, there is insufficient evidence to conclude that this application is a stalking horse for the Mother Church to obtain the Association's assets.

[501] I did find some of the applicants' witness to be unresponsive and evasive. However, I also found that the respondents' witnesses were also unresponsive and evasive. None more so than Reverend Reupena himself.

[502] The respondents submit that the applicants are raising issues about the historical procedural and financial management of the Association, in circumstances where many of the applicants were themselves responsible as they held positions such as secretary within the Association.<sup>542</sup>

[503] The respondents submit that there has been acquiescence by the applicants to any of the alleged irregularities in the management of the Association, namely:<sup>543</sup>

- a. any appointments by Reverend Reupena of committee members;
- b. the payment of \$50,000 to Reverend Reupena; and

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<sup>540</sup> Transcript of the hearing on 1 April 2019, p 42, line 44 to p 43, line 15.

<sup>541</sup> Transcript of the hearing on 1 April 2019, p 14, line 18 to 23.

<sup>542</sup> Exhibit 30 (respondents' closing submissions, p 9, [36].

<sup>543</sup> List of Agreed Issues as at 28 March 2019.

- c. the non-auditing of financial statements and their non-presentation to general meetings.

[504] The Act<sup>544</sup> and the constitution<sup>545</sup> requires that the Association's financial statements be audited and presented to the Association in a general meeting within certain timeframes.

[505] It is agreed between the parties that the Association failed to comply with the time limited by its constitution and the more generous time required by the Act for the financial years ending 31 December 2012, 31 December 2013, 31 December 2014 and 31 December 2015. These are agreed facts.<sup>546</sup>

[506] The management committee, and not the members in a general meeting, are charged with the management of the Association.

[507] The obligation to comply with the constitution and the Act falls to the committee. It is noted that Mr Faamate, as the Association's secretary between January 2009 until December 2013,<sup>547</sup> may have been somehow complicit in the non-compliance with the first relevant financial year (ending 31 December 2012). However, there is no evidence that Mr Faamate was representing the remaining 20 applicants in this complicit non-compliance.

[508] An estoppel cannot operate to relieve a party from complying with mandatory statutory obligations<sup>548</sup> and their contractual compact expressed in their constitution.<sup>549</sup>

#### *The conduct of the Association since 4 September 2016*

[509] The respondents highlight the efforts by the Association since at least 4 September 2016 to:<sup>550</sup>

- a. translate records to English;
- b. have its accounts audited; and
- c. prepare a "stand alone" complete register of members.

[510] The respondents also highlights the conduct of the Association since 4 September 2016 in continuing to:<sup>551</sup>

- a. conduct weekly church services in Samoan;

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<sup>544</sup> *Associations Incorporation Act* 1981 (Qld) s 59.

<sup>545</sup> Exhibit 5 (trial bundle), tab 10/11, cl 26(ix).

<sup>546</sup> Exhibit 7 (statement of agreed facts).

<sup>547</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 22, [3].

<sup>548</sup> See *Salamon Nominees Pty Ltd v Moneywood Pty Ltd* [1998] QCA 440, [48]; *Overmyer Industrial Brokers Pty Ltd v Campbells Cash & Carry Pty Ltd* [2003] NSWCA 305, [51].

<sup>549</sup> *Australian Public Service Association (Fourth Division Officers) v Lawrence* (1982) IR 166, 168 per Toohey J.

<sup>550</sup> Exhibit 28 (Amended Defence), p 14, [25].

<sup>551</sup> Exhibit 28 (Amended Defence), p 14, [25A].

- b. conduct funerals in Samoan and following Samoan cultural traditions upon request;<sup>552</sup>
- c. conduct marriages in Samoan and following Samoan cultural traditions upon request;<sup>553</sup>
- d. conduct Sunday school in Samoan;
- e. conduct its Women’s Ministry in Samoan;
- f. conduct its Youth Ministry for young people from Samoan families;
- g. hold ad hoc social events following Samoan cultural traditions; and
- h. host ad hoc lectures promoting Samoan cultural and family customs.

[511] The applicants acknowledge that the Association has continued to perform these services for its congregation, with the following caveats:<sup>554</sup>

- a. conduct weekly church services in Samoan. That is conceded. However, it fails to take into account the two and half years that the Remainder Group have had to make alternative arrangements for their own weekly church services when, prior to 4 September 2016, they had the unfettered use of purpose built premises they helped build.
- b. conduct funerals in Samoan and following Samoan cultural traditions upon request. Four have been conducted in the last four years. Miss Seupule can only recall three.<sup>555</sup>
- c. conduct marriages in Samoan and following Samoan cultural traditions on request. Only one has been conducted and there are now serious doubts about its legality.
- d. conduct Sunday school in Samoan. Miss Seupule asserts that the Sunday School is no longer part of the Association and it is merely “affiliated with it”.<sup>556</sup>
- e. conduct its Women’s Ministry in Samoan. This is conceded; but with the same caveat as set out in the response to (a) above.
- f. conduct its Youth Ministry for young people from Samoan families. This is conceded; but with the same caveat as set out in the response to (a) above.

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<sup>552</sup> Miss Seupule can only recall three, see transcript of the hearing on 27 March 2019, p 8, line 25.

<sup>553</sup> One wedding for members of the Ipswich Church has been conducted since September 2016, see transcript of the hearing on 27 March 2019, p 8, line 14 to 16 (cross-examination of Michelle Seupule). The applicants submit that there are “serious doubts about its legality” (see exhibit 29, applicants’ closing submissions, p 68, [154.(iii)]), this submission is presumably a result of the cross-examination of Reverend Repeuna where it was put to him that he had not told the Commonwealth Government that he is not a minister with the Mother Church. Reverend Reupena said “they were told at the beginning of the year”, see transcript of the hearing on 26 March 2019, p 64, line 39 to 43.

<sup>554</sup> Exhibit 29 (applicants’ closing submissions), p 67 to 68, [154.(e)].

<sup>555</sup> Transcript of the hearing on 27 March 2019, p 8, line 25 (cross-examination of Michelle Seupule).

<sup>556</sup> Transcript of the hearing on 27 March 2019, p 8, line 5 to 7 (cross-examination of Michelle Seupule).

- g. hold ad hoc social events following Samoan cultural traditions. Again, this is conceded with the same caveat referred to in (a).
- h. host ad hoc lectures promoting Samoan cultural and family customs. “Some” have apparently been conducted and it was for members only, at the end of 2018.<sup>557</sup>

[512] However, the applicants note that because of the respondents’ conduct for two and half years that the Remainder Group have had to make alternative arrangements for their own weekly church services when, prior to 4 September 2016, they had the unfettered use of purpose built premises they helped build.<sup>558</sup>

### **Alternate relief**

[513] It is clear from the evidence that the Association provides a spiritual and community hub for its members.

[514] Winding up is a remedy of last resort and ought not be granted if some less drastic form of relief is available.<sup>559</sup>

[515] The applicants submit that the Originating Application sought certain alternative relief for the appointment of a receiver to undertake investigations as to membership and the Association’s finances and to call meetings at which a committee can be appointed. The applicants no longer seek such a remedy and do not consider the appointment of a receiver to be an appropriate remedy.<sup>560</sup>

[516] The respondents provided written submissions on the appointment of a receiver on day one of the trial.<sup>561</sup> The applicants no longer seek that relief.<sup>562</sup> The respondents withdrew that offer in the Association’s opening.<sup>563</sup>

[517] The respondents’ primary position is that the application to wind up ought to be refused and no appointment of a receiver ought to be made for the reasons set out above.

[518] However, if it became necessary to do so in the context of an appointment of a receiver, the respondents would concede that all of the applicants<sup>564</sup> were members (plus those on their list for which Mr Faamate did not account and which appear on the respondents’ list), for the purpose of a receiver convening a general meeting to determine the Ipswich Church’s future.<sup>565</sup>

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<sup>557</sup> Transcript of the hearing on 27 March 2019, p 7, line 44 to p 8, line 1 (cross-examination of Michelle Seupule).

<sup>558</sup> Exhibit 29 (applicants’ closing submissions), p 67, [154.(e)(i)].

<sup>559</sup> *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247 at 252 per McPherson J; *Nilant v RL & KW Nominees Pty Ltd* [2007] WASC 105 at [119] per Hasluck J.

<sup>560</sup> Exhibit 29 (applicants’ closing submissions), p 68 to 68, [156].

<sup>561</sup> Exhibit 3 (written submissions on the issue of appointment of a receiver).

<sup>562</sup> Transcript of the hearing on 1 April 2019, p 58, line 1-10.

<sup>563</sup> Transcript of the hearing on 20 March 2019, p 50, line 32 to 36.

<sup>564</sup> Save for Junior Papua and Segia Papua, Aso Aukuso and Tiana Afaese (see Affidavit of Kerita Reupena, exhibit 14 (respondents’ book of affidavits), tab 11, p 358, [40]).

<sup>565</sup> Exhibit 30 (respondents’ final submissions), p 29, [137].

[519] The applicants contend that the alternative relief would be inappropriate for the following reasons:<sup>566</sup>

- a. first, in the absence of any agreement, the determination of who are the members of the Association is a task that borders on the impossible. That is particularly so given the Association's historical departure from the constitution's requirements. That critical issue is ripe for further (future) dispute;
- b. secondly, the Receiver would need to be fluent in Samoan to be able to understand and interpret the Association's records;
- c. thirdly, while the Association is conceded to be solvent, it is clearly still in a precarious position in terms of being "cash poor". The forensic task the Receiver would need to undertake, coupled with ongoing threat of the Reupenas' self-managed superfund calling in or refusing any further extensions would be more likely than not to push the Association into insolvency; and
- d. fourthly, it is clear during that the Association's members have been entrenched in a bitter dispute for a number of years. The disputants have taken intractable positions which will be unlikely solved even with the oversight of an independent third party.

[520] The respondents submit that the appointment of a receiver is a matter that the Court can consider as an appropriate and less drastic remedy than liquidation if it considers it necessary to resolve issues concerning the membership of the Ipswich Church.<sup>567</sup> The respondents submit that it is not incumbent on them to plead or claim the existence of such a lesser remedy but, in the context of corporate winding up and the application of the proviso in section 464(4) of the *Corporations Act 2001* (Cth), the courts have said that the respondent to a winding up application on just and equitable grounds bears the onus of establishing (in terms of that section) that the applicant is acting unreasonably in seeking winding up where there is a lesser remedy available. That position merely confirms the position that the courts will not compulsorily wind up a solvent organisation unless there are exceptional circumstances and where no lesser remedy will resolve matters.<sup>568</sup>

[521] The respondents submit that even where, there may be some difficulties with some of the historical records, a properly informed and assisted (probably by a translator) receiver is should be able to determine any disputed questions of membership.<sup>569</sup>

[522] In order to consider the appointment of a receiver I requested that the respondents provide draft orders for the appointment of a receiver, which detail the mechanics of such an appointment and identify an appropriate person who would accept such an appointment.

[523] Accordingly, for the purposes of providing the Court with an indication of the orders that could be made should the court determine that the appointment of a receiver is appropriate, the respondents provided the following draft orders:

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<sup>566</sup> Exhibit 29 (applicants' closing submissions), p 69, [156] to [160].

<sup>567</sup> Exhibit 30 (respondents' closing submissions), p 28, [135].

<sup>568</sup> Exhibit 30 (respondents' closing submissions), p 28, [135].

<sup>569</sup> Exhibit 30 (respondents' closing submissions), p 28, [136].

“1. Anthony Norman Connelly and William James Harris of McGrath Nicol (the Receivers), upon filing an appropriate consent, be appointed as receiver and manager of the assets and undertaking of the first respondent (the Church) commencing on the date of this order and continuing until further order of the Court.

2. The Receiver:

(a) convene an extraordinary general meeting (the Meeting) of the members of Church to be held as soon as practicable, for the purposes of electing a management committee;

(b) issue a notice (the Notice) to all members of the Church at least 14 days before the date fixed for the Meeting, which specifies:

i. the place of the Meeting;

ii. the date of the Meeting;

iii. the time of the Meeting;

iv. the nature of the business to be transacted at the Meeting, namely the election of a management committee

(c) preside as chair at the Meeting and exercise all the rights as chair at the Meeting as provided for under the Church’s constitution; and

(d) without limiting the terms of order 2(c) above, determine who is eligible to vote as a member of the Church at the Meeting;

3. The Notice be given to:

(a) each of the applicants; and

(b) each person determined by the Receiver to be eligible to vote, as required by order 2(d) above;

4. The Receiver has all of the rights and powers:

(a) of the Church;

(b) of a member of the Church;

(c) of any and all members of the management committee of the Church;

(d) necessary to manage any and all of the assets and undertaking of the Church in such manner as the Receiver considers appropriate, consistent with the objectives of the Church; and

(e) as may be reasonably incidental to the pursuit of any of the matters identified in order 2 or the exercise of any of the powers otherwise conferred by these orders;

(f) to retain or engage such contractors as the receiver sees fit to pursue any of the matters identified in order 2;

5. Within seven days of the conclusion of the Meeting, the Receiver provide to the Court and to the legal representatives of the parties, a written report which:

- (a) summarises the events at the Meeting;
- (b) identifies those persons who were elected to the management committee of the Church at the Meeting;
- (c) records any other resolution of the members of the Church at the Meeting.

6. The reasonable costs and expenses properly incurred by the Receiver in the performance of his or her duties and the exercise of his or her powers and any matters arising from, relating to, incidental to and in connection with the performance of his or her duties and the exercise of his or her powers under these orders be paid from the assets of the Church.

7. The Receiver shall be at liberty to seek directions from the Court in respect of any question, matter or issue touching or concerning his appointment, the discharge of his duties or the exercise of his powers, and the Receiver's costs of and incidental to the seeking of such directions shall be allowed as costs of the receivership, unless the Court orders otherwise.

8. Subject to further or other order the Receiver is not required to file or otherwise provide security for the performance of his duties.

9. Liberty be reserved to all parties to apply to the Court to vary or discharge these orders or for directions generally.”

[524] The respondents reserved the right to seek amendments to these draft orders as the precise task for the receiver may depend upon my findings and reasons for judgment.

[525] The respondents provided affidavits from Mr Harris and Mr Connelly who both consent to be appointed by the Court as a receiver for the Association.

## **Conclusion**

[526] Serious concerns have been raised about the management of the Association under the leadership of Reverend Reupena.

[527] Reverend Reupena has exerted his power and influence as the congregation's Minister to chart the course of the Association. The Reupena Group's loyalty to the Mother Church rather than Reverend Reupena was an unheralded challenge to his power and influence within the congregation.

[528] I have considered all of the applicants' submissions as to the matters justifying the winding up of the Association on just and equitable grounds. I have considered each of



the issues raised by applicants in isolation, and in combination, as to whether the conduct alleged justifies winding up of the Association.

[529] At various times I have stated an issue is of little weight when considering whether the Association should be wound up. However, to be clear, I have also considered the combined and cumulative effect of each individual issue in deciding this matter.

[530] In my view, in particular, the applicants have raised justifiable complaints about the management of the Association:<sup>570</sup>

- a. the exclusion of the Remainder Group;
- b. the purported amendment of the constitution;
- c. the failure to maintain a register of members (at least up until September 2016); and
- d. concerns over the accuracy of the list of members.

[531] In the circumstances of this case these are the matters that concern me the most as to whether the Association should be wound up on just and equitable grounds.

[532] However, it is an extreme step, to wind up a solvent company and where an alternative and lesser remedy is available, such as the appointment of a receiver, the Court should be slow to order a winding up.<sup>571</sup>

[533] The courts will not compulsorily wind up a solvent organisation unless there are exceptional circumstances and where no lesser remedy will resolve matters.<sup>572</sup>

[534] The applicants, up to the first day of trial, pleaded as an alternative remedy, the appointment of a receiver.<sup>573</sup>

[535] On the eve of the trial the respondents made an open offer to avoid the need for a trial and to accept the appointment of a receiver.<sup>574</sup>

[536] The respondents on the first day of trial made submissions that I should consider the appointment of a receiver.<sup>575</sup>

[537] The applicants refused to entertain this alternative:<sup>576</sup>

“MR BRENNAN: No, your Honour. The matter has been on foot for two and a half years. That alternative relief has been open for two and a half years. Even quite apart from that, my learned friend says that it's a remedy of last resort. It's an extreme remedy, but not one of last resort. That's what

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<sup>570</sup> Exhibit 8 (List of Agreed Issues as at 14 March 2019).

<sup>571</sup> *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227 at [46].

<sup>572</sup> See McPhersons Law of Company Liquidation, Thomson Reuters, online, [4.225]

<sup>573</sup> Application, exhibit 5 (trial bundle), tab 1, p 2-3, [5].

<sup>574</sup> Transcript of the hearing on 18 March 2019, p 6, line 25.

<sup>575</sup> Exhibit 3 (written submissions on the issue of appointment of a receiver).

<sup>576</sup> Transcript of the hearing on 18 March 2019, p 7, line 14 to 20.

always resources says. But putting that aside for a moment, if there was going to be an association in this State that needed to be wound up on the just and equitable grounds, this is it.”

- [538] The applicants in their written submissions acknowledge that the winding up of an otherwise solvent body corporate is a “remedy of last resort”.<sup>577</sup>
- [539] The respondents during the trial withdrew this offer<sup>578</sup> and the applicants at the conclusion of the trial formally abandoned the alternative remedy.<sup>579</sup>
- [540] The Court has power to appoint a receiver either under its inherent jurisdiction to do so<sup>580</sup> or under section 12 of the *Civil Proceedings Act 2011* (Qld).
- [541] I have assessed the applicants’ position by reference to the consequences of the events and circumstances upon which the application is founded and what is necessary to address them. It is my view that there is an alternative remedy, other than a winding up, which could equally address those consequences.
- [542] In my view, the most concerning aspect of the applicants’ grievances are the problems with the accuracy of the membership lists, their expulsion from the Association and how the Association was managed under the autocratic leadership of Reverend Reupena without reference to the Constitution.
- [543] It is my view that, despite my concerns about the management of the Association, a lesser remedy<sup>581</sup> than winding up is available that will resolve matters.
- [544] I accept the respondents’ alternate position that a receiver should be appointed for the purpose of convening a general meeting to determine the Association’s future.<sup>582</sup>
- [545] I consider that the draft order as proposed by the respondents provides an alternate and lesser remedy to resolve matters. Further, any proposed amendment to the constitution should be dealt with under the supervision of the receiver and, if required, the receiver should establish a process for this to be done.
- [546] In terms of who could attend this meeting and vote, the respondents would concede that all of the applicants, save for Junior Papua, Segia Papua, Aso Aukuso and Tiana Afaese are members (plus those on their list for which Mr Faamate did not account and which appear on the respondents list).<sup>583</sup> I have found in the course of this matter that Junior Papua and Segia Papua were members of the Association.
- [547] Such an outcome of appointing an independent third party to govern the meeting will give the members of the Association an opportunity to exert their membership rights

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<sup>577</sup> Exhibit 29 (applicants’ submissions), p 58, [140].

<sup>578</sup> Transcript of the hearing on 20 March 2019, p 50, line 32 to 36.

<sup>579</sup> Transcript of the hearing on 1 April 2019, p 58, line 1-10.

<sup>580</sup> *Sengthong v Lao Buddhist Society of NSW Incorporated* [2016] NSWSC 1408 at [170] per Lindsay J.

<sup>581</sup> *Re Dalkeith Investments Pty Ltd* (1984) 9 ACLR 247; *Asia Pacific Joint Mining Pty Ltd v Always Resources Holdings Pty Ltd* [2018] QCA 48; [2018] 3 Qd R 520; (2018) 25 ACSR 227.

<sup>582</sup> Exhibit 3 (written submissions on the issue of appointment of a receiver).

<sup>583</sup> Exhibit 30 (respondents’ closing submissions), p 29, [137].

and determine the future of the Association, including whether the constitution should be amended.

[548] I have considered the applicants' submission that such a relief would be inappropriate<sup>584</sup> for the following reasons:

- a. the difficulty in determining the Association's members;
- b. the difficulty in understanding and interpreting the Association's records;
- c. the Association is "cash poor"; and
- d. the Reupena Group and the Remainder Group have been entrenched in a bitter dispute for a number of years and taken intractable positions.

[549] I do not consider these matters raised by the applicant as unsurmountable.

[550] I do not regard the Association's records as an irretrievable mess and I consider that a receiver, assisted by an interpreter, could determine the membership of the Association so that a meeting could be called for the members to determine the Association's future. This is particularly so given the respondents' concession as to the membership of the Association.

[551] I note that since the applicants' exclusion from the Association in 2016 that new members have been admitted. I have found that the admission of these members was not an act of oppression by the Reupena Group.

[552] The applicants did not have the opportunity to vote on whether these persons could be members of the Association. I have not been asked to determine whether these members should be able to continue to partake in the Association's affairs and the exercise about to be embarked upon as supervised by a receiver.

[553] However, it is my preliminary view (without determining this matter) that these "new members" should be allowed to exert their membership rights. I note that pursuant to the constitution, a simple majority is required for a person to be accepted as a member of the Association. Even on the Remainder Group's list of membership,<sup>585</sup> the Reupena Group held the majority of members in late 2016. Accordingly, on one view, it may be assumed that these new members would have achieved the simple majority required by the constitution to obtain membership even if the Remainder Group had not been excluded. This may be a pragmatic way to move forward.

[554] Both parties have been intractable throughout these proceedings. I note that the applicants stated in a letter from their lawyers on 31 October 2016 that their "only desire is that the dispute between the Association's members is resolved amicably by mediation".<sup>586</sup>

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<sup>584</sup> Exhibit 29 (applicants' closing submissions, p 69, [157] – [160]).

<sup>585</sup> Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 5, p 25, [17], p 57, TMF-4; Affidavit of Taua Faamate, exhibit 13 (applicants' book of affidavits), tab 6, p 91 to 94, [40], [42].

<sup>586</sup> Exhibit 23 (letter from Corney & Lind Lawyers dated 31 October 2016).

[555] The applicants rejected out of hand the appointment of a receiver on the first day of trial to resolve this trial.<sup>587</sup>

[556] For there to be any reconciliation between the parties there needs to be a desire on both sides for this to occur. However, there may not ultimately be a reconciliation of the members but that does not mean that the Association needs to be wound up. It means that a once harmonious congregation is divided due to their loyalties.

[557] All members need to be treated in accordance with the terms of the constitution. This did not occur in September 2016. It will occur now.

[558] When any meeting is convened it should be acknowledged that the Association is a part of the Mother Church as the amendment to the constitution deleting such a connection was invalid.<sup>588</sup>

[559] The Reupena Group should now appreciate that their fellow members, the Remainder Group, have been excluded from their association and that all members belong to an association that is part of the Mother Church and will remain so until the constitution is validly amended. Whether this occurs is a matter for the membership of the Association.

[560] As noted previously, the receiver should supervise the process of any proposed amendment to the constitution.

[561] If the constitution is not so amended then this may affect whether Reverend Reupena should stay on as the Minister of this congregation. This will be a matter for the members of the Association and the Mother Church.

[562] I declare that:

- a. The applicants are members of the first respondent, except for the nineteenth and twentieth applicants.
- b. The purported amendment to the first respondent's constitution which is alleged to have occurred on 4 September 2016 is invalid.
- c. The first respondent's constitution is the document exhibited as TMF-2 to Mr Taua Meauli Faamate's affidavit filed herein.
- d. Any appointment to the first respondent's management committee, not in compliance with clauses 11 to 13 of the first respondent's constitution, was invalid.

[563] I will order that the application for winding up be dismissed.

[564] I will order the appointment of a receiver to convene a general meeting of all members to determine the future of the Association.

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<sup>587</sup> Transcript of the hearing on 18 March 2019, p 7, line 14 to 19.

<sup>588</sup> Transcript of the hearing on 1 April 2019, p 52, line 1 to 6.

- [565] The receiver will determine who are the members of the Association taking into account the respondents' concession that all of the applicants (except for Aukuso and Tiana Afaese) (plus those on their list for which Mr Faamate did not account and which appear on the respondents list) are members of the Association.<sup>589</sup> Any dispute as to membership will be resolved by reference to the requirements of the constitution and whether there is evidence to support such compliance. Any proposed amendment of the constitution will only be undertaken with the receiver's supervision.
- [566] Within fourteen days, the parties will provide me with an order that gives effect to these reasons for judgment. I encourage the parties to discuss and provide an order that gives the most practical effect to these reasons in relation to the work of the receiver.
- [567] Following this, I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on an order for costs but if this cannot occur then the parties should agree on a timetable for the exchange of written submissions. If it is appropriate, then I will deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

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<sup>589</sup> Exhibit 30 (respondents' closing submissions), p 29, [137].