

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2013-485-8724
CIV 2013-485-8746
CIV 2013-485-8761
CIV 2013-485-8802
CIV 2013-485-8812
CIV 2013-485-8844
CIV 2013-485-8846
CIV 2013-485-8847
CIV 2013-485-8906
CIV 2013-485-9562
[2013] NZHC 3521**

UNDER Part 19 of the High Court Rules

IN THE MATTER OF the Trustee Act 1956

BETWEEN PERPETUAL TRUST LIMITED
First Applicant

CORPORATE TRUST LIMITED
Second Applicant

AND LOMBARD FINANCE &
INVESTMENTS LIMITED (IN
RECEIVERSHIP)

IRONGATE PROPERTY LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

STRATEGIC FINANCE LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

OPI PACIFIC FINANCE LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

FINANCE AND LEASING LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

LDC FINANCE LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

NATHANS FINANCE NZ LIMITED (IN
RECEIVERSHIP)

DOMINION FINANCE GROUP

LIMITED (IN RECEIVERSHIP AND
LIQUIDATION)

BOSTON FINANCE LIMITED (IN
RECEIVERSHIP AND LIQUIDATION)

ST LAURENCE LIMITED (IN
LIQUIDATION)

ST LAURENCE LENDING LIMITED
(IN LIQUIDATION)

ST LAURENCE REALTY LIMITED (IN
LIQUIDATION)

ST LAURENCE NO. 2 LIMITED (IN
LIQUIDATION)

ST LAURENCE NO. 3 LIMITED (IN
LIQUIDATION)

SL FIVE STAR HOTEL INVESTMENTS
LIMITED (IN LIQUIDATION)

Respondents

Hearing: 12 December 2013

Appearances: S Barker for the First Applicant
J Land for the Second Applicant
H Rennie QC for LDC Finance Limited (in receivership and
liquidation)
P Chisnall as Amicus Curiae

Judgment: 19 December 2013

JUDGMENT OF MALLON J

Introduction

[1] The first applicant (“Perpetual”) is the trustee of the respondents (“Companies”) all of which are insolvent and unable to repay the vast sums of money owed to investors in the Companies. Perpetual applies for Court approval to retire as trustee and for the second applicant (“Corporate Trust”) to be appointed as a

trustee in its place. Court approval is sought because the process by which a change of trustee can occur, that is provided for in each of the relevant trust deeds by which Perpetual was appointed, is said to be inexpedient, difficult and impracticable.

Background

[2] The Companies are all in receivership and/or liquidation. Before their collapse, they issued secured debenture stock to the general public. As issuers of debenture stock the Companies were required to have a corporate trustee in place.¹ Perpetual, a company which provides both personal and corporate trustee services in New Zealand, is that trustee. It was appointed in accordance with duly executed trust deeds.

[3] When the Securities Trustees and Statutory Supervisors Act 2011 (“the STSS Act”) came into force, trustees in respect of debt securities had to be appropriately licensed by the Financial Markets Authority (“FMA”). Perpetual was granted such a licence by the FMA on 28 September 2012. The licence is subject to conditions. Those conditions include a requirement that Perpetual certifies that it has sufficient financial resources and independence to support its trustee business, and a requirement that Perpetual also certifies that it holds adequate professional indemnity insurance for its trustee business. There is also a condition in relation to litigation decisions.

[4] Perpetual’s licence expires on 27 March 2014. It does not want to apply to the FMA to extend or vary that licence because it has sold its corporate trustee business. Going forward Perpetual will only offer the provision of personal trustee services. Perpetual will be unable to discharge the trusteeships of the Companies before the expiry of its licence due to on-going investigations and litigation by the receivers and/or liquidators of the Companies. Perpetual wishes to retire from the trusteeships and to appoint Corporate Trust in its place.

[5] The background to Corporate Trust’s proposed appointment arises out of discussions between Perpetual and Kim von Lanthen in September 2012. Mr von

¹ Securities Act 1978, s 33(2)(a).

Lanthen heads Corporate Trust. At the time of these discussions Corporate Trust was granted a licence by the FMA to act as a trustee in respect of debt securities under the STSS Act. Its licence expires on 27 March 2017. Like Perpetual's licence the conditions include a requirement for Corporate Trust to certify that it has sufficient resources and independence to support and develop its business, and a requirement to certify that it holds adequate professional indemnity insurance. Although it obtained this licence, Corporate Trust was unable to take over Perpetual's trusteeships at this time because it could not get the required insurance.

[6] As an alternative, Perpetual engaged Kim von Lanthen & Associates Limited ("KVL") (another company headed by Mr von Lanthen) to provide management and administration services in respect of the trusteeships. Accordingly, pursuant to a service agreement between Perpetual, Corporate Trust and KVL dated 28 September 2012, KVL has been providing management services to Perpetual in relation to the trusteeships of the Companies. KVL's services have included liaising with the receivers and liquidators of the Companies, overseeing negotiations relating to possible litigation resulting from the collapse of the Companies, and reporting back to Perpetual on the developments and progress of the receiverships and liquidations.

[7] In September 2013 Corporate Trust was able to obtain the insurance it required to manage Perpetual's trusteeships. Perpetual then formally asked Corporate Trust to take on the trusteeships of the Companies and Corporate Trust agreed to do so.

[8] Under each of the trust deeds by which Perpetual is appointed there is a process by which Perpetual can retire and a new trustee can be appointed. Under that process Perpetual may retire by giving a period of notice of its intention to do so.² This is subject to the due appointment of a new trustee and the transfer to the new trustee of the relevant securities given, and moneys and investments held. No new trustee can be appointed unless the appointment is first approved by an extraordinary resolution. An extraordinary resolution means a resolution passed at a

² The required periods of notice differ across the trust deeds between Perpetual and the companies. Most require 30 days' notice. One requires 90 days' notice.

stockholders/depositors (ie investors) meeting by not less than 75 per cent of stockholders/depositors voting.³

[9] The Companies each have many investors ranging from hundreds to thousands. Due to the number of investors, Perpetual considers that arranging and holding investor meetings would be a lengthy, expensive and difficult process. Perpetual also considers that, because of the significant shortfall in returns to investors, disgruntled investors may choose to boycott an extraordinary resolution to approve the appointment of Corporate Trust. Such action may require meetings to be adjourned. Boycotts could continue at any adjourned meetings. That would cause considerable delays.

[10] If a resolution approving Corporate Trust is subject to such delay, Perpetual would either have to apply to the Court for the appointment of Corporate Trust as trustee or it would need to apply to the FMA to extend its licence beyond 27 March 2014. In these circumstances Perpetual has brought this application pre-emptively, so as to ensure that the trusteeships of the Companies are transferred before the expiry of its licence.

Procedural steps taken

[11] Perpetual and Corporate Trust filed originating applications seeking orders that Perpetual may retire, that Corporate Trust be appointed, that trust property be vested in Corporate Trust, and as to costs. It also filed interlocutory applications seeking:

- (a) leave to commence the proceedings in respect of each of the Companies by way of originating application;
- (b) directions as to the parties and conduct of the applications;

³ The trust deeds vary slightly. Some refer only to stockholders. Others refer to both stockholders and depositors. In all cases, however, an extraordinary resolution requires not less than 75 per cent of the votes.

- (c) a direction that the investor meetings under the trust deeds be dispensed with; and
- (d) appointment of an amicus curiae.

[12] By minutes dated 15 November 2013, in relation to all the Companies other than the St Laurence respondent companies, Williams J:

- (a) granted leave to commence the proceedings by originating application;
- (b) directed that the respondents to the proceedings were to be the companies in receivership and/or liquidation, as represented by their relevant receivers or liquidators;
- (c) directed that the investors need not be named as parties to these proceedings;
- (d) directed that there was to be public notice of the applications on two occasions in each of the New Zealand Herald, the Dominion Post, the Christchurch Press, and the Otago Daily Times; and
- (e) appointed Mr Chisnall to assist the Court as amicus curiae.

[13] The originating applications were scheduled to be heard on 25 November 2013. However on that day the applications were adjourned to 12 December 2013. That was because:

- (a) Counsel for LDC Finance Limited (in receivership and liquidation) (“LDC”) sought further time to consider the application.
- (b) The time between the public advertising referred to in [12](d) and the hearing on 25 November 2013 was quite short.

- (c) Perpetual and Corporate Trust had not yet, but intended to, file an application in respect of the St Laurence companies.

[14] After the 25 November 2013 hearing was adjourned, Perpetual and Corporate Trust duly filed its application in respect of the St Laurence companies. By a minute dated 26 November 2013 I made the same orders in respect of the St Laurence companies as had been made by Williams J in respect of the other companies. I also directed that consideration be given to website advertising of all the applications to seek to advise investors of the adjourned date and also to provide broader coverage of notice to investors than that provided by the public notice in the newspapers. By minute dated 29 November 2013 I directed that affidavits be filed by the Official Assignee (the liquidator of Boston Finance, Irongate Property, Finance and Leasing and the St Laurence companies) and the receivers of the Companies as to the conduct of the liquidations and receiverships and investigations undertaken, the implications on the receiverships and liquidations of the applications, and any other matters considered relevant.

[15] In accordance with my directions, affidavits were received from the Official Assignee and from the receivers. Further, in addition to the newspaper notices, Perpetual arranged for website notices to be placed on:

- (a) Perpetual's home page;
- (b) Corporate Trust's releases page;
- (c) on the receiver's page for each of the Companies.

[16] The hearing of the applications proceeded on 12 December 2013. No investors were present. Nor had the applicants received any contact from investors about the applications. Memoranda have since been filed confirming that receivers were also not contacted by investors about the applications.

Jurisdiction

[17] The Court has power to make an order appointing a new trustee under s 51 of the Trustee Act 1956. That section provides:

51 Power of Court to appoint new trustees

- (1) The Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee.
- (2) In particular and without prejudice to the generality of the foregoing provision, the Court may make an order appointing a new trustee in substitution for a trustee who—
 - (a) Has been held by the Court to have misconducted himself in the administration of the trust; or
 - (b) Is convicted ... of a crime involving dishonesty as defined by section 2 of the Crimes Act 1961; or
 - (c) Is a mentally disordered person within the meaning of the Mental Health (Compulsory Assessment and Treatment) Act 1992, or whose estate or any part thereof is subject to a property order made under the Protection of Personal and Property Rights Act 1988; or
 - (d) Is a bankrupt; or
 - (e) Is a corporation which has ceased to carry on business, or is in liquidation, or has been dissolved.
- (3) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.
- (4) Nothing in this section shall give power to appoint an executor or administrator.
- (5) Every trustee appointed by the Court shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

[18] The applicants submit that it is expedient to appoint a new trustee, and it is inexpedient, difficult, or impracticable to do so without the assistance of the Court.⁴

Should the jurisdiction be exercised?

[19] Perpetual submits that it is expedient that a new trustee is appointed for the Companies because:

- (a) Perpetual's licence to act as a corporate trustee is due to expire in March 2014. It does not wish to apply to vary or renew that licence to allow it to continue as trustee of the Companies when, for most of the Companies, the loan books have been almost completely realised and on-going action in the receiverships relate to on-going litigation, possible claims against certain entities and the realisation of the last remaining assets.
- (b) Perpetual has sold its corporate trustee business. For some time KVL has been managing the trusteeships of the Companies on behalf of Perpetual. Perpetual has not retained the expertise itself to provide on-going corporate trustee services, either now or in the future.
- (c) Mr von Lanthen has been actively involved in the management and administration of the trusteeships of the Companies since 2012 on behalf of KVL. The appointment of Corporate Trust will essentially maintain the existing day to day management of the trusteeships. Mr von Lanthen will continue to fulfil the same role in respect of the trusteeships of the Companies, but in his capacity as director of Corporate Trust, as opposed to director of KVL. The appointment of Corporate Trust will therefore provide consistency and continuity to the management of the trusteeships.

[20] Perpetual submits that it is inexpedient, difficult and impracticable to appoint a new trustee without the assistance of the Courts because:

⁴ The applicants also referred to the Court's inherent jurisdiction, but it is not necessary to consider this jurisdiction further in light of the statutory power.

- (a) The trust deeds between Perpetual and the Companies require that a new trustee be appointed by the particular company by way of an extraordinary resolution of the investors.
- (b) The number of investors that the Companies have range from 230 to 13,000. The investors are geographically widespread. Holding and coordinating investor meetings to approve the appointment of a new trustee is difficult and unjustified in circumstances where the proposed appointment will not change the management of the trusteeship or have a material impact on investors.
- (c) The investors of each of the Companies have lost vast sums of money in the collapse of the Companies. Disgruntled investors, or a group of them, could boycott any resolution, and there is no guarantee that the required resolution could be passed at any adjourned meeting.

[21] Perpetual's intention to apply to the Court for the appointment of Corporate Trust as the new trustee of the Companies has been discussed with the FMA, the receivers and liquidators, and counsel for LDC. None of these parties oppose the application. I have affidavits from the receivers and the Official Assignee confirming that they abide the Court's decision. Counsel for LDC confirmed at the hearing on 12 December 2013 that LDC did not oppose the application. No investor has come forward to oppose the application.

[22] The amicus has also liaised with the applicants' counsel, LDC's counsel, the Official Assignee and the FMA. As the amicus says, the impracticalities of the trust deed process for the appointment of Corporate Trust are obvious. Counsel for LDC has experience of the impracticalities in the context of matters arising in that receivership and liquidation. Legal action is being taken against a number of parties, including Perpetual. A number of meetings have been held and around 200 or more investors have attended these meetings. Counsel for LDC advises that these meetings have involved very considerable work and that, in the circumstances that have arisen, investors are unlikely to look favourably on anything Perpetual is doing.

[23] As the amicus also says, under the trust deeds Perpetual is entitled to retire by giving notice. The investors' resolution is about the replacement trustee, not Perpetual's retirement. The only link is that the retirement is subject to the investors' approval of the replacement trustee. Through declining to approve the new trustee, investors could delay Perpetual's retirement. The consequence of dispensing with investor meetings is, therefore, not that investors are denied an opportunity to approve Perpetual's retirement. Rather that they will not have a say on whether Corporate Trust is the appropriate replacement trustee.

[24] As to that, the amicus makes the following points. Corporate Trust is licensed. The FMA is therefore satisfied that it meets the requirements of the STSS Act. There is no reason not to rely on the regulatory regime which applies to such trustees. There is no other information before the Court to suggest that Corporate Trust is not a fit and proper trustee. Corporate Trust does provide continuity and there is nothing to suggest that there is any better option available to the investors. I accept these points.

[25] The question then becomes whether there is any prejudice to investors, creditors or others if Perpetual is permitted to resign. The affidavits from the receivers of the Companies and from the Official Assignee set out the realisations to date and the small distributions which have been able to be made to investors. The affidavits do not raise anything to indicate that a transfer of the trusteeships to Corporate Trust will give rise to any prejudice to investors, creditors or others. As mentioned the receivers and the Official Assignee confirm that they abide the Court's decision.

[26] Particular consideration has been given to whether the transfer of the trusteeship will impact on claims that might be made against Perpetual. LDC is pursuing litigation against Perpetual (and others). It has had the opportunity to consider whether the transfer of the trusteeship will have any adverse impact on that litigation. Having had that opportunity it is content to abide the Court's decision.

[27] Given the collapse of all these Companies, of which Perpetual was the trustee, and the significant shortfall in returns to investors, litigation by others cannot

be ruled out. Perpetual's resignation as trustee cannot alter any liability for acts or omissions at the time it was trustee. An issue that may be relevant to any such litigation is the scope and effect of Perpetual's right to indemnity from trust property. Whatever that scope and effect, Perpetual considers that its right to indemnity from trust property survives the transfer of the trusteeship. It proposes that, to the extent there is any uncertainty about this, the Court can order, as part of the consequential vesting orders to be made, that Perpetual's right to indemnity is neither extinguished nor is any new right created. The proposed order has been discussed with the amicus, who considers that it is in an appropriate form. I agree.

[28] If Perpetual's right of indemnity does not survive or for some other reason does not apply, then it would need to meet any damages awards from its own resources. Perpetual notes that any such awards would need to be applied in accordance with the priority set out in the trust deeds. It says that this may mean that there will be no difference in returns to investors. In any event, Perpetual has provided to the Court (and the applicants' counsel and the amicus), on a confidential basis, details of its insurance position.⁵ That satisfies me that investors are not prejudiced in this respect by the transfer of the trusteeships, and that it is unnecessary that the orders are subject to any condition concerning insurance.

[29] That leaves some final matters:

- (a) There will need to be consequential orders vesting any property held by Perpetual as trustee in Corporate Trust.
- (b) In Perpetual's FMA licence there is a condition requiring Perpetual to make decisions in respect of litigation by or in respect of its supervised interests only after consultation with the Official Assignee (or other liquidator as applicable), with litigation funding entered into on arms length commercial terms, and with notification to the FMA. Corporate Trust's appointment should be subject to a similar condition. The wording in the condition will be different only in that

⁵ I note that I have made an order that the second affidavit of Mr McFetridge dated 12 December 2013 is not to be read by any person, without the leave of the Court and notice to Perpetual.

it will relate to any “significant” litigation decisions, which is probably implicit in the existing Perpetual condition in any event.

- (c) Counsel advises that some of the Companies are not yet in liquidation. When the receivers retire, it is important to ensure that the administration of those companies does not return to the directors. It will be a condition of the orders that Corporate Trust will apply to the Court for the respondent companies currently just in receivership, if any, to be put into liquidation prior to the retirement of the receivers.
- (d) Perpetual seeks to discuss with the receivers whether the costs of this application are recoverable under the respective trust deeds. Unless it is plain that they are recoverable, I agree with the amicus that the costs of this application should not be met from the funds of the Companies when Perpetual seeks to retire of its own motion. I will therefore make the order as to costs that Perpetual proposes, but direct Perpetual and the receivers that the costs of this application are only to be met from the Companies’ funds if it is plain under the respective trust deeds that they are to be. If the receivers consider that is not so, that is the end of the matter and the applicants are to meet the costs.

[30] Accordingly, I am satisfied that is appropriate to make orders as follows:

- (a) Perpetual may, with immediate effect, retire as the trustee of the respondent companies.
- (b) Corporate Trust is appointed as the new trustee of the respondent companies.
- (c) All property (as defined in s 2 of the Companies Act 1993) held by Perpetual as trustee of the respondent companies shall, with immediate effect, be transferred to Corporate Trust subject to any rights to indemnity, lien, or such other rights to which Perpetual is legally entitled under the relevant trust deeds, equity, or statute

including, but not limited to, those rights granted under the Trustee Act 1956 and the Securities Act 1978.

- (d) Corporate Trust, as the new trustee of the respondent companies, will apply to the Court for the respondent companies currently just in receivership to be put into liquidation prior to the retirement of the receivers.
- (e) Any significant decisions taken by Corporate Trust in respect of litigation action by or in respect of any of the respondent companies can only be made after consultation with the liquidator and funding for such litigation actions must be entered into on arm's length commercial terms. The FMA must be notified in advance of any proposed litigation action and the proposed funding arrangements for this action.
- (f) The costs of the applicants and the costs of the amicus curiae shall be a matter of discussion between Perpetual and the respective receivers of the respondent companies in terms of what is recoverable under the respective trust deeds. Unless in the view of the receivers it is plain under the respective trust deeds that the costs are recoverable under them, Perpetual shall meet such costs.

Mallon J