IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-1501
[2019] NZHC 2399

BETWEEN	MALCOLM BRUCE MONCRIEF-SPITTLE First applicant
	DAVID CUMIN Second applicant
AND	REGIONAL FACILITIES AUCKLAND LIMITED First respondent
	AUCKLAND COUNCIL Second respondent
	PHILIP BRUCE GOFF Third respondent

Hearing:	2–3 September 2019
Appearances:	J E Hodder QC, J K Grimmer and T Nelson for the applicants K Anderson and K E Morrison for the respondents F Joychild QC and J E Anderson-Bidois for the Human Rights Commission
Judgment:	30 September 2019

JUDGMENT OF JAGOSE J

The judgment was delivered by me on 30 September 2019 at 3.00pm.
Pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

[1] The first respondent ("RFAL") administers various regional facilities within the second respondent's (the "Council") territory, including the Bruce Mason Centre, an events and performance venue at the north end of the business and entertainment strip in Auckland's Takapuna.

[2] On 6 July 2018, RFAL cancelled an event scheduled to be held at the Bruce Mason Centre on 3 August 2018, citing health and safety considerations. The event offered a variety of priced engagements with two speakers, but was the subject of objections and threatened protest action.

[3] The applicants seek my review of that decision, for declarations accordingly. Specifically, the applicants say – against a background requirement to "facilitate rights to freely express lawful speech and opinions" – RFAL:

(a) acted irrationally in concluding the event posed an unacceptable security risk, without consideration of police or organiser's assessments of such risk or the means by which it may be avoided or mitigated;

(b) disproportionately responded to that risk by cancelling the event, unreasonably restricting the applicants' representative exercise of freedoms of thought and expression, of association and peaceful assembly, and from discrimination on grounds of political opinion, which exercise RFAL and the Council is to facilitate in granting or terminating licences to their venues; and

(c) unlawfully was directed in its actions by the third respondent, Auckland's Mayor, Phil Goff.

[4] I thus serially am to decide:

(a) are RFAL's decisions susceptible to judicial review?

(b) was the decision to cancel the event such as entitles my intervention?

(c) have the applicants 'standing' to claim my review of the decision? and

(d) what, if any, intervention is justified?

Factual background

[5] On 13 June 2018, an Australian events promoter and manager, Axiomatic Media Pty Limited (trading as Axiomatic Events) ("Axiomatic"), contacted RFAL to explore availability of a suitable venue to host the New Zealand leg for two keynote speakers' tour in early August 2018. RFAL advised either the ASB Theatre on 1 August, or the Bruce Mason Theatre on 1–3 August, were available. Axiomatic chose the last, and a "pencil booking" was made at the time. In follow-up the same day, RFAL sought further information as to the contracting and performing parties. Axiomatic responded, identifying the speakers as Stefan Molyneux and Lauren Southern, respectively "a renowned philosopher and author" and "a documentary filmmaker and best-selling author".

[6] On Friday, 15 June 2018, RFAL provided an otherwise generic contractual document to Axiomatic, including requirement for Axiomatic's provision of "Health and Safety Plans". Axiomatic completed and returned that venue hire agreement the same day. The agreement required Axiomatic to provide at least 10 working days in advance of the event, among other things, "a written health and safety plan for the Event and the Venue that addresses all hazards … to [RFAL's] reasonable satisfaction". On Monday, 18 June 2018, RFAL countersigned the agreement. On 27 June 2018, RFAL contacted Axiomatic to engage on various operational details, including its provision of the health and safety plan.

[7] Ticket sales commenced on Friday, 29 June 2018, along with Axiomatic's publicity of the event's date and venue. Soon after, RFAL began to receive complaints about the event directly and indirectly (including from its ticketing agent) from members of the public, as well as observing social media commentary against the event, including launch of a petition for its cancellation. A theme of the complaints was the speakers fomented racial discord.

[8] Apprehending the event may present larger security issues than had been comprehended, RFAL began to enquire of their substance, thinking it "prudent to find out more". RFAL discovered venues for the Australian leg of the tour were not being publicised, raising questions as to why not. RFAL was to engage with New Zealand

police, to see "whether this event is on [their] radar and if so what threat rating it may have".

[9] Late on 5 July 2018, a representative of Auckland Peace Action sought RFAL cancel the event, reinforcing its claim directly with the Council, which had received other complaints and a media enquiry. The Council, already comprehending the event's prospective dispute, referred all that to RFAL around 9 am on Friday, 6 July 2018. At roughly the same time, Auckland Peace Action issued a press release, publicly announcing its intention to "blockade entry to [the] speaking venue".

[10] Later that hour, after internal circulation of public information relating to the speakers' comprehended agenda, RFAL management met to discuss the emerging situation. The discussion focused on management of protest at and in the Bruce Mason Centre. A preliminary view was reached the event should be cancelled – in significant part because of the Bruce Mason Centre's location, embedded in a complex including local businesses and restaurants, and surrounded by similar on the corner of two busy roads. In addition to the complexity of providing crowd and traffic control to segregate attending patrons from protestors, while maintaining public access (or not) to other businesses in the vicinity, "a high degree of risk to safety" was assessed as arising from any need to evacuate the centre into an area of protest. Substantial cost was estimated to accompany such measures, which – not being foreseen – was not covered by any bond or guarantee requirement in the agreement with Axiomatic.

[11] The deciding manager – a director of RFAL's operational division, Auckland Live, to provide opportunity for live arts and entertainment events – took time to reflect on the position. He expected other attendees at the meeting "would have come away from that discussion thinking it was highly likely I would decide to cancel the contract for safety/security reasons". After his supervisor enquired if RFAL had applicable policy (it did not), the director contemplated other entities' policies aimed at "balanc[ing] the competing demands that came with a right to protest in a safe environment", to conclude health and safety concerns were "paramount" for RFAL (precisely echoing the trust's event health and safety policy), along with avoiding prospective property damage. A catalyst for his conclusion was his receipt of Auckland Peace Action's press release, and RFAL's prior experience of its "reputation for

blocking events it disagree[d] with", and the likely resultant "contest" and "potential for disruption and violence".

[12] Taking all those matters into account, the director decided by 11 am on 6 July 2018 to cancel the event. He said "[p]utting it candidly, I did not want to risk being in breach of my health and safety obligations (and potential prosecution) or to be responsible for persons being harmed at this [e]vent". After the decision was made, RFAL's unconsummated attempts to engage with the police were withdrawn as the event had been cancelled, to which the attempted police contact responded "[e]asiest way to resolve it I guess".

[13] RFAL arranged to advise Axiomatic of its decision. That was communicated in a telephone call at 2.15 pm the same day. RFAL emphasised its decision was "pragmatic", for security concerns, on which conversation was "pretty much finished". It included the express propositions:

> So we talked with our security people here, we've had some early conversations with the police and we're really at the stage where we want to terminate the contract for the event at the Bruce Mason centre.

[14] Formal advice followed on 10 July 2018, asserting:

> Since the time the Agreement was entered into, RFA has become aware of information that has led us to the conclusion the Event cannot be hosted at an RFA venue, without posing an unacceptable risk to the security and safety of the presenters, RFA staff, contractors, and patrons attending the Event.
>
> Accordingly, RFA is not comfortable allowing the Event to proceed at an RFA venue. An update to this effect has been published on our website, and ticket sales via the Ticketmaster website have been suspended.

The applicants place substantial weight on the advice's "an RFA venue" formulation, as communicating the event's blanket ban across all trust venues. The respondents admit no other trust venue was available on the date for the event.

This proceeding

[15] Axiomatic originally commenced this proceeding together with the present applicants, in support of interim orders aimed at restraining RFAL from terminating

its 'licence' to hold the event at the venue on 3 August 2018. The interim application, set down for hearing on 30 July 2018, was withdrawn on 24 July 2018.

[16] In its emanation for hearing, the present applicants contend RFAL's grant and/or termination of licences to use Council venues is the exercise of "a public function",[1] in which both RFAL and the Council are:

> … subject to public law obligations, including making decisions involving such functions on the basis of relevant considerations only, on an appropriately informed basis, without errors of law or fact, and rationally.
>
> In particular, in making such decisions, RFAL and the Council were and are required to facilitate rights to freely express lawful speech and opinions without these being denied or eroded by potential health and safety risks associated with possible physical protests against such speech and opinions where such risks are not founded on cogent and informed evidence following proper investigation and consultation.

The applicants' counsel, Jack Hodder QC, emphasised these propositions "underpin[ned] the [applicants'] causes of action".

[17] All that is denied by the respondents, who additionally say:

(a) RFAL only engages in commercial arrangements for hire of trust venues to generate revenue for trust purposes; and

(b) the Council plays no role in entry or termination of RFAL's trust venue hire agreements.

Institutional context

[18] RFAL is the trustee of Regional Facilities Auckland, a charitable trust required to be established in wake of Auckland's local government reorganisation in 2010,[2] with objectives:[3]

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1 The claim for hearing distinguishes a "Decision" the event should not be held at an RFAL venue, "Cancellation" of the event by RFAL's advice to Axiomatic, and a "Representation" none of RFAL's venues was available for the event – all on 6 July 2018 – but does not otherwise differentiate either its claims or the relief sought on the basis of those contended distinctions. In this judgment I treat all indistinguishably as RFAL's decision to cancel the event.

2 Local Government (Tamaki Makaurau Reorganisation) Act 2009, s 19C; Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 9.

3 Clause 9(3).

(a) to support the vision of Auckland as a vibrant city that attracts world class events and promotes the social, economic, environmental, and cultural well-being of its communities, by engaging those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport, and entertainment activities; and

(b) to continue to develop, applying a regional perspective, a range of world class arts, culture, heritage, leisure, sport, and entertainment venues that are attractive both to residents of and visitors to Auckland.

[19] Concomitantly, land vesting in the former North Shore City Council – including particular unit titles in the development known as the Bruce Mason Centre, and the land on which it stands – vested in RFAL as trustee.[4] RFAL's objectives relevantly are:[5]

(a) to ensure that Regional Facilities Auckland is administered, and its property held, for the purposes set out in the deed of trust; and

(b) to undertake any activities, in accordance with the deed of trust, that further those purposes ….

[20] The purposes set out in the deed of trust are expressed as follows:

In order to:

(a) **Engaging the Communities of Auckland**: support the vision of Auckland as a vibrant city that attracts world class events and enhances the social, economic, environmental, and cultural well-being of its communities, by providing Regional Facilities throughout Auckland for the engagement of those communities (and visitors to Auckland) daily in arts, culture, heritage, leisure, sport and entertainment activities: and

(b) **Providing World Class Regional Facilities**: develop and maintain, applying a regional perspective, a range of world class arts, culture, heritage, leisure, sport, and entertainment venues that are attractive both to residents of and visitors to Auckland;

the Trust has been established, and is to be maintained, to promote the effective and efficient provision, development and operation of Regional Facilities throughout Auckland for the benefit of Auckland and its communities (including residents of and visitors to Auckland) and in particular:

(c) **Development and Operation of Regional Facilities**: to promote, operate, develop and maintain, and to hold and manage interests and rights

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4 Local Government (Tamaki Makaurau Reorganisation) Council-controlled Organisations Vesting Order 2010, cl 14(1) and sch 3 pt 1. (The land was subject to a lease to the independent Bruce Mason Centre Trust, but that trust's assets were transferred to RFAL as trustee in 2014.)

5 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 9(6).

> in relation to, Regional Facilities throughout Auckland, and to promote and co-ordinate strategic planning in relation to the ongoing development and operation of such facilities;
>
> (d) **Provision of High Quality Amenities**: to provide, and to promote the provision of, high quality amenities at Regional Facilities throughout Auckland that will facilitate and promote arts, cultural, heritage, education, sports, recreation and leisure activities and events in Auckland which attract and engage residents and visitors; and
>
> (e) **Prudent Commercial Administration**: to administer, and to promote the administration of, Regional Facilities throughout Auckland on a prudent commercial basis, so that such facilities are operated as successful, financially sustainable community assets.

By 'Regional Facilities', the deed means:

> … venues, attractions and other facilities throughout Auckland that are community assets of regional significance, including arts, cultural, heritage, education, sports, entertainment, recreation and leisure facilities, indoor and outdoor venues and stadiums …, and all property and undertakings relating to such facilities, including in particular arts, cultural, heritage, education and other collections associated with such facilities.

[21] Both trust and trustee are "council-controlled organisations" in terms of the Local Government Act 2002 (the "Act").[6] As such, their "principal objective" is relevantly to "achieve the objectives of [their] shareholders, both commercial and non-commercial, as specified in the statement of intent", and to:[7]

> … exhibit a sense of social and environmental responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so.

As council-controlled organisations, trust and trustee are required to have statements of intent,[8] which specify their "activities and intentions … and the objectives to which those activities will contribute", while giving the Council "opportunity … to influence [their] direction" by consultation on their drafts.[9] Any strictly constitutive nature of statements of intent may be doubted, as failure to comply "does not affect the validity

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6 Local Government Act 2002, s 6.

7 Section 59(1)(a) and (c). Neither trust nor trustee were a 'council-controlled trading organisation' – defined at s 6 as "a council-controlled organisation that operates a trading undertaking for the purpose of making a profit" – meaning s 59(1)(d)'s objective to "conduct its affairs in accordance with sound business practice" was not applicable.

8 Section 64.

9 Sch 8 cl 1.

or enforceability of any deed, agreement, right, or obligation entered into, obtained, or incurred by that organisation".[10]

[22] The trust's statement of intent is aspirational, identifying its purpose to be "[e]nriching life in Auckland by engaging people in the arts, environment, sports and events", in which its role includes "advancing the social and cultural well-being of Aucklanders", "contributing to the growth of the Auckland economy", and "being trusted stewards of our venues and collections". Under the first and last of those, the trust is to be measured by reference to attendees' numbers and/or reported satisfaction; on the remaining role, it is to recover about 60% of its operating costs from external revenues. The statement of intent identifies the Council's objective of "equitable provision of cultural, heritage and lifestyle opportunities in the everyday lives of Auckland's residents and visitors", to which the trust contributes by "management of assets and … [making] funding decisions … to support cultural and social activities". The trust is "responsible for the sales and delivery of events across [its facilities] as well as ensuring these venues are fit-for-purpose through the delivery of essential capital renewals programmes".[11] The trustee's intent accordingly is facilitative.

[23] Section 10 of the Act sets out the purpose of local government. At the time of the trust's (and trustee's) establishment, section 10 provided:

> **10 Purpose of local government**
>
> The purpose of local government is—
>
> (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
>
> (b) to promote the social, economic, environmental, and cultural well-being of communities, in the present and for the future.

'Cultural well-being', Mr Hodder submitted, "includes political well-being".

[24] At the time of the decision at issue (and since December 2012),[12] section 10 provided:

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10 Schedule 8 cl 8.

11 Given that responsibility, the trust also is a "substantive council-controlled organisation", as at least "responsible for the delivery of a significant service or activity on behalf of the Council": Local Government (Auckland Council) Act 2009, s 4.

12 Local Government Act 2002 Amendment Act 2012, s 7.

10 Purpose of local government

(1) The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

(2) In this Act, **good-quality**, in relation to local infrastructure, local public services, and performance of regulatory functions, means infrastructure, services, and performance that are—

(a) efficient; and

(b) effective; and

(c) appropriate to present and anticipated future circumstances.

[25] In May 2019, section 10 was restored to its pre-2012 formulation:

10 Purpose of local government

(1) The purpose of local government is—

(a) to enable democratic local decision-making and action by, and on behalf of, communities; and

(b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

Subsection 2 was repealed. Such restoration and repeal was achieved by the Local Government (Community Well-being) Amendment Act 2019. I refer in this judgment generically to "community well-being" to capture all the original s 10(b) (and current s 10(1)(b)).

Discussion

—the law on judicial review

[26] Relatively little needs be said about the law on judicial review. The starting point is susceptible powers are to be exercised "in accordance with law, fairly and

reasonably".[13] The overlapping nature of the considerations makes discrete analysis unnecessary.[14]

—are RFAL's decisions susceptible to judicial review?

[27] Judicial review does not appear previously to have been sought of a council-controlled organisation's decisions. The foundation text on judicial review in New Zealand opines such decisions nonetheless are reviewable, analogously with those of state-owned enterprises.[15]

[28] In general terms, any exercise of 'public' or 'governmental' power – powers with public consequences,[16] or relevant to the public interest,[17] or irremediably affecting private rights and liabilities[18] – is susceptible to the supervisory jurisdiction of this Court. Such reviewable power may better be understood as independent power to regulate the affairs of others.[19] The focus is to distinguish 'public' or 'governmental' acts from those "any private citizen can perform".[20]

[29] Such 'top-down' analysis is supported also, in clear cases, by a 'bottom-up' consideration of which particular decisions of undeniably 'governmental' actors nonetheless may not be susceptible to judicial review. Such would exclude, for example, state-owned enterprises' decisions to enter or terminate a commercial contract, absent "fraud, corruption, or bad faith". That is not a brightline test: instead

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13 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552.

14 *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722 (CA) at [85].

15 Graham Taylor, *Judicial Review: A New Zealand Perspective* (4th ed, LexisNexis, Wellington, 2018) at [2.02].

16 *Wilson v White* [2005] 1 NZLR 189 (CA) at [21].

17 *Attorney-General v Problem Gambling Foundation of New Zealand* [2016] NZCA 609, [2017] 2 NZLR 470 at [42].

18 *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 388.

19 While beyond the scope of this judgment, such description would catch the extent to which non-public entities also may be susceptible to judicial review; see for example: *Stininato v Auckland Boxing Association Inc* [1978] 1 NZLR 1 (CA); *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1 (CA); *Velich v Body Corporate No 164980* (2005) 6 NZCPR 143 (CA). Although applicants in such cases may have contracted to be subject to powers exercised by such entities, those powers have independent foundation such that they cannot be adjusted exclusively between the applicant and the entity, justifying characterisation as 'public'.

20 *I Congreso del Partido* [1983] 1 AC 244 (HL) at 267, and at 269 (citing trial judge [1978] QB 500 at 528) (albeit in exempting purely commercial transactions from application of the doctrine of sovereign immunity).

"[i]t does not seem *likely*" such decisions "will ever be the subject of judicial review";[21] the test "does not *necessarily* apply to all contracting decisions made by state-owned enterprises".[22]

[30] The respondents' counsel, Katherine Anderson, argues – as a charitable trust – RFAL's decisions only are reviewable if exercising "significant public functions or with substantial public effects", which she says do not arise on venue hire decisions. That categorisation is not definitive either; it is "[o]therwise, a charitable trust will *ordinarily* be treated as exercising private powers", for which "intervention on public law grounds" is not available.[23] Yet the 'public' charitable nature of their powers may well engage judicial review.[24] Such especially may be the case when, as here, the trust is established by determinedly public-interest legislation.[25]

[31] The better focus is on the activity, rather than on the actor, for scrutiny. Function, rather than form, should inform amenability to judicial review. RFAL's decisions are not excluded from the ambit of my review by its status as trustee of a charitable trust alone.

—was the decision to cancel the event such as entitles my intervention?

[32] Ms Anderson alternatively characterises RFAL's decision to cancel the event as exclusively commercial, unaffected by any 'fraud, corruption or bad faith' as may justify review,[26] and without any wider context as may engage other procedural obligations.[27] The applicants do not contend for the former, but assert cancellation engaged "broader public interests" in provision of a public forum – including the trust's argued objective to promote cultural well-being, such to be understood by dictionary definition to encompass the sort of interactions as may have occurred at the

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21 *Mercury Energy*, above n 18, at 391 (emphasis added).
22 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [65] (emphasis added).
23 *Falun Dafa Association of New Zealand Inc v Auckland Children's Christmas Parade Trust Board* [2009] NZAR 122 (HC) at [33] (emphasis added).
24 See, for example, *Great Christchurch Building Trust v Church Property Trustees* [2013] NZCA 331, [2013] 3 NZLR 597 at [43].
25 There is an alternative view: Marcello Rodriquez Ferrere "Judicial review of charitable trusts" [2013] NZLJ 107.
26 *Mercury Energy*, above n 18, at 391.
27 *Problem Gambling*, above n 17, at [34].

cancelled event[28] – and involved "a high level of governmental involvement" (in the form of the Council and Mayor) in their denial.

[33] Some caution needs to be taken in conflating obligations between the Council and RFAL. The applicants' pleading generally is careful not to do so; the claim's introductory and substantive paragraphs focus on RFAL as the decision-maker, although their submissions do not maintain that clinical separation from the Council.

[34] The Order in Council directing the trust's establishment specifies its objectives as 'supportive' of a "vision of Auckland" – by engaging Aucklanders and visitors "daily" in activity, at a developing range of venues – to be reflected in its deed,[29] for RFAL's administration.[30] That 'vision' confers promotion of community well-being on the 'city' itself (without being any more prescriptive as to the responsible entity).

[35] The 'supportive' nature of the trust's operation is reinforced in the deed by emphasising it was established and is maintained to promote instead "the effective and efficient provision, development and operation of Regional Facilities throughout Auckland".

[36] While the clause does not permit easy (or grammatical) reading, its subheadings highlight the trust's subsidiary but standalone role. The trust is not itself to promote community well-being, but to provide the 'high quality' conduit, administered with 'commercial prudence', through which such may be promoted by the 'city'.[31] The 'promotion', referred to in the middle provision of the trust deed's clause replicated at [20] above, is what is achieved by the trust's establishment and maintenance, and not a task for the trust.

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28 Definition of 'culture' as including "[t]he cultivation or development of the mind, faculties, manners, etc.; improvement by education and training … [t]he devoting of attention to or the study of a subject or pursuit … [r]efinement of mind, taste, and manners; artistic and intellectual development. Hence: the arts and other manifestations of human intellectual achievement regarded collectively"; and 'cultural' as including "[o]f or relating to intellectual and artistic pursuits". But note also 'cultural activism': "the use or creation of art, literature, or other cultural products to promote social change; (also) political activism promoting (a particular) culture"; see *Oxford English Dictionary* (online 3rd ed, 2008).

29 Local Government (Tamaki Makaurau Reorganisation) Establishment of Council-controlled Organisations Order 2010, cl 9(3).

30 Clause 9(6).

31 See [20] above.

[37] At the time of the trust's and trustee's establishment, promotion of community well-being was "[t]he purpose of local government".[32] 'Local government' is not defined, but the Act's purpose is "to provide for democratic and effective local government", to which end the Act "provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them".[33] By 'local authority' is meant "a regional council or territorial authority";[34] in either case, specific named councils (including Auckland Council here).[35]

[38] A context-free reading of the trust's statutory 'principal obligation' – "to achieve the objectives of its shareholders, both commercial and non-commercial, as specified in the statement of intent"[36] – might be thought to permit the trust to arrogate to itself, by incorporation in the statement of intent, such of the Council's objectives as it sought to achieve. But that would be to disregard the quite careful delineation between Council and trust in their constituent documents.

[39] The 'deciding' entity for promotion of community well-being, when such is a local government purpose, here is the Council. The separation between Council and trust is reinforced in the latter's statement of intent, which emphasises the Council's objective to provide community facilities and the trust's intention to manage them. That is not to say trust and trustee are immune from judicial review on their cancellation of the event. It remains necessary to identify what public or governmental power they (or the Council) may be said to have exercised in deciding to cancel the event.

First ground of review – alleged "irrationality/perversity"

[40] The applicants' first ground of review asserts RFAL's "public law obligations" include "the duty to act rationally and not perversely or arbitrarily, when making decisions about the grant and/or cancellation of licences". Such is claimed to be engaged by RFAL's conclusion the event "posed an unacceptable security risk", for

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32 Local Government Act 2002, s 10.
33 Section 3.
34 Section 5 (definition of "local authority").
35 Schedule 2 pts 1 and 2.
36 See [21] above.

which RFAL is alleged not to have obtained or had regard for relevant information as to the incidence and management of risk from police, Axiomatic, and Australian venues, on which it is contended RFAL could not rationally have concluded the risk justified cancellation.[37] Underpinning the claim is RFAL's contended obligation:

> … to facilitate rights to freely express lawful speech and opinions without these being denied or eroded by potential health and safety risks associated with possible physical protests against such speech and opinions where such risks are not founded on cogent and informed evidence following proper investigation and consultation.

[41] Such is to put the cart before the horse. The starting point is to determine what public power RFAL may be said to have exercised in deciding to cancel the event. Then 'public law obligations' may accompany its decision-making.

[42] As has been seen, however, the trust's "provision, development and operation" of the Bruce Mason Centre (among others) essentially is functional, resting entirely on the venue's vesting in RFAL as trustee, under a deed providing no more expansive a role for the trust.[38] The trust's performance measures are illustrative.[39] There is no evidence the Council decided the trust should have any more facilitative role in furthering the Council's purposes.

[43] More significantly, at the time of the decision at issue, those purposes relevantly here were instead for provision of good-quality public services in a cost-effective way.[40] That revised purpose of local government, compared to its predecessor (and successor) promotion of community well-being, was "to concentrate on 'outputs'

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37 The applicants rely on the familiar incantation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 (HL) at 36:

> [I]t may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal …

as establishing what is 'unreasonable' for the purposes of judicial review. The formulation lends itself more easily to the 'unlawful' limb of judicial review's ambit, but "discrete analysis is unnecessary": see [26] above. Similarly, in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL) at 1058:

> In practice [the propositions] merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings …

those 'other headings' including "by wholly omitting to take into account a relevant consideration".

38 See [22] and [35] above.

39 See [22] above.

40 See [24] above.

rather than ‘outcomes’, although terms like ‘public services’ are still open to broad interpretation”.[41]

[44] The applicants do not expressly claim these outputs include the Council’s facilitation of free speech by maintaining the event at the venue; rather, such ‘underpins’ their claim RFAL was obliged not irrationally to cancel it. Had I to confront the Council’s obligation directly, I would have held ‘public services’ even broadly interpreted still did not extend to the outcome sought by the applicants. Rather, by reference to the since-repealed s 11A,[42] those ‘public services’ then were the more prosaic provision of amenities in which the city’s ‘vision’ may be achieved. Even if the Bruce Mason Centre was to be considered a ‘community amenity’ for the purposes of s 11A, its “contribution” was not expressly to be in promotion of community well-being, but in provision of good-quality public services in a cost-effective way. (I offer no view on the position as it now may be, after s 11A’s repeal and the original s 10’s restoration.)

[45] In the end, it was not for the trust proactively to pursue the Council’s activities. Rather, it was for the Council to devolve such to the trust, if the Council can and decides to do so. There is nothing in the trust’s constituent documents to suggest the Council here has put any direct responsibility for community well-being with the trust. Instead the trust’s express responsibility is to provide services on the Council’s behalf,[43] with only discretionary obligation to have regard for “the interests of the

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41 *New Health New Zealand Inc v South Taranaki District Council* [2018] NZSC 59, [2018] 1 NZLR 948 at [152], n 147 per Glazebrook J, in part citing Christopher Mitchell and Dean Knight (eds) *Local Government* (looseleaf ed, LexisNexis) at [LGA10.4]. Such construction belies Ministerial and Committee assertions, on the Bill’s readings, as to the amendment’s (non-)effect: Hon Chester Borrows (15 November 2012) 685 NZPD 6736; Hon Nanaia Mahuta (11 April 2018) 728 NZPD 3189.

42 Local Government Act 2002, s 11A (repealed):

> **11A Core services to be considered in performing role**
> In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:
> (a) network infrastructure:
> (b) public transport services:
> (c) solid waste collection and disposal:
> (d) the avoidance or mitigation of natural hazards:
> (e) libraries, museums, reserves, and other recreational facilities and community amenities.

43 Above, n 11.

community" (and even then not more proactively to promote community well-being).[44]

[46] RFAL exercised no public power in deciding to cancel the event. The event's cancellation does not engage my review for any contended irrationality or perversity in RFAL's decision.

Second ground of review – alleged failure to act consistently with NZBoRA

[47] The applicants' second ground of review asserts RFAL's "public law obligations" include:

> … a duty to ensure its decisions in relation to the granting of and/or cancellation of licences to use the Public Venues are consistent with and facilitate the exercise of the rights to freedom of thought and expression, freedom of association and peaceful assembly, and freedom from discrimination, established at common law and affirmed and reinforced under the New Zealand Bill of Rights Act 1990.

Reference to 'freedom from discrimination' is to pray in aid the prohibited ground of "political opinion, which includes the lack of a particular political opinion or any political opinion",[45] such as may be engaged by the intended event.

[48] As is reasonably well-comprehended, the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 ("NZBoRA") "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[46] The applicants assert the event's cancellation was in disproportionate response to any (legitimate) health and safety risk, and unreasonably restricted their rights and freedoms to hear and consider the intended speakers' contributions, peacefully together with others in a public forum.

[49] NZBoRA's s 3 provides the Act:

> … applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or

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44 Above, n 7.
45 Human Rights Act 1993, s 21(1)(j).
46 New Zealand Bill of Rights Act 1990, s 5.

> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

NZBoRA has application in the circumstances at issue if RFAL's cancellation of the event is an act done within s 3(b). Such would require (a) RFAL has some public function, power or duty conferred or imposed on it by law, (b) in the performance of which RFAL cancelled the event.

[50] Echoing to some degree considerations in assessing susceptibility to judicial review,[47] under the former of those heads:[48]

> In a broad sense, the issue is how closely the particular function, power, or duty is connected to or identified with the exercise of the powers and responsibilities of the State. Is it "governmental" in nature or is it essentially of a private character?

Such is not unfamiliar territory.[49] The "essential focus" is "on the act undertaken, and whether it was 'in the performance of a public function, power or duty' conferred by law".[50] "[I]n" is the important word.[51]

[51] I already have concluded, in the context of the first ground of review, RFAL exercised no public power in deciding to cancel the event.[52] For largely the same reasons, RFAL performed no public function, power or duty in cancelling the event. RFAL is just a trustee of the trust in which ownership of the Bruce Mason Centre is vested, the trust's functional "provision, development and operation" of which is not 'governmental' in nature. Ownership of the Centre is not in itself a public function; neither is its 'provision, development and operation'. Those singularly are private functions, arising exclusively from the property's vesting in the trust. The 'public' function is promotion of those subsidiary functions "for the benefit of Auckland and

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47 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at [64].

48 At [69(f)], approved in *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808 at [25].

49 See [28] above at n 20. Similarly, in *Foster v British Gas plc* [1991] 1 QB 405 (ECJ) at 428 (subsequently applied in *Foster v British Gas plc* [1991] 2 AC 306 (HL)), liability under human rights obligations applying to 'the state' applied to every entity:

> … whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

50 *Low Volume Vehicle Technical Association Inc v Brett*, above n 48, at [25].

51 At [28].

52 At [46] above.

its communities (including residents of and visitors to Auckland)", which promotion the deed retains for the Council, as I have explained.[53]

[52] The applicants do not rely exclusively on NZBoRA for the duty they assert of RFAL. Rather, they say the trust's public law obligations – even without NZBoRA's application to its acts – require its powers be exercised consistently and proportionately with the identified 'freedoms'. This is because freedoms subject to unjustifiable limitation are "not worth having".[54] But that again is to put cart before horse.[55]

[53] The respondents point to recitations of high principle as to correlative freedoms and fundamental rights protected by articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (drawn into United Kingdom domestic law by its Human Rights Act 1998),[56] broadly for the proposition "proportionality of interference with those rights is ultimately a matter for the Court".[57] *Farrakhan* and *Carlile* both related to government exclusion from the United Kingdom of foreign nationals intending controversially to address British audiences. *Ben-Dor* concerned the University's withdrawal of permission to hold a conference in its facilities on grounds of anticipated disorder, against the backdrop of a specific statutory obligation to "take such steps as are reasonably practicable to ensure freedom of speech within the law is secured for members, students and employees … and for visiting speakers".[58] All were clear exercises of public power, and in none was interference found disproportionate.

[54] None of that resounds in RFAL's position. Without material public function, for NZBoRA purposes, none was 'performed' in cancellation of the event. NZBoRA has no application to RFAL's cancellation of the event. Neither did RFAL exercise any

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53 At [33]–[39] above.

54 *Redmond-Bate v Director of Public Prosecutions* [1999] EWHC 733 (Admin) at [20], cited in Timothy Garton Ash *Free Speech: Ten Principles for a Connected World* (Yale University Press, New Haven, 2016) at 131.

55 See [41] above.

56 *R (Farrakhan) v Secretary of State for the Home Department* [2002] EWCA Civ 606, [2002] QB 1391; *R (Lord Carlile) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945; *R (Ben-Dor) v University of Southampton* [2016] EWHC 953 (Admin).

57 *R (Ben-Dor) v University of Southampton*, above n 56, at [62].

58 Education (No. 2) Act 1986 (UK), s 43.

public power in cancelling the event, even if then to be exercised proportionately with the rights and freedoms affirmed in NZBoRA (about which I express no view).

[55] The event's cancellation does not engage my review for any failure to act consistently with NZBoRA, or to facilitate exercise of the asserted freedoms. For those reasons I do not address the interesting issues raised by Frances Joychild QC, as counsel for the intervening Human Rights Commission.

Third ground of review – direction by the Mayor

[56] The applicants' third ground of review contends 'probably' the decision not to hold the event at any RFAL venue was influenced or dictated by Mr Goff.[59]

[57] The applicants rely on Mr Goff's public statements respectively by tweets at about 2.15 pm and 3.10 pm on Friday, 6 July 2018:

> .@AklCouncil venues shouldn't be used to stir up ethnic or religious tensions. Views that divide rather than unite are repugnant and I have made my views on this very clear. Lauren Southern and Stefan Molyneux will not be speaking at any Council venues.
>
> …
>
> Let me be very clear, the right to free speech does not mean the right to be provided with an @AklCouncil platform for that speech.

and in an interview on Radio New Zealand's *Morning Report* programme at about 8.25 am on Tuesday, 10 July 2018, during which the applicants contend the mayor "said he made the decision to ban [the speakers] from Council venues".

[58] I consider the last too reductive a description of a freewheeling exchange with the host of a live radio broadcast in which Mr Goff repeatedly asserted he would not provide the speakers with a venue. It is unclear from the broadcast's transcript exactly what 'decision' Mr Goff claimed to have made; his answers to the host's repeated questioning, if he made the decision to ban the speakers at Council venues by himself, were first:

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[59] I have some reservations if RFAL 10 July 2018 letter's references to "an RFA venue" can carry the 'blanket ban' characterisation, when the evidence was no other RFA venue was available on the event's date.

> No look I made a decision totally in line with the policy of Auckland Council which is that we are an inclusive city, we are a city with 40% migrant population, people born overseas and, you know, I'm not banning anyone by the way. …

and subsequently:

> Yes, I took that initiative in line with clear council policy which sets out in our Auckland Plan that we are an inclusive society and that means, and I've also signed up as, as the other counsellors have, as give nothing to racism. I have signed up that I will not tolerate people who spout racist views. …

Mr Goff's position appeared to be:

> I haven't stopped them speaking, I have simply not been complicit with their views by providing them with a venue from which to do it.
>
> …
>
> I am not even calling for them to be banned. I'm simply saying I am not going to be associated with the sort of poison that they talk and I am not going to provide them with a venue and that's my right and that's council's right to deny them a venue.

[59] But RFAL's evidence is clear and uncontradicted: its decision to cancel the event at the Bruce Mason Centre was made by 11 am on 6 July 2018 – exclusively with regard for health and safety considerations arising from anticipated protest, and unaffected by any mayoral view – and advised to Axiomatic at about 2.15 pm that day. The prior relevant contact between Council and RFAL was:

(a) between 8.45 am and 10 am that day, the mayoral office's reference of received councillor concerns and public complaints about the event to RFAL, for its direct (but undirected) response;

(b) shortly after 10 am, RFAL's advice to the mayoral office it was probably moving toward cancelling the event because of security concerns, and the office's advice in response the Mayor would probably want to say something publicly about it, without indicating what;

(c) around 11.25 am, the mayoral office's inquiry as to RFAL's progress in the context of the mayor's intended statement, and RFAL's advice the decision to cancel had been made but yet to be advised to Axiomatic; and

(d) the mayoral office's text messages to RFAL at 12.30 pm and 1.45 pm, impressing the mayor's wish to make a statement, on which RFAL asked him to wait.

[60] The "so-called 'duty of candour'" – that those whose decisions are under challenge have "a duty to explain the decision-making process, the relevant factual and other circumstances and the reasons for the decision" – is a responsibility attached to public decision-making.[60] Particularly given both the Council and RFAL, as such decision makers subject to review, have an obligation to explain "how and why they acted or decided as they have",[61] I am satisfied there is unlikely to be any better evidence of the Council's involvement in RFAL's decision to cancel the event.

[61] I also do not take any inference from the absence of any evidence directly from Mr Goff. The only adverse inference available in the circumstances is what he could have said would not have furthered the Council's opposition to the applicants' claim.[62] But my review is not engaged by anything in the application in any event.

—have the applicants 'standing' to claim my review of the decision?

[62] On judicial review, given its constitutional importance, New Zealand law takes a "generous" and "relaxed" approach to standing[63] – that is, to the sufficiency of applicants' interest in the subject matter for review – in which "the question of standing is combined with the substantive issues as part of the judicial review discretion".[64] Although once perceived a preliminary jurisdictional issue, standing now is to be determined "on the totality of the facts",[65] in "the legal and factual context".[66] Even without a personal interest in the subject matter, an applicant for review nonetheless will have standing if "warranted by the public interest in the administration of justice

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60 *Ririnui v Landcorp Farming Ltd,* above n 22, at [105].
61 *Bain v Minister of Justice* [2013] NZHC 2123, [2014] NZAR 892 at [37].
62 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 at [153].
63 *Ririnui v Landcorp Farming Ltd*, above n 22, at [91(a)]; *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 (CA) at [322]; and *Proprietors of Wakatu v Attorney-General* [2014] NZCA 628, [2015] 2 NZLR 298 at [23].
64 *Ye v Minister of Immigration*, above n 63, at [322].
65 *Budget Rent A Car Ltd v Auckland Regional Authority* [1985] 2 NZLR 414 (CA) at 419; and *Ye v Minister of Immigration*, above n 63, at [322].
66 *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council* [1984] 1 NZLR 1 (CA) at 6.

and the vindication of the rule of law" – that is "the ultimate test".[67] The modern approach means questions of standing have most resonance in exercise of discretion to grant relief. But they also play an important role in preventing "irresponsible" intercession in the affairs of those susceptible to judicial review.[68]

[63] The applicants' interests are set out at length in their respective affidavits. Mr Moncrief-Spittle's affidavit includes a paean to "freedom of speech within the usual limits (e.g. regarding slander, the incitement of violence)", as drawn from his reading, study and contemplation. In pursuit of the same, he paid to attend the event – to hear and engage with the speakers and other attendees in Auckland, which he values above technology-mediated delivery of their perspectives to his Dunedin residence – and found its cancellation "quite emotionally upsetting" for Mr Goff's comprehended involvement. Dr Cumin is an Auckland resident and ratepayer with an expectation Council venues are to be made available to users without discrimination as to the users' or their events' characteristics, and in particular despite any protest or threats of violence as may arise in opposition to such use. Dr Cumin's interest especially is founded in his identification as a member of the Jewish community, hostile response to which community's events may risk their exclusion from use of Council venues. Each applicant is claimed to represent the interests of like-minded people, whose rights to the freedoms asserted in this proceeding are contended to have been restricted by RFAL's cancellation of the event.

[64] I have no reason to doubt the values promoted by the applicants are legitimate interests genuinely held by them, distinguishable from any universal interest in the Council's and RFAL's affairs. I also might take it on faith, if not from the attentive gallery during the hearing, the applicants are not alone in those particular interests (although they are not representative litigants).[69]

[65] But those interests are not the subject matter for my review. Rather, the subject matter for my review is RFAL's decision to cancel the event. That the applicants wish

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67 *Jeffries v Attorney-General* [2010] NZCA 38 at [70].

68 *Consumers Co-operative Society (Manawatu) Ltd v Palmerston North City Council*, above n 66, at 5.

69 *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* HC Auckland CP395/93, 17 June 2003 at [15].

(without better foundation, as I have explained in relation to their grounds of review) to imbue that decision with the values they espouse cannot improve their standing to challenge it.[70]

[66] Mr Moncrief-Spittle's legitimate interest in RFAL's decision is contractual, in relation to any loss and damage he incurred through the cancellation; Dr Cumin's is in desired Council policy-making, which – absent any policy said to be engaged by the decision – may not be justiciable at all, but an issue for participative democracy. Neither has standing to bring this proceeding, but the point is academic given its failure. Standing's materiality is in exercise of discretion to grant relief.

—what, if any, intervention is justified?

[67] For all those reasons, no intervention is justified. I therefore do not address the respondents' arguments against declaratory relief on grounds of mootness.

Result

[68] The applicants' claim is dismissed.

Costs

[69] In my preliminary view, as the successful parties, the respondents are entitled to 2B costs and disbursements.[71] That is because, from what I presently know of it, nothing in the steps taken by them in this averagely complex proceeding required other than a normal amount of time.[72] If costs have not been ordered on the withdrawn interim orders application, I would increase the costs otherwise payable on those exclusive steps by 30 per cent as unnecessary on the application's withdrawal.[73]

[70] If that is not accepted by the parties, and they cannot otherwise agree, costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and

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70 *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 630 and 659.
71 High Court Rules 2016, r 14.2(1)(a), (c) and (g).
72 Rules 14.3(1) and 14.5(2).
73 Rule 14.6(3)(b)(ii).

daily recovery rate – to be filed and served by the respondents within ten working days of the date of this judgment, with any response and reply to be filed within five working day intervals after service.

—Jagose J

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