IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 227
EMPC 85/2022

IN THE MATTER OF	a declaration under s 6(5) of the Employment Relations Act 2000
AND IN THE MATTER OF	an application for leave to file amended pleadings
AND IN THE MATTER OF	an application for adjournment
BETWEEN	SERENITY PILGRIM, ANNA COURAGE, ROSE STANDTRUE, CRYSTAL LOYAL, PEARL VALOR AND VIRGINIA COURAGE Plaintiffs
AND	THE ATTORNEY-GENERAL SUED ON BEHALF OF THE MINISTRY OF BUSINESS, INNOVATION AND EMPLOYMENT, LABOUR INSPECTORATE First Defendant
AND	HOWARD TEMPLE, SAMUEL VALOR, FAITHFUL PILGRIM, NOAH HOPEFUL AND STEPHEN STANDFAST Second Defendants

Hearing:	31 October 2023 (Heard at Wellington in person and via Virtual Meeting Room)
Appearances:	BP Henry, D Gates and O Thomas, counsel for plaintiffs K Sagaga, counsel for first defendant P Skelton KC and C Pearce, counsel for second defendants R Kirkness, counsel to assist the Court
Judgment:	15 December 2023

JUDGMENT (NO 2) OF CHIEF JUDGE CHRISTINA INGLIS
(Employer Identity)

Introduction

[1] In *Pilgrim v Attorney-General* declarations were made that Serenity Pilgrim, Anna Courage, Rose Standtrue, Crystal Loyal, Pearl Valor and Virginia Courage were employees while working on what are known as the Teams, when resident at the Gloriavale Christian Community.[1]

[2] I adjourned the question of who the employer was to enable the parties to be heard further on that issue and, if the point was contested, this Court's power to identify the true employer of its own motion in circumstances where, for example, a putative employee had failed to correctly identify the correct putative employer.[2] The plaintiff subsequently filed an application for leave to amend the statement of claim to replead the identity of the employer.

[3] Further submissions were filed. Counsel for the second defendants (the Gloriavale defendants) consented to the application for leave and indicated that they were content for the employer identity issue to be dealt with on the papers. The plaintiffs then filed an application for an adjournment. The application was based on proceedings recently filed in the High Court. It was said that it was necessary for the High Court to resolve issues relating to the Gloriavale structure before this Court decided the employer identity issue.

[4] The plaintiffs' application for an adjournment was opposed by the Gloriavale defendants. Mr Skelton KC advised that the application for an adjournment could, from his clients' perspective, be dealt with on the papers; Mr Henry (counsel for the plaintiffs) advised that he wished to be heard in person on it and, if an adjournment was declined, that he wished to be heard in person on the employer

[1] *Pilgrim v Attorney-General* [2023] NZEmpC 105, (2023) 19 NZELR 793 at [185].
[2] At [183].

identity issue. In the circumstances I directed that the opposed application for an adjournment would be dealt with together with any further argument on the employer identity issue on 31 October 2023. I heard from counsel on that date.

[5] This judgment records my decision on the plaintiffs' application for an adjournment and my findings in respect of the identity of the plaintiffs' employer during the relevant time.

The application for an adjournment

[6] In essence Mr Henry submitted that, while it appeared from written submissions that it was common ground that Howard Temple, as Overseeing Shepherd, was the employer, an adjournment was appropriate to enable the High Court to determine issues as to legal capacity and to clarify the nature of the organisational structure within the Gloriavale Community (including who holds the assets and liabilities) to enable enforcement action to take place.

[7] The two points are intertwined. I agree with Mr Skelton that the adjournment application puts the cart before the horse. At this stage the Employment Court is simply dealing with employment status. That is the gateway which each plaintiff must pass through before proceeding to the next step available to them in this jurisdiction, namely claims for lost wages, breach of minimum entitlements, compensation, penalties and the like. Any such claims would need to be commenced in the Employment Relations Authority,[3] though may be removed to the Court for hearing.[4]

[8] The parties to any such claims would very likely be directed to mediation to see whether resolution was possible (noting that the Employment Relations Act 2000 makes it clear that it is not possible to negotiate away minimum employment entitlements).[5] If resolution did not prove possible, any proceedings would then need to be dealt with in the usual way. It may be, given the complexity of the Gloriavale

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3 Employment Relations Act 2000, s 161.
4 Section 178.
5 Sections 159 and 188.

structure, that any remedies ultimately ordered against the employer would give rise to issues of enforcement. At this stage it suffices to note that the Act contains numerous provisions which deal with enforcement, including against third parties and people involved in a breach.[6] The short point is that until a claim for relief has been filed, pursued and resolved in the plaintiffs' favour, issues of enforcement will not directly arise – and are not issues which need to be finally resolved at this stage.

[9] There are also, as counsel for the Attorney-General pointed out, concerns about delay if an adjournment was granted. These proceedings were accorded urgency and it is desirable to bring them to a timely conclusion, absent a compelling reason not to. I am not satisfied that a sufficient basis has been made out for an adjournment; nor do I consider that it would be in the interests of justice to further delay matters, and decline to do so.

[10] The application for an adjournment is accordingly declined.

Who employed the plaintiffs?

[11] Counsel for the parties, and counsel appointed to assist the Court, advanced helpful submissions on the employer identity issue. I record that the Gloriavale defendants had earlier argued that the Court could not determine whether a person was an employee without at the same time identifying who their employer was. I did not accept that submission for reasons set out in the substantive judgment.[7] The Court of Appeal has now indicated the approach taken was not incorrect in the circumstances.[8]

[12] The Gloriavale defendants submit that if (as I have already found) the plaintiffs were employees, the employer was Hopeful Christian in his capacity as Overseeing Shepherd while he was alive and, from 15 May 2018, the plaintiffs who remained living at Gloriavale and who worked on the Teams, were employed by Howard Temple in his capacity as Overseeing Shepherd. The plaintiffs agree with that possibility, but I understood them to argue it as a fall-back position; their primary submission was that

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6 Section 142W. See also ss 137 – 140.

7 *Pilgrim*, above n 1, at [184]; *Courage v Attorney-General* [2022] NZEmpC 77, (2022) 18 NZELR 746 at [23].

8 *Temple v Pilgrim* [2023] NZCA 631 at [12].

the Shepherds named as second defendants (namely Samuel Valor, Faithful Pilgrim, Noah Hopeful and Stephen Standfast) were also employers.

[13] Counsel appointed to assist the Court, Mr Kirkness, agreed with the primary position advanced by the Gloriavale defendants, but also agreed with the plaintiffs that it would be open to the Court on the facts as found to conclude that there were joint or multiple employers, being the Overseeing Shepherd and the Shepherds.

[14] Submissions were also advanced during the course of the hearing as to the role of the Overseeing Shepherd, as opposed to the individual holding that role, and the potential implications of that.

[15] I have formed the view that at all material times the employer was the Overseeing Shepherd. Essentially that is because the evidence pointed squarely to the Overseeing Shepherd, at any particular point in time, being the ultimate controlling force within the Community, specifically (although not exclusively) in respect of work and in respect of the assets of the Community. While it is true that the Shepherds play an important role, including in relation to work undertaken within the Community, by whom and when, they are not the ones who ultimately pull the strings. The ultimate string-pulling function, and entitlement to do so by virtue of the Community's foundational documents, sits firmly with the Overseeing Shepherd. From the inception of the Gloriavale Community until his death on 15 May 2018, the individual holding that role was Hopeful Christian and, from that date, Howard Temple.

[16] I note a further point at this juncture. I accept that it is possible to have joint or multiple separate employers, and that the Court has the power to identify the correct employer/s where a plaintiff has got it wrong. In this case only four named Shepherds had an opportunity to be heard and it would require an opportunity for further evidence if the employer net was to be widened.[9] Those concerns, and how that might be dealt with in the circumstances of this case, do not need to be considered further given the clear conclusion I have reached on the true identity of the employer.

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[9] Employment Relations Act 2000, s 6(6)(b).

[17] I set out the reasons why I have reached the view I have in respect of the employer identity issue.

Framework for analysis

[18] There is some authority for the proposition that there is an onus on a worker to prove that a particular person or entity is their employer.[10] I prefer to approach the s 6 inquiry on an objective basis, weighing the evidence to reach an informed assessment as to who, on the balance of probabilities, the employer is. Such an approach has the benefit of acknowledging the realities of working relationships and what are not infrequently very complex corporate structures, and aligns with the objectives of the Act – including to address the inherent inequality of power and having regard to the Court's broad equity and good conscience jurisdiction.[11] There is nothing in the wording of s 6 which, in my view, requires an onus to be read in. The same points can be made in relation to the Court's power, on its own motion, to identify the true employer. I return to this issue (which is no longer live) below.

[19] Identifying the true employer is an intensely factual exercise. While it may be helpful to have regard to the way in which documentation purporting to record a working relationship is crafted, including the identified parties to the relationship and the way in which their capacity is described, it is well established that form and reality may diverge, particularly in employment relationships. It is reality which must be discerned. The unique features of this case reflect the need for realism when assessing the identity of the employer, if the statutory purpose is to be met rather than undermined.

The facts

[20] In this case the documentation is helpful, most particularly What We Believe. This document is of central importance within the Gloriavale Community and clearly states that it is the Overseeing Shepherd who has the authority and responsibility to

[10] Compare, for example *Colosimo v Parker* (2007) 8 NZELC 98,622 (EmpC) at [25].
[11] Employment Relations Act 2000, s 189.

make all appointments to fill positions of responsibility.[12] What We Believe also makes it explicit that:[13]

> … there will always be one principal leader who must accept full responsibility for all that happens in the Church, and to whom all the other leaders and brethren must give account.

[21] What We Believe emphasises that members of the Community "willingly submit" to the Overseeing Shepherd and the Shepherds of the Community "in every area of [their] Christian Faith and practical life".[14] As the earlier judgment found, the practical life includes work within and for the benefit of the Community, and further that the Overseeing Shepherd exercised ultimate control and management over all assets of the Community.

[22] Relevantly, and as was noted in the earlier judgment, the Overseeing Shepherd's evidence reinforced the centrality of his role as leader of the Community in all aspects of spiritual and practical life. While he delegated certain functions in the Teams to, for example, the House Mother, and regarded himself as a "hands off manager",[15] he readily accepted that as Overseeing Shepherd he retains ultimate control. As the judgment notes:[16]

> [174] I have already dealt with issues relating to who the plaintiffs undertook their work for and why. In respect of the employer identity issue I do not regard it as particularly useful to consider whether the plaintiffs were undertaking their work for the direct benefit of the Overseeing Shepherd or any of his subordinate leadership group, or that it was directed at a perceived communal good. There are, as Mr Kirkness pointed out, analogies with the work undertaken by civil servants, employed to benefit the community they serve rather than the specific organ that signs the employment agreement and pays their wages. Rather it can be said that the state organ is the employer because it has ultimate responsibility for the communal purpose for which it exists.
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> [175] In this case it is of particular significance that the Overseeing Shepherd has ultimate responsibility for ensuring that the Community operates in a way that is consistent with his interpretation of the Bible, in all aspects of life (including in respect of the work undertaken by the women) to meet the objectives which he has set and which he has responsibility for

12 *Pilgrim*, above n 1, at [170].
13 The Christian Church at Springbank *What We Believe* (1st ed, The Christian Church at Springbank, Rangiora, 1989) (*What We Believe 1989)* at 48.
14 The Church at Gloriavale *What We Believe* (3rd ed, The Church at Gloriavale, Moana, 2018) (*What We Believe 2018)* at 25.
15 *Pilgrim*, above n 1, at [171].
16 Footnotes omitted.

> ensuring are met. In this regard, What We Believe, the Commitment and the Christian Church Charitable Trust deed (in its current and previous iterations), all underscore the centrality of his role in terms of the hierarchy of decision-making and the chain of control. The Overseeing Shepherd could also, of course, exclude people from the Community if they were perceived to fall out of unity, including if they refused to do as they were told, including work.

[23] In short, the facts of this case point to the Overseeing Shepherd being the employer.

Changes in the individual appointed as Overseeing Shepherd over time

[24] Hopeful Christian was the Overseeing Shepherd during some of the time that the plaintiffs worked on the Teams. He died on 15 May 2018 and had, by that stage, appointed Howard Temple as his successor in accordance with powers conferred on him, as Overseeing Shepherd, in What We Believe.[17] Howard Temple became Overseeing Shepherd on 15 May 2018.

[25] Mr Skelton submitted that a contract of employment exists between two persons, because it is a contract for personal services; the death of one or both (such as in the present case on the passing of Hopeful Christian) discharges the contract.[18] I understood him to submit that, while Hopeful Christian held office as the Overseeing Shepherd, that was not an office with legal personality, and so when he died the contract died too. All future obligations were, at that point, discharged; accrued entitlements were not discharged. Rather, the personal representative of the deceased remained liable for obligations incurred by the deceased before death, for example to pay unpaid wages. But the rights and liabilities of the employer cannot be bequeathed to or inherited on the employer's death.[19]

[26] Mr Skelton observed that a finding that Hopeful Christian, and, following his death, Howard Temple, were the plaintiffs' employers would be consistent with the findings in the judgment that it was the Overseeing Shepherd who had ultimate oversight and managerial responsibility for the Community. He went on to submit that

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17 *Pilgrim*, above n 1, at [4].

18 See *Farrow v Wilson* (1869) LR 4 CP 744 at 746, cited in *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 (HL) at 1018-1019.

19 *Stubbs v Holywell Railway Co* (1867) LR 2 Ex 311 at 313-314.

such a finding would also be consistent with the principle articulated by the United Kingdom Court of Appeal in *Bradley Egg Farm Ltd v Clifford* that officers of an unincorporated association may be found to be personally liable for the debts and obligations of an unincorporated association.[20] In *Bradley,* the rules of the Society placed its management in the hands of an executive council. The Court did not impose personal liability on the members of the Society; rather each member of the executive council was held to be personally liable for the debts and liabilities of the Society's contracts.

[27] The Court's approach in *Bradley* is instructive in this case. The role of Overseeing Shepherd is created by the Community's foundational document – What We Believe. The man (as the Overseeing Shepherd is required to be) who for the time being holds that role is charged with ultimate authority over all aspects of the daily lives of all Community members (provision of the daily necessities of life; food; clothing; shelter, as well as decision-making around work and management of the Community's assets). If they wished to remain in the Community, each of the plaintiffs had to agree to submit absolutely to the Overseeing Shepherd.

[28] The role of Overseeing Shepherd is continuous – the man holding the role may change from time to time, but the role itself is never vacant. This continuity is a critical functional feature of the existence of the Community, and is recognised as such in What We Believe. In this regard What We Believe expressly provides that the current Overseeing Shepherd has the exclusive and absolute right to appoint the next Overseeing Shepherd during his lifetime, and the Community at all times knows who the next Overseeing Shepherd will be.[21] So, while Hopeful Christian was alive and was the Overseeing Shepherd, the Community knew that Howard Temple was the Overseeing Shepherd designate, and that he would assume the role of Overseeing Shepherd immediately on Hopeful Christian's death. And, just as Hopeful Christian appointed Howard Temple as the Overseeing Shepherd designate, Howard Temple has appointed Stephen Standfast to immediately take on the role of Overseeing Shepherd on his death. In other words, the chain is unbroken, and deliberately so – at all times

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20 *Bradley Egg Farm Ltd v Clifford* [1943] 2 All ER 378 (CA).

21 *What We Believe 2018* at 53-59.

the Community retains its direct link to God through the Overseeing Shepherd, whosoever that man might be.

[29] Fundamental too is the fact that it is only because of the authority conferred on the Overseeing Shepherd that the man who holds that role has the ability to exercise ultimate control over the Community and its members' lives, including as to work.

[30] The reality of the Community's operational structure and way of life, who does what, when and how within the Gloriavale internal world, is that it is the role of Overseeing Shepherd, not the individual, which carries the ultimate authority within the Community.

Does an employer have to be a person or entity recognised at law?

[31] This point arises because there was a focus in argument as to whether the role of Overseeing Shepherd was known to law and, if not, how that impacted on the employer identity issue. Mr Kirkness submitted that an employer does not have to be an entity recognised at law for the purposes of s 6 of the Act; if it were otherwise it would likely undermine the statutory purpose. I agree.

[32] The point has been made in a number of previous cases, most notably by Chief Judge Goddard in *Muollo v Rotaru,* decided under the Employment Contracts Act 1991.[22] The case concerned whether Mr Rotaru was jointly employed by Mr Muollo and Mr De Gregorio working together on a vessel, though no formal legal partnership existed. Chief Judge Goddard noted that "employer" was defined in the Employment Contracts Act as a "person employing any employee or employees", and that "while this seems naturally to tend to a conclusion that an employer therefore should be a separate legal personality, it is well settled that that is not necessarily so". Chief Judge Goddard gave the example of a partnership being capable of being an employer, observing that a joint venture has also been held to be an employer and person, though not a legal entity, in *New Zealand Federated Labourers and Related Trades Industrial Association of Workers v Tyndall.*[23] His Honour concluded that:

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22 *Muollo v Rotaru* [1995] 2 ERNZ 414 (EmpC).

23 *New Zealand Federated Labourers and Related Trades Industrial Association of Workers v Tyndall* [1964] NZLR 408 (SC).

> The submissions ... concentrated unduly upon the absence of any legal entity or partnership as between the two appellants, but that in my judgment does not prevent them from being an employer of the respondent.

[33] *Tyndall* was decided under the Industrial Conciliation and Arbitration Act 1954 by a Full Court of the Supreme Court. The issue in that case was whether a joint venture could be a "person" and "employer" under the Act. Justice Hutchison had no doubt about this conclusion. Justice Haslam agreed and observed that the Act in operation at the time, and the Acts Interpretation Act 1924 (now repealed), defined person as including "a body of persons whether incorporated or not". His Honour made the point (which I regard as particularly salient) that the legislation was:[24]

> … designed to cover the many forms of industrial unit which consist of partnerships or of analogous legal relationships, but do not themselves enjoy corporate personality.

And that:

> For the purposes of this Act, an employer can include an unincorporated group, and as a corollary, it appears that immediately a composite unit starts to operate in the industry, it may be regarded as becoming engaged therein for the first time as a new employer.

[34] Chief Justice Barrowclough also stated:[25]

> Having regard to the definition of 'person' in the interpretation clause of the Act it cannot be doubted that the three concerns named as second defendants are for the purposes of the Act a person even though they do not constitute a legal entity at common law.

And:

> No one of them individually was the employer: the 'employer' was the combination of the three and though they were not a legal entity at common law, nor a partnership, in my opinion they must be regarded as an entity of some sort or kind for the purposes of the [Act].

[35] The Industrial Relations Act contained a more extensive definition of "person" than the Employment Relations Act, namely as including "a corporation sole; and also [including] a body of persons, whether incorporated or not". That extended definition was not carried over to the Employment Contracts Act, and nor did it find its way into

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24 At 413.
25 At 416.

the Employment Relations Act. That is likely because, by that stage, the Interpretation Act 1999 applied such a definition of "person" uniformly across New Zealand legislation.[26]

[36] It is accordingly clear that an employer need not be a separate legal entity for the purposes of s 6, acknowledging the array of "employer" manifestations that exist within our employment relationship environment.

[37] However, while Mr Skelton accepted that a person may be an unincorporated entity, he submitted that can only take the analysis so far because ultimately the "clear and inevitable policy and practice of the courts" is that only a legal entity can be sued in the courts, citing *Hawke's Bay Bulk Gas Users Group v Commerce Commission*.[27] As explained by the Court in that case, neither a judgment nor costs can be enforced against a person unknown to the law. In other words, if the Overseeing Shepherd is an office holder unknown to law, the Overseeing Shepherd as office holder (as opposed to as an individual) could not be found to be the plaintiffs' employer; the same objection would apply to the Overseeing Shepherd and Shepherds grouping.

[38] It seems to me that such an objection again conflates two separate steps in the required analysis – employer identity and subsequent enforcement. The horse (employer identity) must come before the cart (enforcement of entitlements).

[39] In any event, and as Mr Kirkness submitted, judgments and costs *can* be enforced against the person occupying the relevant position at the relevant time or, as he submitted, against whoever fills that role in the Community's executive structure. Examples of such an approach are *Bradley* and *Tyndall*.[28]

[40] The reality is that the Gloriavale Community operates within its own operational structure, with various individuals (such as the plaintiffs) carrying out the tasks assigned to them, all within the Community's rubric. That rubric includes an

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[26] Interpretation Act 1999, s 29 (repealed). See now Legislation Act 2019, s 13.

[27] *Hawke's Bay Bulk Gas Users Group v Commerce Commission* (1988) 4 NZCLC 64,167 (HC). See also *Hostick v New Zealand Railway and Locomotive Society Waikato Branch Inc* [2006] 3 NZLR 842 (HC).

[28] *Bradley*, above n 20; and *Tyndall*, above n 23.

understanding of who is subordinate and who is the final arbiter in all things, including work. That final arbiter is the Overseeing Shepherd, regardless of the identity of the individual who holds that role at any particular point in time. It is necessary to appreciate the realities of the situation when assessing the issues now before the Court.

[41] I conclude that the Overseeing Shepherd was the employer.

Alternatively, the individual holding the title of Overseeing Shepherd was the employer

[42] If I am wrong in my conclusion that the Overseeing Shepherd was the employer, I would have otherwise found that the employer was the individual holding the title of Overseeing Shepherd at the relevant time/s. From the inception of the Community until his death, that individual was Hopeful Christian; immediately on his death it was Howard Temple; when Howard Temple dies, it will be Stephen Standfast.

[43] Under this analysis the question arises as to whether, and if so how, the change in employer identity on death affected the employment relationship with the relevant plaintiff employees, namely those whose work within the Community, spanned the terms of more than one Overseeing Shepherd.

[44] As I have already observed, the Overseeing Shepherd is critical to the functional existence of the Community. The Overseeing Shepherd is, according to What We Believe, the Community's direct link to God.[29] I infer that is the reason why the "office" of Overseeing Shepherd is never vacant – the Overseeing Shepherd has the absolute power to appoint his successor Overseeing Shepherd. That absolute power of appointment is exercised during his lifetime; and members of the Community are aware of who the current, and successor, Overseeing Shepherd is and will be.

[45] I have already referred to Mr Skelton's submission that employment relationships are ones of personal service, requiring a person recognised as such in law on each side of the relationship. If that is so, and if the role of Overseeing Shepherd is not one recognised in law, it follows that the person for the time being holding the role of Overseeing Shepherd was the employer of the relevant plaintiffs; Hopeful

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29 *What We Believe 2018* at F(V).

Christian was the employer during his time as Overseeing Shepherd, succeeded by Howard Temple as successor Overseeing Shepherd. In due course the employer will be Stephen Standfast.

[46] Absent any alternative arrangement, upon the death of each individual Overseeing Shepherd, the employment relationship with each of the relevant plaintiffs would have come to an end. Any monies owed by Hopeful Christian as employer (such as outstanding wages) would need to be paid out of his estate by his administrator.[30] If Hopeful Christian was impecunious on his death, and absent his administrator having a role other than as an administrator, any such monies would be unrecoverable. As Mr Skelton submitted, however, "what happened in this case is clearly a novation…after the death of Hopeful Christian from 15 May 2018 there was a new employment relationship with Howard Temple as the Overseeing Shepherd". If that is so, what are the implications as a matter of law?

[47] In a novation an original party to a contract (in this case the deceased Overseeing Shepherd) is replaced by a third party (the new Overseeing Shepherd); all the rights and obligations of the original party (the outgoing party) are transferred to the new party and the outgoing party ceases to be a party to the contract.[31] The High Court of Australia explained it as follows:[32]

> A novation, in its simplest sense, refers to a circumstance where a new contract takes the place of the old. It is not correct to describe novation as involving the succession of a third party to the rights of the purchaser under the original contract. Under the common law such a description comes closer to the effect of a transfer of rights by way of assignment. Nor is it correct to describe a third party undertaking the obligations of the purchaser under the original contract as a novation. The effect of a novation is upon the obligations of both parties to the original, executory, contract. The enquiry in determining whether there has been a novation is whether it has been agreed that a new contract is to be substituted for the old and the obligations of the parties under the old agreement are to be discharged.

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[30] See Administration Act 1969, s 26: "The whole of the estate of every deceased person shall be assets in the hands of his or her administrator for the payment of all duties and fees payable under any Act imposing or charging duties or fees on the estates of deceased persons…"

[31] See generally Stephen Todd and Matthew Barber *Laws of New Zealand* Contract (online ed) at [272].

[32] *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue* [2012] HCA 6, (2012) 245 CLR 338 at [12].

[48] So, in the present circumstances, a new employment arrangement would form between each plaintiff employee and the new Overseeing Shepherd. The ability to pursue any rights as may have been accrued against the deceased Overseeing Shepherd is maintained, but as against the current Overseeing Shepherd. That is because liability is assumed as part of the act of a novation.[33]

[49] The Court of Appeal set out the requirements relevant to novation in *Hela Pharma AB v Hela Pharma Australasia Ltd*, citing *Chitty on Contracts*:[34]

> There is no doubt that with the consent of both contracting parties all contracts of any kind may be transferred, and the term "novation" has been introduced from Roman law to describe this species of transfer. Novation takes place where the two contracting parties agree that a third, who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained: in this necessity for consent lies the most important difference between novation and assignment.

[50] As the Court made clear, consent may be inferred from conduct, and need not be express.[35] In that case the Court was satisfied that there was "ample evidence" for the finding that consent could be inferred from the conduct of the parties, having regard to the contextual evidence.

[51] I am satisfied that consent may be inferred on the facts in this case.[36] The plaintiff employees who spanned the term of more than one Overseeing Shepherd knew who the current and successor Overseeing Shepherd was and would be. If they did not consent to the designation of the future Overseeing Shepherd, who would act as their employer on the death of the current Overseeing Shepherd, they could (at least conceptually) leave the Community. The designated Overseeing Shepherd knew that

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33 The way in which the Community, through What We Believe, has set up the transfer from one Overseeing Shepherd to the next means that s 26 of the Administration Act has no relevance as regards to the employment situation; instantaneously at the moment of death, there is a discharge of the rights and obligations between the previous obligations between the previous Overseeing Shepherd and the employee and an immediate recreation of all of those rights and obligations, now between the employee and the new Overseeing Shepherd.

34 *Hela Pharma AB v Hela Pharma Australasia Ltd* CA16503, 17 February 2005 at [56], citing HG Beale (ed) *Chitty on Contracts* (29th ed, Sweet & Maxwell, London, 2004) at [19-085].

35 At [63], citing *Chatsworth Investments Ltd v Cussins (Contractors) Ltd* [1969] 1 WLR 1 (CA) at 4; *Tito v Waddell* (No 2) [1977] Ch 106 at 286. The Court was also satisfied as to consideration, noting that it was well established that mutual promises can amount to consideration.

36 For a case where consent was found not to exist on the facts see *Designlink Ltd t/a Rodney Wayne Hairdressing Whangaparaoa v Raymond* EmpC Auckland AC24/06, 1 May 2006.

they would be the next Overseeing Shepherd, and consented to their appointment. And the current Overseeing Shepherd consented by exercising their successor appointment powers under What We Believe. Agreement to the novation can be said to have been entered into around the time of the appointment of the Overseeing Shepherd designate, with timing of its implementation being conditional on the death of the then current Overseeing Shepherd.

[52] The Community's foundational documents, What We Believe in particular, provide the necessary underpinning of a request for the initiation of a new contractual nexus, reflecting a clear intention by the parties to effect a novation, with conduct subsequent to the naming of a designate Overseeing Shepherd confirming the consent of all parties. In other words, What We Believe may be said to have the effect of conferring the right on the individual occupying the role of Overseeing Shepherd to effect a novation to a new Overseeing Shepherd, with the prior agreement of the employee.[37]

[53] In summary, I am satisfied that, if the employer was the individual occupying the role of Overseeing Shepherd, there was a transfer by novation from Hopeful Christian to Howard Temple.

Equity and good conscience

[54] Regardless of how the analysis is approached, the outcome is the same. The individual that holds the role of Overseeing Shepherd is liable to account for any alleged breaches against the plaintiff employees.

[55] Section s 189 of the Act, which requires the Court to exercise its jurisdiction consistently with equity and good conscience, reinforces the point. That requirement is engaged when determining who the true employer is for the purposes of broadly worded s 6. I see it as wholly consistent with equity and good conscience that the Overseeing Shepherd be accountable for actions/inactions as employer and that the

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[37] See also *Savvy Vineyards 3552 Ltd v Kakara Estate Ltd* [2014] NZSC 121, [2015] 1 NZLR 281 at [57], where the Supreme Court recognised that it was "conceptually possible for a party to a contract to have a contractual right to novate by nominating a successor, who, by accepting the novation, becomes a party to the contract in succession to the novating party".

rights and obligations of the employment relationship roll over to the new Overseeing Shepherd on death. Such a result is in my view firmly in line with the overarching principles of equity and good conscience, and is fully consistent with the Community's foundational documents:[38]

> … there will always be one principal leader *who must accept full responsibility for all that happens in the Church*, and to whom all the other leaders and brethren must give account.

The existence or otherwise of a trust

[56] For completeness I note the plaintiffs' submission (rather than pleading) that "a trust exists and the employer is the person in power who is in ultimate control of the community's assets and leads the community." I have already found, at [178] of the earlier judgment, that this Court has no power to declare the existence or otherwise of a trust. Nor does it have the power to determine the validity of a trust or what assets and liabilities a trust might hold and who, if anyone, they devolve to on death (in this case of the Overseeing Shepherd). In any event, the point does not advance matters in light of the current pleadings, which refers to the Overseeing Shepherd overseeing a "complex legal structure". That pleading is made out on the facts.

Conclusion: the identity of the plaintiffs' employer

[57] I am satisfied, based on the evidence before the Court, that the Overseeing Shepherd was the employer during the periods that each of the plaintiffs worked on the Teams. From the inception of the Gloriavale Community until his death on 15 May 2018, the Overseeing Shepherd was Hopeful Christian and, from that date, Howard Temple. The following declarations are accordingly made:

- Serenity Pilgrim was employed by the Overseeing Shepherd from 2016 (when she started full-time work on the Teams) to the time she stopped working on the Teams. The Overseeing Shepherd was the first named second defendant, Howard Temple, from 15 May 2018 to the time of Serenity Pilgrim's departure from the Community and Hopeful Christian until 15 May 2018.

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38 *What We Believe 1989* at 48.

- Anna Courage was employed by the Overseeing Shepherd from around 2015 (when she started full-time work on the Teams) to the time she stopped working on the Teams.

- Rose Standtrue was employed by the Overseeing Shepherd from around 2014/2015 (when she started full-time work on the Teams) to the time she stopped working on the Teams.

- Crystal Loyal was employed by the Overseeing Shepherd from around 2008 (when she started full-time work on the Teams) to the time she stopped working on the Teams.

- Pearl Valor was employed by the Overseeing Shepherd from around 2005 (when she started full-time work on the Teams) to the time she stopped working on the Teams.

- Virginia Courage was employed by the Overseeing Shepherd from around 1994 (when she started full-time work on the Teams) to the time she stopped working on the Teams.

Court's power to identify true employer on own motion

[58] I had invited submissions on the issue of whether the Court had the power, of its own motion, to identify the true employer. The issue appeared to me to be important where, for example, a putative employee named the wrong putative employer in their pleadings on a s 6 claim, perhaps because of the complexities of the organisational structure. I observed:[39]

> [182] I return to the pleadings. The plaintiffs seek a declaration at [4] of their statement of claim that Howard Temple and three current and one previous named individual Shepherds were their employers, sued in their capacity as trustees of the Gloriavale Community assets pursuant to the Declaration of Commitment. The statement of defence (at [5]) pleads that the named second defendants are not trustees in the sense pleaded and nor do they hold assets on behalf of the Community.

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[39] *Pilgrim*, above n 1.

> [183] Where does all of this lead? Generally speaking it would be regrettable for a worker's claim for employment status to be defeated simply because they have proceeded against, for example, one corporate entity within a complex corporate structure only to find that the evidence discloses that another entity within the same structure was the true employer. I have reservations about whether the Court's hands would be tied to the pleadings in such circumstances. No counsel suggested that they would be but nor did any counsel tackle the pleadings point directly. In the circumstances I consider it appropriate to adjourn determination of the employer identity issue. In particular I wish to provide an opportunity for counsel to be heard on the issue I have identified, including (if the point is contested) the nature and scope of the Court's powers under ss 189 (equity and good conscience jurisdiction) and 221 (conferring power on the Court at any stage of proceedings of its own motion or on the application of any party to make directions, including joinder and the amendment or waiver of defects in proceedings, and disposing of matters before it according to substantial merits and equities).

[59] In the event the issue does not need to be dealt with because the plaintiffs were granted leave (not opposed) to file an amended statement of claim in respect of the employer identity issue. The original statement of claim pleaded:

> 4. The Second Defendants are the Shepherds of a community called Gloriavale and are sued in their capacity as the trustees of the Gloriavale Community assets pursuant to the Declaration of Commitment to Jesus Christ and his Church and the Community at Gloriavale (hereinafter known as "The Commitment").

The amended statement of claim deleted reference to the alleged existence of a constructive trust, substituting reference to a "complex legal structure", and pleaded that the employer responsibility carried over to whoever held the office of Overseeing Shepherd, in the event that the holder of the position changes.

[60] In light of the amended statement of claim, nothing need be done on the Court's own motion, and the issue as to the source, nature and extent of the Court's own-motion power is no longer live. It may however be helpful to set out what I understand the position to be, informed by the helpful submissions filed by counsel on the point.

[61] I start with s 189 of the Act. It confers a broad power on the Court to determine any matter before it (which includes deciding the identity of parties to an employment relationship) consistently with equity and good conscience. Section 189 does not

confer a power to do whatever tickles the judge's fancy in any particular case. Rather, the jurisdiction has been described as follows:[40]

> … the Court systematically brings to the decision of each case a certain attitude of mind which is that it should endeavour to do that which is right in adjusting the position of the parties.

[62] The Court of Appeal had also described it as follows:[41]

> Without attempting any exhaustive statement of the occasions when it can appropriately be used, one can say that they include cases where an award does not in its words or spirit clearly cover a particular set of facts; cases where there are some deficiencies or lack of precision in the evidence; cases where appropriate remedies, as for unjustified dismissal, have to be determined.

[63] The powers in s 189 are supplemented by those in s 221. Section 221 empowers the Court to make any directions "necessary or expedient in the circumstances", to enable the Court more efficiently to dispose of matters before it according to the substantial merits of the case. Section 221 provides that the Court may make directions as to joinder.

[64] It seems to me that the Court has the power, of its own motion, to join a party to a claim under s 6 at any stage of the proceedings, where it considers it appropriate to do so. It may well consider it appropriate to do so where it appears that the plaintiff has proceeded against the wrong person or organisation. Plainly, where the Court decides to exercise powers of this sort, natural justice considerations will come into play. Where, for example, the Court concludes that the wrong employer may have been identified, the proposed correct employer would need to be given notice and an opportunity to be heard, including (depending on the circumstances) through further evidence.

[65] In summary, I can discern nothing in the Act which precludes the Court from exercising its powers to draw a person or entity into s 6 proceedings where appropriate. Rather, I see it as being wholly consistent with the underlying objectives of the Act, the statutory context and the special nature of the Court.

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[40] Thomas Goddard "Decision-Making in the Employment Court" [1996] NZLJ 409 at 411.

[41] *Bell (Inspector of Awards & Agreements) v Bradley Downs Ltd* (1987) ERNZ Sel Cas 172 (CA) at 175.

Where to from here?

[66] The claim against the Labour Inspector for breach of statutory duty in both the *Courage* and *Pilgrim* proceedings remains on foot. The Labour Inspector protests the jurisdiction of this Court to determine this claim. The protest to jurisdiction in both proceedings should now be timetabled through to hearing.

[67] The employer issue in the *Courage* proceedings also needs to be concluded.

[68] The Registrar is directed to liaise with counsel to convene a case management conference. Counsel should confer and file memoranda well in advance. It may be that some matters can now be dealt with on a consent basis.

[69] As I have said, the declaration of employment status in these proceedings is the first step for the six named plaintiffs. If they wish to pursue a claim for compensation, lost wages, penalties and the like, fresh proceedings will need to be filed in the Authority, which may be removed to the Court.

[70] The Court is obliged to consider directing parties to mediation. I raised with counsel for the plaintiffs and the Gloriavale defendants whether they thought there might be merit in attending mediation or a judicial settlement conference, noting that they may wish to explore the possibility of bringing matters to a conclusion as between themselves, and in a way that might meet broader objectives which the litigation process may not be able to deliver.

[71] Mr Henry advised that the plaintiffs would welcome the opportunity to attend a settlement conference with an experienced Judge; Mr Skelton subsequently took instructions and advised that, while his clients saw some merit in this option, they would confirm the position once the employer identity issue was determined. That issue has now been resolved. Mr Skelton should advise the Registrar promptly as to whether a settlement conference is sought. If so, the Registrar is to liaise with counsel to make the necessary arrangements.

[72] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 8.30 am on 15 December 2023