IN THE COURT OF APPEAL OF NEW ZEALAND CA125/98

	BETWEEN	DAVE MENDELSSOHN
		Appellant
	AND	THE ATTORNEY-GENERAL
		Respondent

Hearing:	29 March 1999
Coram:	Gault J Henry J Keith J
Appearances:	G J Thwaite for the Appellant M Hodgen and C Geiringer for the Respondent
Judgment:	4 May 1999

JUDGMENT OF THE COURT DELIVERED BY KEITH J

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[1] Mr Mendelssohn, as a member of the Centrepoint religion, wishes to bring proceedings against the Attorney-General in respect of the Attorney's acts and omissions concerning the Centrepoint Community Growth Trust, a trust incorporated under the Charitable Trusts Act. In 1984 the High Court found that the Trust was a charitable trust and existed for a charitable purpose, the advancement of religion, with the consequence that it was exempt from conveyance duty under the Stamp and Cheque Duties Act 1971 : see *Centrepoint Community Growth Trust v Commissioner of Inland Revenue* [1985] 1 NZLR 673.

[2] After a three day hearing Master Faire, in a judgment given on 5 November 1997, struck out the original statement of claim and on 26 March 1998, following a further six days of hearing, Laurenson J, with a qualification (mentioned in para [10] below), dismissed an application for review of the Master's strike out decision. The review application related to a proposed statement of claim which differed from that which was before the Master. On 6 May 1998 the Judge granted leave to appeal to this Court, referring to his legal ruling that the duties of governmental authorities under the New Zealand Bill of Rights Act 1990 in relation to freedom of religion were passive and, contrary to Mr Mendelssohn's claim, did not involve a positive duty to promote that freedom. (That leave was stated to have been given under s67 of the Judicature Act 1908 but the appropriate source of authority would appear to be rule 61C(6) of the High Court Rules.) The argument for giving leave, he said, was that that

question of law was capable of bona fide and serious argument and involved a public interest sufficient to outweigh the cost and delay of the further appeal.

[3] Since this appeal was filed, this Court has dismissed an appeal by Mr Mendelssohn and another member of the Community in which they challenged the appointment by Robertson J of the Public Trustee as trustee in substitution for the existing trustees : *Mendelssohn and Schmid v Centrepoint Community Growth Trust & Attorney-General* CA217/97, 5 August 1998. The appellants were unsuccessful in their direct petition to the Privy Council for leave to appeal against this Court's judgment on that matter.

The proposed statement of claim

[4] The introductory part of the proposed statement of claim says that in August 1995 the plaintiff wrote to the Attorney-General seeking action to restore the operation of the Trust to its proper purposes. Despite a follow-up call by the plaintiff the Attorney-General did not take that action. In February 1996 the plaintiff brought proceedings in the High Court at Auckland in an attempt to prevent "disaffected members and trustees from interfering with the proper operation of the Trust" and, it is alleged, the Attorney-General failed or refused to take any part in those proceedings. In July 1996 the Attorney-General ordered an inquiry into the affairs of the Trust. An Auckland barrister completed the report which was released in February 1997. According to the proposed statement of claim that report was defective in a number of respects, including exceeding the terms of reference, insulting the religious beliefs and practice of the plaintiff and other members of the Centrepoint religion and making recommendations adversely affecting core religious beliefs and practices of the plaintiff. The Attorney-General had taken no steps to suppress, contain or correct the report or otherwise limit the damage from it. The proposed statement of claim then recited the fact (mentioned in para [3] above) that the Attorney-General had applied to the High Court for the appointment of new trustees (it being alleged that he had made no provision for the protection of the interests of the plaintiff and other members of the religion who adhered to its traditions) and that the Court had appointed the Public Trustee as interim trustee.

[5] On the basis of those allegations four causes of action are pleaded. The first is in negligence :

> 21. Defendant had a duty of care to Plaintiff to use his *parens patriae* powers in coordination with his powers under the Charitable Trusts Act 1957 and the Trustee Act 1956 to protect the religious beliefs and practices of Plaintiff and other members of the Centrepoint religion who adhere to the traditions of the Centrepoint religion.
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> 22. Defendant has breached the duty of care by *inter alia*
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> (a) refusing to intervene when requested by Plaintiff in August 1995 and subsequently;

(b) failing to assist Plaintiff in the Originating Application M96/96 [the February 1996 proceedings, para [4] above];

(c) commissioning a report on the Trust with inadequate terms of reference;

(d) failing to suppress, contain, or correct the report, or otherwise limit the damage from the report;

(e) commencing litigation under M 204/97 to replace trustees who were complying with the traditions of the Centrepoint religion;

(f) not making adequate provision for protection of the interests in M204/97 of Plaintiff and other members of the Centrepoint religion who adhere to the traditions of the Centrepoint religion.

23. Defendant's breach of the duty of care has caused damage to Plaintiff in his religious beliefs, and in the practice and observance of those religious beliefs.

24. Defendant's conduct has been outrageous.

[6] The second proposed cause of action is breach of statutory duty. The duty which is cited is the duty under the New Zealand Bill of Rights Act 1990 to protect the plaintiff's freedom of religion in respect of both beliefs and practice by taking positive steps to protect the freedom and abstaining from conduct that would damage that freedom. The breaches are in the same terms as set out in paragraph 22 quoted above. The statement of claim alleges that breach of the duty in the Bill of Rights is a ground of civil liability and, as under the first ground, alleges injury and damage to the plaintiff's religious beliefs and in the practice and observance of them caused by the breach of obligation, and outrageous conduct.

[7] Misfeasance in public office is the third cause of action. The proposed statement of claim says that the defendant is a public officer and at all relevant times was acting in the exercise of his office. Again it is said that the defendant had a duty in the terms already indicated to protect and not damage the plaintiff's freedom of religion under the Bill of Rights and that the defendant had breached that duty in the terms indicated in paragraph 22 quoted above. Further paragraphs allege malice, injury and outrageous conduct.

[8] The final cause of action is a claim of public law under the Bill of Rights. The allegations in the preceding paragraphs of the proposed statement of claim are repeated. It is said that the Attorney's inactivity and activity amount to acts done in terms of the Bill of Rights, that as the result of those acts Mr Mendelssohn has suffered injury and damage to his religious beliefs and the practice and observance of them and that the acts violate his freedoms set out in ss13, 14, 15, 17, and 20 of the Bill of Rights Act.

[9] In respect of all four causes of actions Mr Mendelssohn claims:

1. A declaration that his freedom of religion has been violated.
2. Damages.
3. An order for representation in litigation at the expense of the Attorney-General.
4. Punitive damages.
5. Costs.
6. Such other order as appears just.

[10] The only part of the proposed statement of claim which was not struck out was the cause of action based on the allegation contained in paragraph 22(d) set out in para [5] above as incorporated into the cause of action in public law under the Bill of Rights. As Laurenson J said, that particular matter was not advanced before the Master. The Attorney-General did not seek to cross-appeal against that part of the judgment. While it is not before us, we note that that ruling involves the possible recognition of an action based on the Bill of Rights when one is not available in tort (since no action in tort was left standing). The possibility of such a result is recognised in Canada in cases such as *Crossman v R* (1984) 5 Admin LR 85 and in New Zealand in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 and *Attorney-General v Upton* (CA305/96 2 July 1998). In saying that we are not of course to be taken as commenting on the merits of the particular claim.

[11] This court has recently stated the law relating to the exercise of the power to strike out proceedings as follows:

> It is well settled that before the court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*Lucas and Sons (Nelson Mail) Limited v O'Brien* [1978] 2 NZLR 289, 294-5; *Takaro Properties v Rowling* [1978] 2 NZLR 314, 316-7); the jurisdiction is one to be exercised sparingly, and only in a clear case where the court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*). ([1998] 1 NZLR at 267; see similarly Gallen J in the present case, [1997] NZFLR at 556). (*Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267 quoted and applied for instance in *McGrory v Ansett New Zealand Ltd* CA2/98 18 November 1998 and *B v Attorney-General* CA292/96 18 March 1999.)

A positive duty to protect freedom of religion?

[12] As appears from the statement of the issue in the judgment granting leave to appeal (para [2] above) and from all but the first cause of action, Mr Mendelssohn's essential proposition is that the Attorney-General has breached his duty to take positive steps to protect the plaintiff's freedom of religion. Critical to that proposition is that there is a tenable argument that the Bill of Rights in the present context creates positive duties and that Laurenson J was wrong to hold that "the requirement is solely not to interfere".

[13] Mr Thwaite, as counsel for Mr Mendelssohn, supported the argument for a positive duty by reference to the constitutional nature of the Bill of Rights, court interpretation of other provisions of the Bill of Rights, the context of statutory law, especially that relating to religion, New Zealand's international obligations and foreign constitutional provisions. He was careful to try to keep his argument narrow, saying that the duty contended for does not necessarily involve the Crown intervening on all occasions of interference with religion or seeking out breaches, or the Crown acting when third parties are involved (as however they may be here when the position of the allegedly disaffected members and trustees is considered). He invoked the provisions of the Bill of Rights affirming the rights to freedom of thought, conscience, religion and belief (s13), to freedom of expression (s14), to manifest religion in worship, observance, practice or teaching, individually or community with others, in public or private (s15) and to freedom of association (s17), and the right of persons belonging to a religious minority not to be denied the right in community with other members to profess or practice that religion (s20).

[14] The short answer to this submission is that in their essence those provisions do not impose positive duties on the State, at least in any sense relevant to this case. Rather they affirm freedoms of the individual which the State is not to breach. The very nature of these rights and freedoms means that they are freedoms *from* state interference. These rights and freedoms are affirmed by s2 *against* acts of the various branches of the State (referred to in s3) including the executive branch. The freedoms in issue are in general within the category often referred to as negative freedoms, to use one part of Isaiah Berlin's famous categorisation (*Two Concepts of Liberty* (1958) recognised for instance by Lord Lester of Herne Hill QC and his co-authors in 8(2) *Halsbury's Laws of England* (4th ed reissue) para 105 n2). In the particular context of religious freedom, Paul Rishworth, a leading New Zealand commentator, says simply that the duty of the branches of government and others bound by the Bill of Rights is not to interfere unreasonably with the individual's right to religious freedom. He concludes his discussion by emphasising the value of "autonomous institutions which are left to determine their own conception of 'the good'. That is what 'freedom of religion' in bills of rights is all about." Grant Huscroft and Paul Rishworth *Rights and Freedoms* (1995) 228, 254.

[15] By contrast, other parts of the Bill of Rights do expressly impose on branches of the state positive obligations to act. That is especially so of rights in respect of the criminal justice system: for instance to be informed of certain rights, including the right to legal services, to be charged promptly, to receive legal aid in appropriate cases, to be tried without undue delay and especially to have a fair trial. It follows that the cases on the provisions requiring positive state action to which we were referred (such as *R v Piper* (1995) 13 CRNZ 334, 337, in respect of privacy of legal consultation) are not relevant in the present circumstances. The reference in the Title to the Bill of Rights to affirming, protecting and *promoting* human rights and fundamental freedoms recognises that some of the rights are positive (involving positive government obligations) while others are negative.

[16] The relevant international provisions draw the same distinction. That provision which is central in the present case is article 18 of the International Covenant on Civil and Political Rights protecting freedom of religion. It too primarily places restraints on the state. It essentially affirms a freedom from State interference. Its second paragraph does however indicate the need in some circumstances for protective legislation or other positive State action:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
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> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
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> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
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> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

[17] Article 20 more explicitly requires protective action in favour of religion, but again only in confined, indeed extreme, situations:

> 1. Any propaganda for war shall be prohibited by law.
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> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

When ratifying the Covenant, New Zealand entered a reservation to this article:

> The Government of New Zealand having legislated in the areas of the advocacy of national and racial hatred and the exciting of hostility or illwill against any group of persons, and having regard to the right of freedom of speech, reserves the right not to introduce further legislation with regard to Article 20.

[18] The legislation referred to in the reservation is presumably that creating the offence of inciting racial disharmony (originally enacted in 1971 and now in s131 of the Human Rights Act 1993) and that aspect of the definition of seditious intention based the inciting of hostility or ill will between different classes of persons as may endanger the pubic safety (Crimes Act 1961 s81(1)(e)). Parliament has also made it an offence to disturb congregations in public places or assembled for public worship (Summary Offences Act 1981 s37 and Maori Community Development Act 1962 s30(1)). The crime of blasphemous libel is also relevant (Crimes Act 1961 s123), as are offences relating to the use of profane

language (Telecommunications Act 1987 s8(1) and Penal Institutions Act 1954 s32(1)(c)). Religious freedom is also recognised in the right to refuse on grounds of conscience to belong to district law societies and to refuse to answer census questions about religious denomination (Law Practitioners Act 1983 s24 and Statistics Act 1975 s43).

[19] To return to the Covenant, several of its provisions highlight the distinction between negative and positive freedoms by directly imposing obligations (sometimes in general form) on the states parties to take action : the inherent right to life "shall be protected by law" (article 6(1)), as must the right to privacy (article 17(2)), and rights of families (article 23(1)) and of children (article 24(1)). The contrast is also to be seen in the more detailed obligations imposed on States by the Convention on the Elimination of all Forms of Racial Discrimination to enact protective legislation (originally included in New Zealand's case in the Race Relations Act 1971 and now in the Human Rights Act 1993). But those treaty provisions do not in any general sense extend to the protection of religion and, even if they did, their substantive provisions would be inapplicable in the circumstances of the present case, as appears from the fact that the 1993 Act has not been invoked in it. The Convention on the Elimination of all Forms of Discrimination against Women, also implemented by the 1993 Act, is to be seen in the same way.

[20] We do not, of course, suggest that there are no circumstances in which the State would not be obliged or not consider it desirable, under international law or on a more general basis, to intervene to protect religious freedom against private oppression or coercion. The extensive legislation already mentioned indicates that it has not simply stood passively by. The principal international decision to which Mr Thwaite referred us, *Otto-Preminger Institute v Austria* (1995) 19 EHRR 34, 56-60, provides an instance of State intervention – the seizing of a satirical film with a religious subject matter. The European Court of Human Rights upheld that action in terms of a permitted limit to freedom of expression allowed by the European Convention in similar form to para (3) of article 18 of the Covenant (quoted in para [16] above). A State could legitimately consider it necessary to repress the imparting of information and ideas judged incompatible with the respect for the freedom of thought, conscience and religion of others; the Court mentioned that the respect for the religious feelings of believers can legitimately be thought to be violated by provocative portrayals of objects of religious veneration and such portrayals can be regarded as malicious violations of the spirit of tolerance which must also be a feature of democratic society. What the case is about in other words is the *power* of the State to limit expression in favour of religious freedom, not a *duty* to do so. It involves the striking of a balance between two freedoms affirmed in the relevant text (as for instance did *Re J (An Infant) : B and B v Director-General of Social Welfare* [1996] 2 NZLR 134). Along with the rest of the legislative and treaty action mentioned it does not support the broader reading of the passive provisions of the Bill of Rights for which Mr Mendelssohn contends.

[21] As indicated, Mr Thwaite also referred us to other New Zealand legislation, especially that relating to religion, in support of an active or positive reading of the relevant provisions of the Bill of Rights. The legislation concerning religious bodies does no more, however, than facilitate transactions relating to the property of various churches and related persons or remove legal obstacles apparently standing in their way. Thus the Spiritualist Church of New Zealand Act 1924 established a body corporate with the right to sue and be sued, created rights in respect of property, and regulated limited aspects of processes of meetings dealing with property matters. The legislation in this respect is similar to that concerning the Methodist Church considered by this Court in *Gray v M* [1998] 2 NZLR 161, 166-167. The various private Acts of 1924 relating to the Roman Catholic Church confer on the Bishop of Auckland, the Archbishop of Wellington and the Bishop of Dunedin wide powers to take actions in respect of their lands and related interests. The Wellington statute also vests certain lands in the Archbishop. The final Act to which we were referred, the Church of England Empowering Act of 1928, is of a somewhat different order since it touches on matters of doctrine and belief by conferring certain powers on the General Synod to alter the Formularies of the Church – doubt having been raised about its power to do that because, among other things, of changes in Imperial legislation relating to the Churches of England and Ireland. This Act is, however, like the others mentioned in this paragraph in the sense that it is facilitative in respect of a particular matter. The statutes simply do not support a general positive duty to protect freedom of religion.

[22] Much other legislation reflects the role of religion in New Zealand (for instance the still special, if reduced, role of Sunday, and in respect of marriage ceremonies and burials and cemeteries) and gives it some preferences (for instance through the law of charities and by financial aid through the Private Schools Conditional Integration Act 1975). (I L M Richardson *Religion and the Law* (1962) still provides a most helpful overall picture, even if much of the legislation has been repealed or altered.) But, again, that legislation provides no support for reading the State's obligation in respect of the right to freedom of religion as a positive one.

[23] Nor do we see the foreign constitutional material as supporting a positive obligation (quite apart from the question of how it is to be related to quite a different legal text arising from a different history and context). Indeed the United States material strongly heads in the opposite direction, since the First Amendment to the Constitution prohibits State establishment of religion. Major cases to which we were referred concern the other part of the Amendment – the bar on legislation prohibiting the free exercise of religion such as *Church of Lukumi v Hialeh* (1993) 508 US 520. Those cases cannot, of course, support positive governmental obligations; they are all about restraining government power. Nor can cases in which the Courts have had to resolve disputes about the ownership of Church property or other questions arising under the general law such as *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513.

[24] It follows that we can see no tenable basis in terms of the proposed second, third and fourth causes of action for the proposition that the Attorney-General was under a duty to take positive steps to protect Mr Mendelssohn's freedom of religion. There is no possible basis in the particular circumstances of this case for recognising a positive duty on an exceptional basis.

[25] The proposed statement of claim also alleges *acts* by the Attorney-General which breach Mr Mendelssohn's right to freedom of religion – the commissioning of the report and commencing the litigation to replace the trustees. The latter matter which, as mentioned earlier, has already been before this Court cannot provide a basis for further litigation without impugning the earlier decisions; and the mere commissioning of a report without more cannot possibly amount to a breach of a right to freedom of religion.

[26] It follows that we see no tenable basis for the causes of action founded on the Bill of Rights.

A duty of care in negligence?

[27] The only provisions to which Mr Thwaite referred us in support of the claimed duty of care were s60 of the Charitable Trusts Act 1957 and s51 of the Trustee Act 1956. The former *empowers* the Attorney-General, any government officer or any persons (see *Morgan v Wellington City Corporation* [1975] 1 NZLR 416) to apply to the High Court in respect of property subject to a charitable trust for orders enforcing or varying the trust or requiring a new scheme. There is no possible base in those provisions for finding a right vested in a beneficiary of a trust matching a duty of care owed by the Attorney-General. The second provision empowers the Court to appoint new trustees; it is the provision actually invoked by the Attorney-General in the proceedings mentioned earlier. Again it provides no possible basis for a duty of care owed to a beneficiary. As well, any such action would impugn the judgments in those proceedings. The reference to the Attorney's non-statutory duties in the proposed pleading adds nothing : as with the legislative powers his right and duty to intervene if the trustees of a charitable trust fall short of their duty gives rise to no duty of care owed to the beneficiary.

Result

[28] It follows that the appeal fails. Any question of costs can be the subject of memoranda.

Solicitors:
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