

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## Re The Auckland City Mission Incorporated [2024] NZHC 255

High Court of New Zealand, Anderson J, 21 February 2024

An application to vary the purpose and powers of the charitable trust to better achieve its purposes.

**Key words:** Charitable Trust, New Zealand, Convalescent Home, Scheme, Variation, Cy-près

1. The Auckland City Mission Inc (Mission) is a charity incorporated in 1927.
2. In 1933, a charitable trust (the Trust) was established when a property known as Whitneydale was donated as a convalescent home for the poor of Auckland. The Trust's purpose was to:

appropriate, use, and maintain Whitneydale ... in perpetuity for the purposes of and as a seaside convalescent Home for Poor Persons old and young of the City or Suburbs or surrounding districts of Auckland (and irrespective of the Religious Beliefs of such persons).

3. The Mission proposed applying the funds from the sale of Whitneydale to its new purpose-built supportive housing and social services facility, HomeGround, in the centre of Auckland.
4. The Mission applied to the Court for approval of a scheme to vary the charitable trust deed under Part 3 of the [Charitable Trusts Act 1957](#) (NZ). The Attorney General agreed with the proposal.
5. The Court explained that (at [5]-[6]):

Part 3 of the Charitable Trusts Act provides a means through which the trustee of a charitable trust can seek and obtain court approval of a scheme that varies the trust deed and the powers of the trustee.

Specifically:

- (a) A trustee may apply for a variation under the Act where it is impossible, impracticable, or inexpedient to carry out the relevant trust's original charitable purpose.
  - (b) The powers of trustees may also be extended or varied if to do so would facilitate the charitable purpose and the administration of the property, income or the carrying out of the trust.
6. The evidence was that the trust assets had not been capable of achieving the original intent of the gift:
    - There were no funds for the operations of the property, and the Mission was unable to source sufficient funds over the years;

- Convalescent homes envisaged in the original purpose were now an obsolete service; and
- The property had been variously used for disability care and rented. Still, its distance from the Mission's central hub, inability to fund supervisory staff, and staircases that were a hazard for the young, elderly, and those with a disability, meant it was delivering little practical benefit to the community.
- The Court was satisfied that the purpose of the Trust was "impossible or impracticable or inexpedient" to carry out.

7. The proposed amended purposes were (at [22]):

... for the purposes of the healing Auckland City Mission HomeGround building to care for Poor Persons old and young of the City or surrounding districts of Auckland (and irrespective of the religious beliefs of such persons) including those suffering or recovering from ill health, addiction, the effects of poverty, trauma, or adversity.

These purposes include paying costs relating to the construction, fit-out and maintenance of the HomeGround building, as well as the operational costs of the detox centre, the general practice for addressing the needs of the poor, the rooftop gardens used by residents, and other communal living spaces.

8. The Court was satisfied that using funds released from the sale of the Trust's property for the HomeGround development accorded as closely as was reasonably possible with the Trust's original convalescence purpose.
9. The Court also approved variations to the Trust deed to allow the sale of the trust property, wind up the Trust, and acknowledge the donor.
10. The Court noted that it was contemplated that by application of the funds to the HomeGround development, the Trust fund would be exhausted, and hence lead to the winding up of the Trust. In practical terms, the Mission would use the Trust funds ongoing to further that development.
11. The application was approved.

## COMMENT



The purpose of the Court's jurisdiction under the Act to vary trusts is to enable trustees to continue applying funds to charitable purposes where the original purposes have become impossible, impracticable, or inexpedient to fulfil, and not to terminate the trust.

In varying charitable trusts under s 32, the Court is exercising a statutory jurisdiction and is not bound by the common law doctrine of cy-près. However, the Courts have held those promoting a statutory scheme should nonetheless seek to substitute beneficiaries or purposes resembling as closely as possible (in the changed circumstances) those specified by the original settlor.

## VIEW THE CASE



This case may be viewed at: <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2024/255.html>

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