SUPREME COURT OF QUEENSLAND

CITATION: *Faamate & Ors v Congregational Christian Church in Samoa-Australia (Ipswich Congregation) & Ors* [2020] QCA 87

PARTIES:
TAUA MEAULI FAAMATE
(first appellant)
LAGILAGIA FAAMATE
(second appellant)
VAEA LOLE NOUATA
(third appellant)
SEGIA NOUATA
(fourth appellant)
MAIAVA PERETISO MULIAGA
(fifth appellant)
NAUMATI MULIAGA
(sixth appellant)
TUITEA MAFUTAGA FOE
(seventh appellant)
LEITU FOE
(eighth appellant)
TAGO AVE IATIGA
(ninth appellant)
SEUAANA TAOFIA MULIAGA
(tenth appellant)
LINE MULIAGA
(eleventh appellant)
FAALAA TUSI FANOLUA
(twelfth appellant)
ALA FANOLUA
(thirteenth appellant)
LUATUA ASOSILI SETEFANO
(fourteenth appellant)
TALALELEI SETEFANO
(fifteenth appellant)
FALEAUTO TALUVALE FA
(sixteenth appellant)
JUNIOR PAPUA
(seventeenth appellant)
SENIA PATO
(eighteenth appellant)
ASO AUKUSO
(nineteenth appellant)
TIANA AFAESE
(twentieth appellant)
LEAVEA JONES
(twenty-first appellant)
v

CONGREGATIONAL CHRISTIAN CHURCH IN SAMOA-AUSTRALIA (IPSWICH CONGREGATION)
ABN 90 103 392 182
(first respondent)
KERITA REUPENA
(second respondent)
TIPI TISEMA
(third respondent)
LOLINI SAKAIO
(fourth respondent)

FILE NO/S:	Appeal No 9455 of 2019 SC No 12831 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 194 (Wilson J)
DELIVERED ON:	28 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	19 November 2019
JUDGES:	McMurdo JA and Lyons SJA and Boddice J
ORDERS:	**1. The appeal be dismissed.** **2. Each party provide any submissions as to the costs of this appeal in writing, not to exceed four pages in length, within 21 days of the delivery of the judgment.**
CATCHWORDS:	ASSOCIATIONS AND CLUBS – INCORPORATED ASSOCIATIONS – OTHER MATTERS – where the first respondent is an incorporated association and a church ("the Association") – where the church was affiliated with what its constitution calls its "mother church" in Samoa – where the appellants represent a group of members of the Association who objected to steps taken by the Minister to sever the ties between the church and the mother church – where the appellants were excluded from participating as members of the Association and the church – where there were other irregularities in the conduct of the Association – where the primary judge ordered the appointment of receivers to determine who are the members of the Association and to conduct an election of a new management committee – where the appellants argue that the primary judge erred in ordering the appointment of receivers, and should have ordered that the Association be wound up – whether it was demonstrated that the Association should be wound up CORPORATIONS – WINDING UP – OTHER GROUNDS FOR WINDING UP – JUST AND EQUITABLE –

GENERALLY – where the Association used donations and borrowed funds towards legal fees to defend the proceeding – where the trial judge accepted that the Association had a proper interest in defending what she described as the validity of its corporate actions – where the appellants argue that this finding is inconsistent with the rule that one group of members is not permitted to use corporate funds in the pursuit of a purpose in which the entity has no "direct" interest – whether it was a proper application of the Association's funds to seek to justify actions which were clearly inconsistent with the procedural requirements of the Act and the constitution – whether any misapplication of funds justified an order for winding up on the 'just and equitable' ground

Associations Incorporation Act 1981 (Qld), s 90(1)(e)

Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd [2018] 3 Qd R 520; [2018] QCA 48, applied
Power v Ekstein (2010) 77 ACSR 302; [2010] NSWSC 137, cited

COUNSEL: A J H Morris QC, with V G Brennan, for the appellants
P P McQuade QC, with N J Pearce, for the respondents

SOLICITORS: Corney & Lind Solicitors for the appellants
Neumann & Turnour Lawyers for the respondents

[1] **McMURDO JA:** This is a dispute between two groups within the membership of a church at Goodna. The church was formed in 1988 and three years later, it became an incorporated body under the *Associations Incorporation Act* 1981 (Qld) ("the Act"). On land which it has owned since 2011, the church, which I will also call the Association, regularly conducts services, a Sunday school, discussion groups within the congregation and bingo nights.

[2] The Minister at the church is Mr Reupena, who has been in that position since 1988. As I will discuss, his performance has not had the universal approval of the congregation. In particular, one group, represented by the appellants, objected to steps taken by him to sever the ties between the Association and what its constitution calls its "mother church" in Samoa, namely the Congregational Christian Church of Samoa ("the Samoan Church"). In August 2016, the Samoan Church purported to strip Mr Reupena of his status as an ordained Minister. In litigation in Samoa in 2017, Mr Reupena successfully challenged that and other steps taken against him by the Samoan Church. But before that occurred, things came to a head between the appellants' group, who wanted Mr Reupena removed and the Association's affiliation with the Samoan Church preserved, and Mr Reupena and those members of the congregation who supported him.

[3] On the afternoon of 4 September 2016, much of the congregation gathered in the church hall at Goodna. On one side sat the group represented here by the appellants, who in these proceedings were called "the Remainder Group" because they wanted the church to remain affiliated with the Samoan Church. On the other side sat those who supported Mr Reupena's position, who were described in this proceeding as "the Reupena Group". What then occurred became the subject of a major issue in the trial of this case. The respondents contended that at this meeting

or immediately after, the appellants resigned as members, a contention which the appellants denied. In the judgment under appeal,[1] that issue was resolved in favour of the appellants, and there is no challenge to that finding. But from September 2016, the appellants were excluded from participating as members of the Association, and if it be different, as members of the congregation of the church.

[4] Later on 4 September 2016, the Reupena Group purported to amend the Association's constitution, without reference to the Remainder Group. The evident intent of the Reupena Group was to remove references in the constitution by which the Association was affiliated with the Samoan Church. By the purported amendments, the reference to the church as being "a part of the mother church in Western Samoa" was removed, although there was no change to clause 29, by which any surplus assets on the winding up of the Association would be transferred to the Samoan Church, or donated to a parish or congregation of that church in Australia.

[5] In December 2016, the appellants commenced this proceeding by an Originating Application, seeking an order that the Association be wound up upon the ground that it was insolvent. Subsequently, the appellants amended their case to seek an order for winding up upon the basis that it was just and equitable to do so, which is a ground for the winding up of an incorporated association according to s 90(1)(e) of the Act.

[6] After a nine day trial, Wilson J delivered an extensive judgment in which the appellants obtained substantial relief, but not an order for winding up. It was declared that they were members of the Association,[2] and that the purported amendments to the Association's constitution, on 4 September 2016, were invalid. No notice had been given of a proposed special resolution to amend the constitution. Nor had the proposed amendments, in accordance with the Association's constitution, been submitted to and approved by the Director General of the Department of Justice.[3] It was further declared that certain appointments to the management committee of the Association, which had been made by Mr Reupena alone, had not been made in accordance with the Association's constitution and were invalid. Her Honour found that there had been other departures from the regulatory requirements of the Act and the constitution, at least before the commencement of the proceedings, and a history of non-compliance with the financial reporting obligations of the Association. There is no challenge by the respondents to any of those orders and findings.

[7] Wilson J said that the circumstances did not justify the drastic step of winding up a solvent and functioning body, as the Association was, when the appellants' remaining concerns could be addressed by alternative relief.

[8] Her Honour was unable to determine precisely who constituted the members of the Association. One unresolved issue was whether certain persons who became, or apparently became, members not long after the September 2016 meeting (and who supported Mr Reupena) were validly admitted. She ordered that any questions about who were the members (apart from those affecting the appellants' status

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

2 With the exception of two of the applicants.

3 Judgment [447]-[454].

which were the subject of her declarations) be investigated and determined by court appointed receivers. By a subsequent order, she appointed receivers and managers of the assets and undertaking of the Association, for them to determine who were the Association's members and then to convene an extraordinary general meeting of the members for the purpose of electing a management committee. The purpose of these orders was to have the Association managed according to the will of the majority of those who were valid members of the Association. In her Honour's view, with those orders, together with the declaratory relief which had been given, the circumstances which might otherwise have required the winding up of the Association were addressed satisfactorily.

[9] The appellants challenge her Honour's decision not to order a winding up. They challenge findings that particular conduct, of which they complained, was not oppressive to them as a minority, or was not conduct which would otherwise favour the winding up of the Association. They challenge her Honour's reasoning concerning the appointment of those new members after the meeting of September 2016. And they challenge her Honour's decision that the appointment of the receivers would provide an appropriate remedy such that a liquidation would not be the only means for redressing the consequences of the events and circumstances upon which the application was founded.

Events before September 2016

The management committee

[10] In October or November 2013, Mr Reupena announced that thereafter he would appoint the Association's management committee. The functions and powers of the management committee are effectively those of a board of directors of a corporation.[4] By clause 11 of the constitution, the management committee, consisting of a chairman, secretary and treasurer,[5] is to be elected each year. A vacancy on the management committee is to be filled by a ballot at a general meeting of members.[6] A member of the management committee might be removed only by a vote of members.[7]

[11] The Act also makes provision for the appointment of a management committee of an incorporated association. By s 60, the business and operations of an incorporated association are to be controlled by a management committee. By s 61, the management committee is to have at least three members, of whom one holds the office of president and another holds the office of treasurer. By s 62, the members of the management committee shall be elected at a general meeting of the association in accordance with its rules.

[12] Mr Reupena proceeded to unilaterally appoint the Association's management committee, contrary to the provisions of both the Act and the constitution.[8] This continued until November 2016, when the management committee became appointed by a meeting of members. (By then, the appellants' group had been excluded from participating as members.[9]) But because the committee was again appointed at a meeting of members, rather than by Mr Reupena unilaterally, her

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4 Clauses 15 and 16 of the constitution.
5 Clause 10 of the constitution.
6 Clause 14 of the constitution.
7 Clause 13 of the constitution.
8 Judgment [390].
9 Judgment [399].

Honour regarded this complaint by the appellants as "largely a historical allegation and by itself … of little weight when considering the winding up of the Association on the just and equitable ground", adding that the receivers could supervise the election of the Association's management committee.[10]

Affiliation under the Samoan Church

[13] Wilson J described this as follows:

> "[43] That affiliation is enshrined in the original constitutional objects 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).
>
> [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.
>
> [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.
>
> [46] The Association was, for all intents and purposes, the Ipswich Parish of the Church. …"

[14] In its constitution, the Association's objects refer to the Samoan Church as follows:

> "This congregation is part of the CONGREGATION CHRISTIAN CHURCH IN SAMOA – AUSTRALIA (QUEENSLAND SUBDISTRICT) as well as (AUSTRALIA DISTRICT). This congregation through subdistrict and district is a part of the mother church in Western Samoa; "CONGREGATIONAL CHRISTIAN CHURCH IN SAMOA."

[15] The first appellant, Mr Faamate, gave evidence of the practical operation of this link between the Association and the Samoan Church, which was apparently accepted by her Honour.[11] In particular, the Association sent delegates to participate at the Samoan Church's annual conference, in company with members of other Samoan churches in Australia and other countries.

[16] In March 2015, the Samoan Church purported to remove Mr Reupena as an Elder Minister. Almost immediately, Mr Reupena told a general meeting of the Association of this action by the Samoan Church and his intention to challenge it by litigation in Samoa. He and Mrs Reupena asked the members if they could borrow $50,000 from the Association to pursue that litigation,[12] and the Association lent that to them. It was repaid, the final repayment occurring in 2017.[13]

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10 Judgment [401]-[402].
11 Judgment [47].
12 Judgment [73].
13 Judgment [74].

[17] Mr Reupena brought those proceedings in Samoa, and in a judgment delivered on 3 August 2016, Chief Justice Sapolu rejected Mr Reupena's case. However that judgment was reversed by the Court of Appeal of Samoa on 31 March 2017.[14]

[18] It was soon after the judgment of the Chief Justice that the Samoan Church purported to remove Mr Reupena as a Minister, stripping him of his ministerial status and requiring him to leave the Association's premises. On 3 September 2016, a meeting of the District, of which the Association is a member, was informed of that decision by the Samoan Church. The District Elders decided that two members of the Elders' Committee would attend the Association's church on the following morning, to inform them of the decision. At the conclusion of the Sunday morning service on 4 September 2016, a letter from the Samoan Church was read to the congregation. At that point either Mr Reupena or the third respondent, Mr Tisema, told those present that there would be a meeting of members on that afternoon to discuss the letter, and the critical meeting of 4 September thereby occurred.

Events after the September meeting

[19] In December 2016, the Association borrowed $20,000 from the separate funds of its Sunday School for the purpose of defending this proceeding. That loan was forgiven on 30 December 2018.

[20] In a period from March to December 2017, the Association borrowed a total of $220,000 from a superannuation fund controlled by Mr and Mrs Reupena, in order that the Association and the other respondents could defend this proceeding. Those funds remained unpaid at the time of the trial.

[21] However there was evidence that the Association spent more than the total of those loans on this case. Mr Lucas is a chartered accountant and insolvency practitioner who prepared a report about the financial position of the Association on the joint instructions of the parties' solicitors. He concluded that the Association was solvent at the date of his report (15 March 2019).[15] On his analysis, he estimated that the Association might require, at a minimum, two to three years to repay the money borrowed from the Reupenas' superannuation fund. He referred to the further legal expenses which the Association anticipated for the trial itself, of the order of $100,000. Mr Lucas wrote that provided the Association received that amount in donations, as it then expected, the Association would remain solvent.

[22] In the accounts for the Association, which Mr Lucas included in his report, was a profit and loss statement for the calendar year ending 31 December 2018.[16] It showed "legal fees" expended in that year in a total of $174,403.77, which it compared with an expenditure of the same kind in the previous year of $338,289.37. Further, a draft profit and loss statement for the three months to 31 March 2019, included in Mr Lucas's report, showed a donation for legal expenses in the month of February 2019 in the sum of $30,000.[17] All of this evidence was the basis for the appellants' pleaded case that an amount of the order of $450,000 had been or would be spent by the Association in the defence of this proceeding. No finding was made by her Honour as to that pleaded allegation, apparently because the appellants' final written submissions at the trial complained of the use of $220,000 (the amount owing to the superannuation fund), and not $450,000, in the defence of the

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14 Judgment [76].
15 ARB 2, volume 2, p 197.
16 ARB 2, volume 2, p 247.
17 ARB 2, volume 2, p 262.

proceeding.[18] Her Honour found that other money had been derived from "members of the Ipswich Congregation [having] on a number of occasions held fundraising events where the money has gone towards the funding of legal fees for this proceeding".[19] There was evidence that a donation of $100,000 was received from one member of the congregation.[20]

Non-compliance with accounting obligations

[23] Her Honour found that the Association had consistently failed to comply with its statutory and constitutional obligations with respect to its annual financial reports, not as to their content but as to their timing.[21] The respondents accepted that the Association had failed to arrange for the timely auditing of its financial statements for the years 2012-2015.[22] But after the commencement of the proceedings, the audited statements were duly lodged, within two or three months from the end of the 2016, 2017 and 2018 years.[23] It was for this reason that her Honour said that the complaint about the late lodgement of audited accounts was "largely a historical allegation."[24]

Admission of new members

[24] Within a month of the September 2016 meeting, ten new members were admitted, all on a single day. In total, 19 new members were admitted after that meeting and before the trial.[25] Her Honour rejected the appellants' case that the admission of these new members was "nothing more than a callous attempt to further alienate the Remainder Group", and found that instead it was a demonstration of "the ongoing relevance of the Association to some members of the Samoan community".[26]

Exclusion of the appellants

[25] The Remainder Group was excluded from the Association from September 2016. This occurred despite their protests that they had not resigned and their stated preparedness to resolve the dispute by a mediated compromise.[27] Her Honour said that the respondents had refused "such an olive branch",[28] although a statement of agreed facts referred to a mediation which occurred in November 2017.[29] The Remainder Group were forced to set up their own church in the area, and they did so.[30]

The reasoning of the trial judge

[26] It is necessary to discuss only her Honour's reasons on the question of whether a winding up was to be ordered, which includes her reasoning as to the alternative relief of the appointment of a receiver, some of which I have discussed already.

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18 ARB 2, volume 1, p 77.
19 Judgment [438].
20 ARB 2, volume 2, pp 152-155.
21 Judgment [466]-[467].
22 Judgment [468].
23 Judgment [471].
24 Judgment [474].
25 Judgment [475].
26 Judgment [477], [480].
27 Judgment [405].
28 Judgment [406].
29 ARB 2, volume 2, p 267.
30 Judgment [407].

[27] Her Honour accepted that the accuracy of the list of members, as it was at the trial, was affected by "the historical hangover of a failure to maintain an accurate register of members" in earlier years, and prior to September 2016.[31] She rejected the appellants' argument that the determination of the members of the Association was a task which bordered on the impossible,[32] although saying that it would be a difficult one.[33] She concluded that "a properly informed and assisted (probably by a translator) receiver is well able to determine any disputed questions of membership."[34]

[28] As to the election of a management committee, her Honour reasoned that this could proceed in a proper way under the supervision of a receiver.[35]

[29] The appellants argued that the Association should be wound up because they had been excluded from the Association's affairs. Accepting that this had occurred, her Honour said that this would be remedied by her declaration that the appellants at all times remained members, and 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 …".[36]

[30] Her Honour rejected the appellants' argument that the use of the amount of $50,000, which was loaned to Mr Reupena by the Association for his litigation in Samoa, was conduct warranting the winding up of the Association. That argument referred to clause 26(x) of the constitution which was as follows:

> "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 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 to 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."

Her Honour noted a submission by the respondents to the effect that it was unclear whether this loan contravened that provision of the constitution, and she expressed no opinion on the question. Her Honour reasoned that in circumstances where the loan, together with interest, had been duly repaid, and where, until the proceeding,

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31 Judgment [362].
32 Judgment [365].
33 Judgment [367].
34 Judgment [369].
35 Judgment [402].
36 Judgment [409].

no complaint had been made about the loan being made, the transaction was of little weight when considering whether the Association should be wound up.[37]

[31] As already noted, her Honour did not discuss the allegation that something of the order of $450,000 of the Association's funds had been spent in the defence of the proceeding. But she did discuss the propriety of the use of $220,000 which the Association had borrowed from the Reupenas' superannuation fund for this purpose. She noted the appellants' submissions that the Association had no interest in the proceeding, because it involved a dispute between rival groups and members, so that it was wrong for one group to use the Association's money to fund its own case.

[32] Her Honour then referred to the respondents' argument that when the proceeding was commenced, it claimed only an order for winding up on the ground of an alleged insolvency, so that it was appropriate that the proceeding be resisted for the benefit of the Association, and for its money to be used for that purpose. On the same basis, it was said that the Association had a proper interest in having the Court uphold the validity of "its corporate actions".[38] The respondents submitted that the case was not, in essence, "a dispute between shareholders [in that] none of the members have any financial interest in the Ipswich Church either in its current state or on liquidation."[39] Her Honour recorded the respondents' further submission that there was nothing to suggest that Mr and Mrs Reupena would not continue to allow their superannuation fund to extend this credit to the Association "for the foreseeable future", so that the loan presented no risk to the Association's solvency which was demonstrated by the report of Mr Lucas.[40]

[33] Her Honour then resolved this issue in the respondents' favour, simply in these terms:

> "[437] I accept the respondents' submissions on this issue.
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> [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."

[34] As to the purported amendment of the constitution, to sever the Association's ties with the Samoan Church, her Honour accepted that the removal of this connection was a "significant amendment"[41] and that the present relationship between that church and Mr Reupena "and his loyal congregation is not consistent or in accordance with clause I of the constitution."[42] Her Honour said:

> "[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.

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37 Judgment [427].
38 Judgment [434].
39 Judgment [434].
40 Judgment [435]-[436].
41 Judgment [457].
42 Judgment [462].

> [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. I agree."

[35] As to Mr Reupena's own relationship with the Samoan Church, her Honour appeared to see that as an unimportant consideration, saying that she regarded his "position with the Mother Church as a matter between Reverend Reupena, the congregation and the Mother Church."[43]

[36] Her Honour was unpersuaded by a submission for the respondents that the applicants had not come to Court with clean hands.[44] She noted that this argument had not been foreshadowed by the respondents' pleading and indeed had not been raised during the trial.[45] She rejected 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", saying that there was "no compelling evidence to this effect."[46] But she accepted that there was clear evidence that the Samoan Church was donating money to the appellants for their legal fees.[47]

[37] For the most part, Wilson J accepted the respondents' submissions about the ways in which the Association had continued to be conducted for the benefit of the community which it was formed to serve. In particular, it had:

(a) conducted weekly church services in the Samoan language (albeit to the exclusion of the Remainder Group);

(b) conducted funerals in Samoan and in accordance with Samoan cultural traditions;

(c) conducted a Sunday school in the Samoan language (although according to one witness, the Sunday school was no longer part of the Association but was merely "affiliated with it");

(d) conducted its Women's Ministry in the Samoan language (although to the exclusion of the Remainder Group);

(e) conducted its Youth Ministry for young people from Samoan families (with the same rider);

(f) held ad hoc social events which followed Samoan cultural traditions (with the same rider);

(g) hosted ad hoc lectures promoting Samoan cultural and family customs.[48]

[38] Her Honour said that it was clear from the evidence that the Association continued to provide "a spiritual and community hub for its members."[49]

[39] Earlier in the judgment, her Honour discussed the relevant legal principles. By s 90(1)(e) of the Act, an incorporated association may be wound up by the Court if

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43 Judgment [485].
44 Judgment [494].
45 Judgment [495].
46 Judgment [498].
47 Judgment [499].
48 Judgment [510]-[511].
49 Judgment [513].

the Court is of the opinion that it is just and equitable to do so. Her Honour noted that by s 89(1) of the Act, an incorporated association may be wound up by a special resolution of its members passed at a general meeting, requiring the votes of three quarters of the members who are present and entitled to vote.[50] From this, her Honour said, it followed 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."[51]

[40] Wilson J said that one of the principal reasons for this remedy, as it had developed from partnership law, was to allow a member to withdraw their capital investment from the firm, in a case where it could not be wound up in insolvency.[52] Her Honour said that the classes of conduct which justify the winding up of a company on the just and equitable ground are not closed and that although the courts have regard to pre-existing categories of cases, these are not treated as rigid or comprehensive.[53] She said that those categories included where it is impossible to achieve the objects for which the company was formed or to carry on the business of the company, or where there has been serious fraud, misconduct or oppression in regard to the affairs of the company.[54] At the same time, her Honour recognised that "[it] is not easy to apply the recognised categories where a company is not a commercial company".[55]

[41] Her Honour noted that the appellants conceded that the winding up of a solvent body corporate, as was the case here, was a "remedy of last resort".[56] Her Honour quoted extensively from this Court's judgment in *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd*, in which it said that, in the application of s 467(4) of the *Corporations Act* 2001 (Cth), what had to be considered was whether a winding up order was necessary, in the interests of the applicant for the order, to redress the consequences of the relevant events and circumstances upon which the application was founded, or whether instead some other form of relief could do so.[57]

[42] Towards the end of the judgment, her Honour considered whether the appointment of receivers would be an appropriate remedy, instead of a winding up order. In the Further Amended Originating Application, which was filed only in the course of the trial, the appellants sought, as an alternative to a winding up, orders for the appointment of receivers. What was there sought was for the receivers to determine who were the members *as at 3 September 2016*, and whether there had been any breaches of the Association's constitution or the Act in respect of the Association's financial management. But each of those matters was the subject of findings by her Honour. She noted that the appellants had ultimately abandoned that claim and had submitted that the appointment of a receiver otherwise would not be an appropriate

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50 Judgment [17].

51 Judgment [18], citing McPherson's Law of Company Liquidation, Thomson Reuters, online [4.225].

52 Citing *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 48 at [77]; [2018] 3 Qd R 520; (2018) 125 ACSR 227 and McPherson, B, "Winding up on the 'Just and Equitable' Ground", Modern Law Review, May 1964, 282 at 286.

53 Judgment [24], [25], citing *Gregor & Anor v British-Israel-World Federation (NSW)* [2002] NSWSC 12; (2002) 41 ACSR 641 at [136].

54 Judgment [25].

55 Judgment [26], citing *Gregor & Anor v British-Israel-World Federation (NSW)* at [137].

56 Judgment [29], citing *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd*.

57 At [46]-[52] per McMurdo JA, Gotterson JA and Jackson J agreeing at [1] and [75].

remedy.[58] Her Honour further noted that an indication early in the trial by the respondents that they would consent to the appointment of receivers, was subsequently withdrawn.[59] Nevertheless, her Honour recorded, she had asked the respondents to prepare a draft order for the appointment of receivers, in the event that she decided not to wind up the Association, and that a certain draft had been provided by the respondents' counsel. By this order, the receivers would convene an extraordinary general meeting of members for the purposes of electing a management committee, and notice of the meeting would be given to each of the appellants and each person determined by the receivers to be eligible to vote.

[43] Under the heading "Conclusion", her Honour reasoned as follows. She said that serious concerns had been raised about the management of the Association under the leadership of Mr Reupena, who had exerted his powers and influence "to chart the course of the Association".[60] Her Honour said that the appellants had raised justifiable complaints about the management of the Association, in particular about the exclusion of the Remainder Group, the purported amendment of the constitution, the failure to maintain a register of members (at least until September 2016) and concerns over the accuracy of the list of members.[61] Whilst they were the matters of the greatest weight, her Honour said that she had also considered other complaints although she had attributed to them, individually, little weight.[62]

[44] However, her Honour said, it was an extreme step to wind up a solvent company and where an alternative and lesser remedy was available, such as the appointment of a receiver, a court should be slow to do so.[63] In her Honour's view, the most concerning of the appellants' grievances were the problems with the accuracy of the list of members, the expulsion of the appellants from the Association and how the Association was managed under "the autocratic leadership" of Mr Reupena without reference to the constitution.[64] But she concluded that despite those concerns, the lesser remedy of the appointment of receivers would "resolve matters".[65] It would give the members of the Association an opportunity to exert their membership rights and determine the future of the Association, including whether the constitution should be amended.[66] Her Honour did not consider that there were insurmountable problems in determining the Association's members, or from the fact that the Association was "cash poor" and the two groups had been entrenched in a bitter dispute for a number of years and had taken "intractable positions".[67] Her Honour acknowledged that this might not result in a reconciliation of the two groups, but that did not mean that the Association needed to be wound up.[68] She observed that if the constitution was not to be amended, as had been attempted in 2016, this might affect whether Mr Reupena should stay as the Minister, but said that this would be a matter for the members of the Association and the Samoan Church.[69]

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58 Judgment [515].
59 Judgment [516].
60 Judgment [526], [527].
61 Judgment [530].
62 Judgment [529].
63 Judgment [532].
64 Judgment [542].
65 Judgment [543].
66 Judgment [547].
67 Judgment [548], [549].
68 Judgment [556].
69 Judgment [561].

The grounds of appeal

Grounds 1 and 2

[45] The first and second grounds of appeal challenge the judge's reasoning about the use of the Association's funds to defend the proceeding. There is some overlap between these grounds and they may be considered together.

[46] The appellants' argument complains of the use of $450,000 for this purpose. As I have discussed, her Honour did not find that such an amount was used and nor did she deal with the pleaded allegation of that fact. Whilst there is evidence that an amount of that order was spent in the defence of the proceeding, there is also evidence that a substantial sum or sums were donated for the purpose, so to the extent of those contributions, there was no real depletion of the Association's funds. Her Honour correctly focussed upon the amounts, totalling $220,000, which the Association had borrowed from the Reupenas' superannuation fund.

[47] Her Honour accepted the respondents' argument that the Association had a proper interest in defending what she described as the validity of its corporate actions. The appellants challenge that finding, contending that in no respect should the Association have been an active participant in the proceeding which, it is argued, was in all respects a contest between two groups of members. The appellants submit that the use of corporate resources by a controlling majority in these circumstances is a well-settled species of oppression.[70]

[48] The appellants further argue that the judge's statement, at paragraph [437] of the Judgment, that she simply accepted the respondents' submissions on this issue, did not disclose any process of reasoning, which of itself constituted an error of law.

[49] The appellants further argue that on the evidence, it was not open to her Honour to accept the respondents' submissions on this issue. The judge's acceptance of the submissions that the Association was "entitled to use its own funds to defend an application for its winding up … on … the ground of insolvency", is said to ignore the abandonment of that allegation of insolvency. The judge's acceptance of the submission that it was relevant that none of the members had any financial interest in the Association or upon its liquidation, is challenged upon the basis that it was an irrelevant consideration, being inconsistent with the rule that one group of members is not permitted to use corporate funds in the pursuit of a purpose in which the entity has no "direct" interest.

[50] The respondents argue that this case is an example of a kind where it can be a legitimate use of a corporation's funds to participate in litigation between rival groups of members. It is submitted that it was necessary or expedient in the interests of the Association as a whole that it participated, and therefore her Honour was correct to decide this issue as she did.

Consideration of the first and second grounds

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70 For which they cite *Advance Bank Australia Ltd v FAI Insurances Ltd* (1987) 9 NSWLR 464 at 493 (Mahoney JA); *ANZ Executors & Trustee Company Limited v Qintex Australia Limited* [1991] 2 Qd R 360 at 370.5 (McPherson J with whom Lee and Mackenzie JJ agreed); *Re DG Brims & Sons Pty Ltd* [1995] QSC 53; (1995) 16 ACSR 559 (Byrne J); *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [1998] NSWSC 413; (1998) 28 ACSR 688 at 732-734 (Young J); *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 2)* [2010] FCA 1342 at [112]-[133] (Dodds-Streeton J).

[51] It is not in every case, where a winding up is sought on the just and equitable ground by one group of members opposed to another group who are in control, that the company should not be an active participant and expend its own funds for that purpose. In *Power v Ekstein*,[71] Austin J reviewed the authorities and concluded that the preponderance of Australian authority accorded with this statement in the English case of *Re a Company (No 1126 of 1992)*:[72]

> "… [T]here is no rule that necessarily and in all cases such active participation and such expenditure is improper.
>
> … [T]he test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole …
>
> [I]n considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case."

[52] The Association had a proper interest in defending a case that it was insolvent, and that it would be wound up on that ground. That was the sole ground for winding up on the commencement of the proceeding and an alternative ground for winding up in the further amended originating application filed during the trial.[73]

[53] Much of the trial was taken up with the issue of whether the appellants continued to be members of the Association after September 2016. It could be said that the Association had a legitimate interest in the Court's determination of whether someone was a member. It is another thing to say that the Association ought to have adopted a partisan position and aligned itself with the other respondents. Nevertheless, in the respondents' favour, it can be said that the Association had a legitimate interest in challenging the appellants' claims to be members, because they were relevant to the standing of the appellants to bring proceedings for its winding up.

[54] In general, a corporation would have a legitimate interest in the litigation of an issue involving the interpretation of its constitution and or about whether that constitution had been duly amended. But in the present case, the arguments which were advanced in defence of the validity of the amendment to the constitution, and the appointments by Mr Reupena to the management committee, were without any substance, and it is difficult to see that they would have been advanced by the Association if it had been independently advised and represented.

[55] The result, in my respectful opinion, is that the trial judge erred in accepting the entirety of the respondents' argument on this question. It should have been recognised that the litigation of some of these issues was not a proper application of the Association's funds. The appellants' argument establishes that there was a substantial consideration, which supported a winding up, which was not weighed in the exercise of her Honour's discretion.

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71 (2010) 77 ACSR 302; [2010] NSWSC 137 (*Power*).

72 [1994] 2 BCLC 146 at 155-6, set out in *Power* at [114]; see also *Trojan Equity Ltd v CMI Ltd & Ors* (2011) 87 ACSR 144; [2011] QSC 346 at [25]-[35].

73 ARB 1, page 120, paragraph 1A.

[56] The Association may not have drawn on its own reserves, rather than borrowing the relevant monies. Nevertheless, the Association's net asset position was depleted by this borrowing and expenditure. The expenditure of more than a trivial proportion of those funds, to the detriment of the Association's financial position, was done to defend the indefensible conduct of Mr Reupena and his supporters about the amendment of the constitution and the appointment of the management committee. The question here is not whether it was in the best interests of the Association that its constitution be amended. It is whether it was a proper application of the Association's funds to seek to justify actions which were clearly inconsistent with the procedural requirements of the Act and the constitution.

[57] For these reasons, the appellants have established an error in the exercise of her Honour's discretion, when deciding to make a winding up order. But it need not follow that this Court should do so.

The third and fourth grounds

[58] These grounds challenge her Honour's reasoning about new members of the Association who were admitted following the September 2016 meeting. By ground 3 of the appeal, it is contended that her Honour erred "in point of principle" in concluding that the admission of these 19 new members was not an act of oppression. By ground 4, it is contended that her Honour made an error of law in expressing "a preliminary view" as to the rights of those individuals to participate in any general meeting convened and supervised by the receivers.[74]

[59] In the appellants' outline of argument, in support of ground 3, they contended that the admission of these new members was "a callous attempt to further alienate [the appellants], foreclosing any future chance of a reconciliation". It was there argued that her Honour erred in rejecting that contention and instead preferring the respondents' submission that the admission of the new members demonstrated "the ongoing relevance of the Association to some members of the Samoan community."[75] The appellants' arguments do not raise any "point of principle". They challenged factual findings, as the appellants were entitled to do. But at the hearing of the appeal, counsel for the appellants abandoned the challenge.[76]

[60] The fourth ground involves a different question. The relevant statement by her Honour was made in the course of her consideration of a submission that the appointment of a receiver could not resolve the difficulties in determining who were the Association's members. Her Honour said:

> "[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

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74 Judgment [553].
75 Judgment [480]-[481].
76 Transcript 1-12.

> exercise about to be embarked upon as supervised by a receiver.
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> [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, 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."
>
> (Emphasis added.)

[61] The appellants' argument criticises her Honour's expression of that "preliminary view", in circumstances where neither side had asked her to consider the question or had been provided with an opportunity to be heard on it.

[62] It is also said that her Honour, impermissibly, offered an advisory opinion, which had the mischief that it could influence unfairly the outcome of the proposed meeting. As to that point however, the orders which were made for the appointment of receivers left it to them to determine any dispute regarding who were the members and required them to provide reasons for their decision. It cannot be accepted that the receivers would be unduly influenced by her Honour's preliminary view. The alternative relief of the appointment of the receivers was not compromised by her Honour's observation.

[63] More generally, the appellants have failed to demonstrate that the expression of this preliminary view is something which advances their case for a winding up order. Her Honour's observation was relevant, in addressing what might have been considered a practical difficulty for the regime which she was intending to put in place. If the appellants cannot otherwise establish that that the Association should be wound up, their case is not improved by reference to this observation.

Grounds 5 and 6

[64] By ground 5, it is contended that her Honour erred in determining that the appointment of a receiver could "equally address [the] consequences" of the oppression of which they complained. It is said that this was an error given the circumstances that:

(a) the oppressors controlled the Association for three years after the expulsion of the appellants;

(b) the Association incurred significant debt during those three years, primarily in defence of the oppressors' position;

(c) the appellants, who comprised approximately 49 per cent of the Association's membership in September 2016, were "in an overwhelming minority" at the time of the judgment;

(d) the appointment of a receiver entrenched Mr Reupena's autocratic leadership and would not adequately address the oppression.

[65] I have concluded already that there was an error in the exercise of her Honour's discretion, in her consideration of the use of the funds of the Association in defending the proceeding. The arguments in support of ground 5 are relevant to this Court's own consideration of whether the Association ought to be wound up, and are considered later in this judgment.

[66] By ground 6, it is contended that an order for the appointment of receivers was wrongly made, in circumstances where neither party had sought that relief, the make up of the Association's members was "uncertain to the point of being irreconcilably so", the task of the receivers would require them to "assume certain judicial tasks", the Association's members comprised "bitterly divided factions who cannot work together" and her Honour accepted (by the "preliminary view") that the new members should be entitled to vote at a meeting convened by the receivers.

[67] As already noted,[77] the appellants sought, as an alternative to a winding up order, orders for the appointment of receivers. But that claim was expressly abandoned at the end of the trial, when it was submitted that this alternative relief would be inappropriate because the determination of who were the members was a task bordering on the impossible, the receivers would be unable to understand and interpret the Association's records without fluency in the Samoan language, the Association was "cash poor" and a receivership would likely push the Association into insolvency and it would not shift the two sides from their intractable positions.[78] There was no cross-application for the appointment of receivers. But in the final submissions for the respondents, it was argued that the appointment of a receiver was a matter which could be considered as an appropriate and less drastic alternative to liquidation.[79] The primary position of the respondents then was that the Court should refuse a winding up order and not make an appointment of a receiver.[80] But it cannot be said that neither party sought orders such as those that were made, or that the appellants did not have a proper opportunity to address the issue.

[68] The appellants continue to argue that the task set for the receivers is a very formidable one, and probably an impossible one. They point to her Honour's finding, at [167] of the Judgment, that:

> "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."

[69] However, that was a statement as to what the evidence before her Honour allowed, and it is another thing to say that the inquiries by the receivers would not reveal further and sufficient evidence for the task. The controversy involving the so-called "new" members involved only 19 people.[81] The receivers would also have to

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77 At [42].
78 ARB 2, volume 1, p 81.
79 As was recorded at Judgment [520].
80 Judgment [517].
81 Statement of agreed facts ARB 2, volume 2, p 266.

consider the status of some persons who were apparently members prior to September 2016, but whose membership might be disputed by the appellants. Her Honour was aware of the potential difficulty for the receivers in resolving such an issue. However, the appellants have not demonstrated that her Honour erred in thinking that it was practicable for the receivers to perform the tasks which her orders assigned to them.

[70] The suggestion that her Honour had imposed "judicial tasks" upon the receivers is unpersuasive. The receivers will have to investigate and determine who should constitute the members for the purpose of the extraordinary general meeting which they are to convene. But their determination of who should constitute the membership will not have the effect of a judgment, especially where, pursuant to paragraph 8 of the orders, the receivers may refer any question to the Court for its direction. If it is right to describe the parties as bitterly divided factions who cannot work together, that supports her Honour's decision to appoint receivers in the terms of this order.

Should the Association be wound up?

[71] Is this a case where it is now impossible to achieve the objects for which the Association was formed? The Association has continued to provide the services to this community according to the Association's objects, with two qualifications. The first is that the Remainder Group became excluded after September 2016 and the second is that the Association's affiliation with the Samoan Church was then severed.

[72] As to the first matter, the Judgment restored the appellants to the membership of the Association, and they can no longer be excluded. As a practical matter, the appellants do not wish to return to this congregation, and have formed their own church elsewhere. The exclusion of the appellants from what was then their church, must have been offensive and hurtful, and it was legally flawed. But at the same time, there exists a substantial community for which this church is an important part of their lives. For them, the objects of the Association are being achieved and it is to be expected that a winding up of their church could cause them a considerable loss.

[73] Because the purported amendments to the constitution have been declared to be invalid, it remains an object of the Association that it operate as part of a group headed by the Samoan Church. Nevertheless, the history of disputes between Mr Reupena and the Samoan Church make it likely that he and others in the congregation might seek to sever the connection with the Samoan Church, and this might be done validly. It must be noted that the prospect of that severance is not advanced by the appellants as a reason for a winding up. Counsel for the appellants conceded that if there was a decision by the requisite majority (75 per cent) to amend the constitution to do so, such a step would not inevitably be an act of oppression.[82]

[74] Many of the irregularities in the conduct of the Association were described by her Honour as "historical" in that they were things that had occurred but which had been remedied. That may be accepted, although the history does indicate something of a propensity on the part of Mr Reupena to have his own way in the management

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82 Transcript 1-15.

of the Association, without strict regard to relevant legal constraints. That concern favours the making of a winding up order, but it is not a compelling reason for it.

[75] I substantially agree with her Honour's assessment of the relevant considerations, save for the question of the use of the Association's funds in the defence of the proceeding, where only some of the issues were appropriate for the Association's active participation. The extent of that misuse of funds cannot be presently assessed, but it must have been something substantial rather than trivial. The argument for the respondents in this Court, that the Association was entitled to actively oppose the appellants on all issues, suggests that Mr and Mrs Reupena are not minded to forgive any of the loans which the superannuation fund made for legal expenses. This is another indication of a likelihood that Mr Reupena might again act inappropriately in influencing the affairs of the Association. But it is not a determinative consideration.

[76] The orders made by her Honour should have the effect of having a management committee duly elected by those who are, in the considered opinion of the receivers, the members of the Association. It is not unlikely that the members of that committee will be influenced by Mr Reupena. But that is not to say that they would disregard their responsibilities to the Association and the community which it serves. The orders which are in place will leave the future of this church, and the position of Mr Reupena, in the hands of the members, acting in accordance with the constitution of the Association.

[77] It must be kept in mind that this is not a commercial enterprise. This is not a case where it is just and equitable for a corporation to be wound up in order that members might recover their investment. Her Honour was correct in saying that this case differs from a dispute between shareholders, each of whom has a financial interest in the outcome of a winding up application. The proper interest of members is in the operation of the church in furtherance of its objects as stated at any time in its constitution. As I have said, that can be achieved.

[78] As Wilson J held, the winding up of a solvent incorporated body is a remedy of last resort. There is no challenge to her Honour's finding that it was clear from the evidence that the Association continues to provide a spiritual and community hub for its members.[83] A winding up order would have substantial adverse consequences for much of the Samoan community in this area. Like the trial judge, I have concluded it is not demonstrated that the Association should be wound up.

Order

[79] I would order that the appeal be dismissed. I would further order that each party provide any submissions as to the costs of this appeal in writing, not to exceed four pages in length, within 21 days of the delivery of the judgment.

[80] **LYONS SJA:** I agree with the reasons of his Honour McMurdo JA and the orders proposed.

[81] **BODDICE J:** I agree with McMurdo JA.

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[83] Judgment [513].