IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV 2018-419-000261
[2020] NZHC 8

UNDER	the Property (Relationships) Act 1976 and the Family Proceedings Act s 182 and the Companies Act 1993
IN THE MATTER	of an application under Section 51 of the Trustee Act 1956
BETWEEN	DOROTHY ANN OLDFIELD Plaintiff
AND	KENNETH DAVID OLDFIELD First Defendant
	THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED as trustee of THE DAVID OLDFIELD FAMILY TRUST Second Defendant
	DEMOLITION TRADERS LIMITED Third Defendant

Hearing: 23-27 September 2019, 30 September 2019, 1 October 2019

Appearances: A Grant and C Bunce for Plaintiff
P Morgan QC and Z Mora for First Defendant
V Bruton QC and T Adamson for Second Defendant
J Savage for Third Defendant

Judgment: 13 January 2020

REASONS JUDGMENT OF DUFFY J

This judgment was delivered by me on 13 January 2020 at 12 noon pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

[1] The plaintiff and first defendant (Mrs and Mr Oldfield respectively) were married in 1971. Their marriage lasted 44 years, having been dissolved in 2017. This proceeding involves claims under the Property (Relationships) Act 1976 (PRA) for the division of relationship property and under s 182 of the Family Proceedings Act 1980 (FPA) for resettlement of the terms on which trust properties are held.

Background

[2] Mr and Mrs Oldfield have three adult children and five grandchildren. They started out in life as a young married couple with little in the way of assets. Together they built up a very successful family business in the form of Demolition Traders Limited (DTL).

[3] From as early as 1975 Mr and Mrs Oldfield chose to channel the rewards of their success into a family trust, with very little being owned by them personally. The bulk of the shares in DTL, the land on which DTL carries out its business, the family home and later the family bach were all held by a family trust. Over the years there were a series of these trusts with the most recent being the David Oldfield Family Trust (DOFT), which was settled by Mr and Mrs Oldfield on 30 November 1998. The terms of this trust were later varied by a deed of variation in 2005.[1] The assets held under this trust now have an approximate value of somewhere between $9 million and $10 million. The main beneficiaries are Mr and Mrs Oldfield and their descendants down to the third generation (the descendants). The DOFT ends in 2070.

[4] Until March 2019 the trustees of the DOFT were Mr and Mrs Oldfield and Peter John Stewart. By then the disharmony between Mr and Mrs Oldfield had reached a point where, albeit for separate reasons, each could not properly perform as a trustee and Mr Stewart wanted to retire as a trustee. Management of the trust was paralysed. Accordingly, on 19 March 2019 van Bohemen J made orders under the

[1] When the David Oldfield Family Trust was first settled on 30 November 1998 there were four trustees: Mr and Mrs Oldfield, Peter John Stewart and Michael John Jackson. A deed of variation of trust executed in 2005 records that Mr Jackson retired by deed of retirement on 15 October 2003.

Trustee Act 1956 removing the existing trustees and appointing the New Zealand Guardian Trust Company Limited (Guardian Trust) as sole trustee.[2]

The trial and subsequent developments

[5] At trial the parties were agreed that much of the relationship property could be divided by consent, although there remained some items on which Mr and Mrs Oldfield were unable to agree and on which the Court must, therefore, rule.

[6] Regarding the DOFT, the key issue for the Court to determine was the extent to which the terms of the present trust arrangement should be varied. The parties were agreed that this could be done by way of an interim judgment with other issues to be dealt with later. There were other issues including the need for the DOFT to purchase a home for Mrs Oldfield, the sale of the family bach at Raglan, which was a trust asset, and payment of the legal expenses that Mr and Mrs Oldfield had incurred since their separation.

[7] After the hearing there were new developments. These developments have altered the character of the DOFT's assets. The first is recorded in a minute I issued on 22 October 2019 when I made orders: (a) varying the terms of the DOFT deed to permit the Guardian Trust to provide security over all assets of the DOFT including the shares in DTL; and (b) directing the sale of the family bach at 106J Greenslade Road Raglan for the best price reasonably obtainable in the circumstances at its discretion and after consultation with Mr and Mrs Oldfield and Susan, Michael and John Oldfield.[3] The second was on 23 October 2019 when Guardian Trust successfully purchased a home for Mrs Oldfield, which cost the trust $1.315 million. The third was when the Guardian Trust accepted an offer to sell the family bach at Raglan for $2.150 million. Settlement of the purchase provided the DOFT with funds that could be applied to pay Mr and Mrs Oldfield's legal costs. The fourth was when I delivered a results judgment in which I ordered that the Guardian Trust pay those legal costs.[4] In that judgment I also dismissed Mr Oldfield's argument for two mirror

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[2] *Oldfield v Oldfield* [2019] NZHC 492. As a trustee corporation the Guardian Trust could be appointed as sole trustee to replace the three former trustees.

[3] *Oldfield v Oldfield* HC Hamilton CIV 2018-419-261, 22 October 2019.

[4] *Oldfield v Oldfield* [2019] NZHC 3317 at [3]–[4].

trusts and found that the appropriate form of trust was for the DOFT to continue with the present trustee.[5] The Guardian Trust was confirmed as trustee of the DOFT. Owing to reorganisation within Guardian Trust its trustee responsibilities are to be transferred to Perpetual Trust Limited, but this will have no practical impact on the management of the DOFT. For the purpose of this judgment and because I have no formal notice of a court order effecting the change to Perpetual Trust limited, I shall refer to the trustee throughout in this judgment as being the Guardian Trust. My reasons now follow.

Section 182 claims

[8] The parties accept that the DOFT qualifies as a post nuptial family settlement. I agree; the necessary connections between the marriage, the settlement and the main beneficiaries are all present.[6] The parties also accept that the DOFT requires review given the change of circumstances brought about by the end of the Oldfield marriage.

[9] Mr and Mrs Oldfield are at odds over whether the DOFT should essentially remain in its present configuration as one family trust with the Guardian Trust as the sole trustee, which is what Mrs Oldfield wants, or whether the DOFT should be divided into two mirror trusts with one for the benefit of Mrs Oldfield and the descendants and the other for the benefit of Mr Oldfield and the descendants. Before the respective proposals can be assessed some understanding of the present legal structure of the DOFT and how it worked in the past is required.

The DOFT and how it worked

[10] During the Oldfield marriage the family appears to have lived a relatively careful and thrifty but also financially comfortable lifestyle, supported by the DOFT.

[11] The ongoing source of funds for the DOFT came from the profits generated by DTL. The shares of this company were structured in a way that gave Mr and Mrs Oldfield control of the company with them owning only a few of the shares, thus reducing the risk of any personal financial exposure their actions might have in relation

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5 At [8].
6 See generally: *Clayton v Clayton* [2016] NZSC 30, [2016] 1 NZLR 590.

to the shares. There were A and B shares. The DOFT owned 92 per cent of the A shares with the balance split so that Mr Oldfield owned 4,274 A shares (being 5.99 per cent of the issued share capital) and Mrs Oldfield owned 1,578 A shares (being 2 per cent of the issued share capital). The A shares had no voting rights, but they received the income from the company. There were 10 B shares of which Mr Oldfield owned six and Mrs Oldfield owned four. Those shares held all the voting rights, but they receive no income from the company.[7] This structure allowed Mr and Mrs Oldfield control of the company while the profits went to the DOFT. The land on which DTL operates its business is owned by the DOFT, which provides security of tenure and means that rent DTL pays goes to the DOFT.

[12] DTL generates good profits; it is the life blood of the family's wealth and Mr and Mrs Oldfield have always realised this. The overall effect of the terms of the DOFT reflects the intention to preserve the value of the shareholding in DTL, to focus the DOFT's financial investment in DTL and to preserve and enhance the trust property for the long-term benefit of Mr and Mrs Oldfield their children and their descendants. The DOFT deed aligns with the expressed wishes of Mr and Mrs Oldfield.

[13] They each prepared a memorandum of wishes which makes it clear that they as settlors wanted the DOFT to be managed "for the long haul according to the intent of the trust deed for the needs of its present and future beneficiaries". Each was to be comfortably provided for, preferably from the income of the DOFT with, if possible, capital being retained and managed to provide for the needs of future generations of beneficiaries. They each expressed the clear wish that the spouses of their children not become discretionary beneficiaries, and that any advance of funds to those persons to assist them would be by way of loans from the trust rather than a distribution of trust money.[8]

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7 The A and B shares held by Mr and Mrs Oldfield are now the subject of a consent order for their sale: see *Oldfield v Oldfield* Hamilton HC CIV-2018-419-261, 24 September 2019.

8 See generally: the Memorandum of Wishes that each has executed.

[14] The memoranda of wishes that Mr Oldfield executed in relation to the DOFT specifically refers to his wish for the DOFT to focus its investment energy on DTL. He states that the trustees should not diversify into other ventures to spread risk but should instead seek to ensure competent management of DTL "which presently offers a predictable, reliable and excellent income".

[15] The same concern is expressed in the deed of variation which at cl 1.1B expresses the settlors' firm belief that the interests of the beneficiaries will be best served by the DOFT keeping capital assets intact. The deed of variation also varied cl 14.2 of the trust deed to make plain that trustees were under no obligation to diversify investments or to take account of investment obligations imposed by ss 13B and 13C of the Trustee Act.[9] Also, the trustees were enjoined not to invest in shares listed on stock exchanges, but instead to ensure that DTL was competently and profitably managed and operated in the expectation it would continue to provide a reliable and excellent income return. The terms of the DOFT deed express similar intentions and purposes.[10] Again, the wish to protect the integrity of the trust capital is expressed.

[16] The DOFT deed provides for two classes of beneficiaries, capital and discretionary beneficiaries. The capital beneficiaries are the children of Mr and Mrs Oldfield (being Susan, Michael and John Oldfield). The discretionary beneficiaries are Mr and Mrs Oldfield, the capital beneficiaries, the children or grandchildren of the capital beneficiaries (subject to them meeting stipulated requirements), the trustees of any trust of the discretionary beneficiaries and any charitable trust, purpose or institution to advance education. The surviving capital beneficiaries are the persons to whom the trust fund will be ultimately distributed, or any children of those persons in the event there are no surviving capital beneficiaries. Such children will take the share of the trust that would have gone to their respective parent.

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[9] This effect was provided for more generally in the original cl 14.2. The deed of variation reinforced this effect. However, the DOFT deed at cl 17 excludes cl 14 and other identified clauses from the powers to alter, vary, add or revoke. The present status of the variation to cl 14.2 requires attention.

[10] See cl 14.2 in the original DOFT deed.

[17] The trustees have the power to appoint additional discretionary beneficiaries.[11] Save in limited circumstances, the spouses of any child or grandchild of the settlors are excluded from this power.[12] The trustees can also remove a discretionary beneficiary.[13]

[18] Advancements and benefits are defined in cl 1.5 to include distributions, which in the trustees' opinion foster the development of self-help, self-worth, respect, modesty and industry in any beneficiary, and provision for health care and education. Maintenance is excluded except in circumstances which do not detract from the development of those values.[14]

[19] The trustees have a broad discretionary power to make certain payments to beneficiaries being: (a) for the maintenance of Mr and Mrs Oldfield; or (b) for the education and advancement of the discretionary beneficiaries, again subject to specified conditions.[15] Payments made under this power can be made in whatever shares or proportions the trustees think fit and regardless of whether there is any fund set aside for the purpose.

[20] The trustees have a discretionary power to vest the whole or a portion of the capital of the trust fund in Mr and Mrs Oldfield and in the capital beneficiaries, subject to certain conditions.[16] The trustees can also bring forward the date of distribution.[17] However there are specific restrictions on distributions when the only trustees are either beneficiaries or relatives of either settlor.[18]

[21] The trustees have power to resettle the whole or any part of the trust fund upon a trust in which any of the beneficiaries are interested.[19]

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11 See cl 3.1.
12 See cl 3.1.
13 See cl 3.3.
14 See cl 1.5.
15 See cl 4.2
16 See cl 4.4.
17 See cl 4.4(d).
18 See cl 8.
19 See cl 6.

[22] The DOFT deed provides for at least three trustees and the appointment of advisory trustees.[20] Before the Court appointed the Guardian Trust, there were three trustees including Mr and Mrs Oldfield; there were no advisory trustees.

[23] The power of appointing new trustees is vested in the settlors and the persons they have nominated in their wills.[21] Failing there being such persons, s 43 of the Trustee Act 1956 takes effect.[22] The settlors also have power to remove trustees.[23] Clause 9.3 of the trust deed sets out the skills and qualities required of the trustees and advisory trustees.

[24] The DOFT deed provides that trustees can pass resolutions by a majority so long as both Mr and Mrs Oldfield are represented in the majority.[24] After the death of one or both, the trustees cannot make decisions or exercise powers in respect of "major transactions" without first taking advice from the advisory trustees.[25] Such advice is not binding on the trustees but the substance of it must be recorded in the trustees' minute book.

[25] The trustees have broad general powers. Subject to the obligation to take advice regarding major transactions the trustees are given the "fullest possible powers in relation to the trust fund and the beneficiaries" and the trustees may do "everything they think desirable notwithstanding that it is something which they would not normally have power to do in the absence of an express power or an order of the Court".[26] Further trustees have discretionary power to do anything pertaining to the trust fund as if they owned it absolutely.[27] The trustees are directed, without being obliged, to have primary regard to the needs of the discretionary beneficiaries who are members of the settlors' family and persons for whom the trust fund was principally established.[28]

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20 See cl 9.
21 See cl 9.2.
22 See cl 9.2
23 See cl 9.4.
24 See cl 10.1(a)
25 See cl 10.1(b). Clause 1.1(g) defines a major transaction as a purchase of a capital item or the distribution to a beneficiary to the value of $100,000 more or less adjusted for inflation from 1998.
26 See cl 14.1(a)
27 See cl 14.1(b)
28 See cl 14.1(c)

[26] The DOFT deed provided for the appointment of advisory trustees[29] and specified the skills and personal qualities for this role.[30] The purpose of the advisory trustees was to provide good counsel to the trustees. Suitable persons could include the Oldfield children or "close caring family friends".[31] The advisory trustees had a specific role once one or both Mr and Mrs Oldfield died. At that point the trustees were not to make decisions or exercise powers in respect of a "major transaction" without first taking advice from the advisory trustees, although the trustees were not bound to follow this advice.[32]

[27] The date of distribution is 31 March 2070 or such earlier date as the trustees in their discretion may appoint.[33]

[28] Mr and Mrs Oldfield avoided debt. Their cautionary approach is illustrated by the fact that at the date of hearing the assets of the trust were unencumbered. The deed of variation reinforced this approach. It imposed restrictions on borrowing against trust assets.[34] In essence the power to borrow was limited to the non-income generating assets and the level of borrowing was set at no more than 25 per cent of the security value of those assets. Also, the purpose of the borrowing must be to enhance the capital base of the trust assets. Similar restrictions are imposed on the trustees' powers to guarantee any obligations.[35]

[29] However, following the substantive hearing I directed a change to the DOFT which permitted Guardian Trust to provide security for borrowings of up to $300,000 over the shares in DTL despite them being an income earning asset of the DOFT.[36] This was done to enable the Guardian Trust to bid at auction for a residential property to provide a home for Mrs Oldfield. I did so because I was satisfied that: (a) Guardian Trust had found a suitable property for Mrs Oldfield; (b) since the separation in 2015 Mrs Oldfield had been living with her daughter Susan Oldfield and in March 2019 van

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29 See cl 9.4(f).
30 See cl 9.3.
31 See cl 11.
32 See cl 10.1(b); a "major transaction" is defined in cl 1.1(g) as a distribution to a beneficiary or purchase of a capital item to a value of $100,000 or more adjusted for inflation from 1998.
33 See cl 1.1(e).
34 See cl 1.6.
35 See cl 1.7.
36 See *Oldfield v Oldfield* HC Hamilton CIV-2018-419-261, October 2019.

Bohemen J had directed that, subject to the availability of trust resources, the Guardian Trust was to make urgent provision to obtain a house for her, furnished to an appropriate standard, of approximately the same value as 44 Lakeview Crescent, Hamilton, which was valued at approximately $1.3 million;[37] (c) earlier bids, in compliance with this direction, to purchase a property at auction had been out bid with due diligence costs incurred by Guardian Trust being wasted; (d) there was a risk that the auction price might go beyond the cash funds available to Guardian Trust; (e) seemingly no bank would lend funds to the Guardian Trust without a security over trust assets that included the shares in DTL; (f) the property at Raglan (the family bach) was soon to be auctioned and its sale would easily allow for the permitted borrowings to be repaid; and (g) the permitted borrowings were for a one-off purpose and they were required to be repaid once the Raglan property sold.

[30] As is set out at [7] herein the anticipated property acquisition and disposition came to pass. The power to borrow against the incoming earning assets of the DOFT is now spent. Accordingly, the restrictions on borrowing imposed by the DOFT deed remain in effect.

Current circumstances

[31] Mr Oldfield is now 81 years old and Mrs Oldfield is 73 years old. Had they remained married they could have expected a financially secure and comfortable retirement. They could expect to look to the DOFT for their maintenance. The DOFT would have met the outgoings on their home and family bach, covered their household and personal everyday expenses, such as health insurance, and provided them with a regular income.

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[37] *Oldfield v Oldfield* [2019] NZHC 492 at [68].

[32] As trustees Mr and Mrs Oldfield could have made additional and larger payments to themselves. Whether they chose to view ad hoc payments of cash sums to themselves as maintenance or distributions there was ample scope within the powers available to them as trustees to provide funds for overseas travel, domestic travel, holiday expenses and for other recreational pastimes. There were also sufficient funds available to allow them to make such payments to themselves without jeopardising the strength of the DOFT's capital base. Now, all that has changed.

[33] Such change has come about through: (a) the marriage coming to an end; (b) the removal of Mr and Mrs Oldfield as trustees, which leaves each of them now dependent on the discretionary decisions of the Guardian Trust; and (c) the DOFT has reduced liquid funds owing to payment of Mr and Mrs Oldfield's legal costs.

[34] The purchase of a home for Mrs Oldfield and the sale of the Raglan bach has altered the mix of the trust assets. Previously the DOFT had cash funds of approximately $1.3 million which have now been expended on the purchase of a house for Mrs Oldfield. In return the DOFT will have acquired a new residential property as a trust asset. The DOFT has paid out roughly total $1 million for Mr and Mrs Oldfield's legal costs. The basis on which the legal costs will be covered for each individual and whether there will be reimbursement of paid costs or simply payment of outstanding costs is to be determined later. There remains a cash sum of approximately $1 million. Mr and Mrs Oldfield may expect some distribution to themselves from this fund.

[35] Mr and Mrs Oldfield and their children generally accept that Mr and Mrs Oldfield should each receive a cash sum to give them some financial independence and to allow them to cover more than their day-to-day costs. However, while the DOFT was looking to purchase a home for Mrs Oldfield and legal costs were mounting no-one was able to say what those sums might be. Since the recent changes to the trust property there is now greater certainty as to the trust asset base and its value.

[36] Mr Oldfield lives in the former family home. The DOFT pays for the outgoings. He receives an allowance of $8,000 per month for his maintenance. If he wants to go on holiday or acquire something he must do so by saving the funds from his monthly allowance. For the time Mrs Oldfield was living with her daughter she has received a monthly allowance of $9,000, with the additional $1,000 being paid to cover rent paid to Susan. This additional $1,000 payment is likely to stop once Mrs Oldfield moves into her new home. She is similarly obliged to make savings from her monthly allowance if she wants to go on holiday or acquire something.

[37] Susan Oldfield is presently unable to work and so she receives a monthly allowance of $3,000. None of the other Oldfield children or grandchildren receive payments from the DOFT. Michael Oldfield has separated from his wife and there is general acceptance among most family members that his children need financial help.

A single trust

[38] Mrs Oldfield argues for a single trust that essentially follows the form of the DOFT, with the Guardian Trust as sole trustee. She recognises that there are certain aspects of the DOFT which may require fine tuning.[38] Mr Oldfield opposes this.

[39] A single trust leaves the present DOFT as it is but for the change of trustee. However, such change still had a substantive impact on how the DOFT works for the beneficiaries, particularly for Mr and Mrs Oldfield. They are now reliant on the approval of the Guardian Trust before they can seek anything from the DOFT. Mrs Oldfield has been interacting with the Guardian Trust since it was appointed as trustee. The experience has been positive for her. Accordingly, she is content with the present structure. She is also very opposed to Mr Oldfield's proposal for separate mirror trusts.

[40] The capital beneficiaries support Mrs Oldfield's case for a single trust. The Guardian trust, which has assumed a role in the proceeding of protecting the interests of beneficiaries other than Mr and Mrs Oldfield also supports a single trust with it as

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[38] For example, the DOFT at cl 17 precludes any variation of cl 14. However, the deed of variation has purported to vary cl 14. This requires attention. There are other similar types of contradictions in the DOFT which the parties recognise require attention.

sole trustee. The grandchildren were not separately represented however the Guardian Trust took their interests into account as did their parents. There is no suggestion of any conflict of interest between the children of Mr and Mrs Oldfield and their respective children.

[41] Mrs Oldfield and the other beneficiaries oppose the two trusts proposal because they see it as leading to delay, increased costs and the possibility of dispute between the trustees of the two trusts over decision making such as appointment of directors of DTL and the making of distributions. They consider there is no need for two separate independent trustees as one would be sufficient for the decision making referred to above. In their view the DOFT was set up to protect the interests of all the beneficiaries and not just for the benefit of Mr and Mrs Oldfield. They are concerned that confusion might occur because the existing terms of the DOFT deed when read together with the deed of variation are at times contradictory. Finally, they contend the power of appointment of trustees is a fiduciary one and Mr Oldfield has in the recent shown himself to be incapable of properly exercising a fiduciary power.

Two mirror trusts

[42] Mr Oldfield proposes separate mirror trusts with the present trust assets being jointly held by each trust and that a cash sum be vested in him and Mrs Oldfield.

[43] The proposal is complicated. It involves the creation of separate mirror trusts each with its own settlor and trustee/s, with each group of trustees holding a legal interest in half the present assets of the DOFT. Mr Oldfield has sensibly realised that the assets of the DOFT do not readily lend themselves to separate division with some going to his new trust and others to Mrs Oldfield's new trust.

[44] Mr Oldfield's proposal was that the two separate mirror trusts would adhere as closely as possible to the DOFT deed. Mr Oldfield would be the settlor of one trust and its primary beneficiary and Mrs Oldfield would be the settlor of the other trust and its primary beneficiary. The two separate trusts would each have a sole independent trustee appointed and it must be either a trustee company established by a reputable law firm or a trustee corporation. Tompkins Wake had agreed to establish a trustee company to act as a sole independent trustee of the trust settled by Mr Oldfield.

Initially, Mr Oldfield wanted to be an advisory trustee of his mirror trust however this idea was abandoned during the substantive hearing. He was content for the mirror trust for Mrs Oldfield to reflect the present DOFT and for the Guardian Trust to be its trustee.

[45] The DOFT assets would be divided equally between the two separate trusts. The proposal has been overtaken by the purchase of a home for Mrs Oldfield, which is of similar value to that of Mr Oldfield. I assume therefore that under the two-trust proposal the homes occupied by both Mr and Mrs Oldfield would each be jointly owned by the two separate trusts.

[46] Mr and Mrs Oldfield would each be given an indefeasibly vested interest in each respective trust of $1 million each. Mr and Mrs Oldfield would have their outstanding debts paid with any difference in these amounts being equalised by distribution from the DOFT. Mr and Mrs Oldfield's children who are beneficiaries of the DOFT to have their $220,000 loans to the DOFT cleared by distribution from that trust.

[47] In respect of the B shares in DTL Mr Oldfield proposed that these be sold and the two separate trusts purchase them in equal amounts. The proceeds of the sale of the B-shares (agreed to be $202,504)[39] to be divided equally between Mr and Mrs Oldfield.

[48] Mr Oldfield contends that this approach will ensure a clean break solution between him and Mrs Oldfield, because the B-shares, which hold the voting rights in DTL, will then be in the hands of the sole independent trustees of each mirror trust, thereby ensuring that DTL will continue to be managed effectively into the future despite any Oldfield family discord. He accepts that the assets of the DOFT are not to be treated as if they were relationship property but he argues that relevant considerations for the Court to take into account when exercising its discretion under s 182 are: (a) Mr and Mrs Oldfield established the DOFT together; (b) only Mr and Mrs Oldfield have contributed to the capital of the DOFT; (c) they have been married for 44 years and all the assets of the DOFT were accumulated by them during their

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[39] See *Oldfield v Oldfield* HC Hamilton CIV-2018-419-261, 24 September 2019.

marriage; (d) the DOFT deed was carefully crafted to allow them to control the assets and activities of the DOFT in a way that permitted them to treat themselves as primary beneficiaries and this would have continued had they remained together.

[49] Mr Oldfield contends that his proposal achieves the following outcomes:

(a) The integrity of the original trust structure will be maintained as much as possible, the original intention and expectations of the DOFT held by Mr Oldfield and Mrs Oldfield, the settlors and the primary beneficiaries will be maintained as far as possible.

(b) The Oldfields' expectations of the DOFT following the dissolution of their marriage will be achieved.

(c) The Oldfields' children will, as far as possible, not be detrimentally affected by the marriage breakdown and will in fact be financially improved with the clearing of their respective $220,000 loans.

(d) The interests of all the discretionary beneficiaries under the DOFT will be maintained.

(e) The consequences of the failure of the continuation of Mr and Mrs Oldfield's marriage, which is the premise on which the DOFT was established, will be remedied.

Analysis

[50] There is no dispute as to the applicable legal principles or the essential facts. The parties accept that their case essentially hinges on how those principles are applied to the facts.

[51] The legal principles are well settled. As stated in *Clayton v Clayton*:[40]

> … [T]he purpose of the exercise of the discretion is to remedy the consequences of the failure of the premise of a continuing marriage. The

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[40] *Clayton v Clayton*, above n 6, at [53].

> comparison is undertaken not at a fixed point but is a general comparison between the position under the settlement had the marriage continued and the position that pertains after the dissolution. This is not backward looking to the time of settlement. It is forward looking, comparing the position under the settlement assuming a continuing marriage against the current position under a dissolved marriage.
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> (citations omitted)

[52] Because the comparison is between the position had the marriage continued with the position after dissolution the analysis will be fact specific with each case requiring individual consideration. Factors for consideration will include: (a) how trustees are likely to exercise their powers in the changed circumstances; (b) who established the trust and the source and character of the trust assets; (c) interests of children or other beneficiaries; (d) the suitability of the particular trust structure in light of the changed circumstances; and (e) the length of the marriage.[41]

[53] The single trust proposal, which sees a continuation of the DOFT albeit with any contradictory aspects tidied up and with the Guardian Trust as sole trustee, causes the least degree of change to the legal structure of the DOFT.

[54] The breakdown in the relationship of Mr and Mrs Oldfield inevitably led to their removal as trustees, which necessarily restrains their expectations of what they might now receive from the DOFT. However, such restraint may be more apparent than real. The management and growth of the DOFT while Mr and Mrs Oldfield were trustees shows that until their personal difficulties they have always acted in a manner that put the growth and enhancement of the DOFT and the beneficiaries' interests before their own personal interests. Throughout the 44 years of their marriage they chose to hold very little property in their own names preferring instead to see all property of value vested in what were a series of nuptial trusts that ended with the DOFT. There is nothing to suggest they would have adopted a different approach later in their lives had they remained together and been able to continue as trustees. Accordingly, having to engage with the Guardian Trust should not expose them to an approach that is markedly different from their own approach as trustees. Moreover, given that each is now retired they are both at a stage in their lives when passing control to other trustees would have been inevitable in any event. Had they remained

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41 At [58]–[59].

together it is likely that by now they would be in the process of retiring and appointing new trustees. Accordingly, I consider the change they each now face through no longer being trustees and having instead to deal with another trustee is something that would always have happened. In this regard their circumstances have not changed so much.

[55] Further in my view it is not so much the presence of a new trustee that has led to the change Mr and Mrs Oldfield now face as a lack of cash funds to cover all that they might otherwise have wished for. While they were married they lived in the one household, before their dispute there was no debt in the form of roughly $1 million in legal fees and there was no need to purchase an additional residence, which left the DOFT with a cash fund of $1.3 million, that would have been partly available to cover their needs. The present circumstances, which are more financially strained than before the separation, albeit somewhat improved by the purchase of a house for Mrs Oldfield and the sale of the family bach, are an inevitability that will make the lives of Mr and Mrs Oldfield less financially comfortable whether there is a single trust or two mirror trusts.

[56] I consider the adoption of separate mirror trusts would be unwieldly and unnecessarily expensive. From the perspective of all the beneficiaries there is no purpose in having separate mirror trusts each owning a share of the present trust assts. I can understand that such division would provide Mr Oldfield with more semblance of independence and a cleaner break from Mrs Oldfield than he currently enjoys under the DOFT. However, I consider this to be insufficient reason for adopting his proposal.

[57] Mr Oldfield has sought to counter the concerns raised by Mrs Oldfield and the other beneficiaries, but I do not find his arguments persuasive. Insofar as the interests of the beneficiaries in both trusts are aligned it can be expected that the trustee of each trust will act similarly to the other. Thus duplicating each other's efforts at additional expense. On the other hand, not every decision calls for a particular outcome. Where there is room for different views to be reasonably held there is potential for each trust's trustee to hold a different view, which at best might lead to delay and at worst to dispute. Insofar as the interests of the beneficiaries of one trust do not align with the beneficiaries of the other trust there is the potential for dispute and even deadlock. This will also lead to unnecessary expense. Mr Oldfield has proposed a dispute

resolution process which includes arbitration. However, this will also be expensive and time consuming.

[58] Another factor against two mirror trusts is that the only real basis for their existence seems to be to provide a clean break between Mr and Mrs Oldfield. However, that is a principle derived from the PRA, it is not part of the s 182 world view. Indeed, it is recognised in *Ward v Ward* that the "fundamental starting point is that under s 182 there is no entitlement to a 50/50 or any other fractional division of the trust property".[42] Moreover, once either Mr or Mrs Oldfield dies there would be little sense in having two mirror trusts. Given both are nearing the end of their lives there is little point in reconfiguring the DOFT into two mirror trusts when any perceived need for this arrangement will be of short duration in comparison to the length of the proposed trusts, which are likely to last for as long as the DOFT. Before their marriage dissolved they had wished for the DOFT to be managed "for the long haul according to the intent of the trust deed for the needs of its present and future beneficiaries". There is no sensible reason for this wish to be abandoned now at this stage in their lives. It is more likely to be achieved with a single trust than with two mirror trusts. Further the discretionary beneficiaries have their own needs, which have not been addressed while Mr and Mrs Oldfield have been in dispute. Their interests cannot be ignored.

[59] By the time the hearing was nearing its close, in the final address for Mr Oldfield the argument was advanced that two heads are better than one, therefore two trusts each with its own trustee will result in better decision making than a single trustee of a single trust. I have already said that I am not persuaded by that argument. Particularly when the sole trustee is a trustee corporation like Guardian Trust that is well experienced and has ample support to carry out its trustee role.

[60] Mr Oldfield has also placed reliance on the Supreme Court decision of *Ward*. Whilst the Supreme Court ultimately upheld the usage of mirror trusts in *Ward*, the circumstances surrounding the DOFT are quite different. In *Ward*, the parties had entered into a post-nuptial settlement in the form of a trust primarily for the benefit of

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[42] *Ward v Ward* [2009] NZSC 125, [2010] 2 NZLR 31 at [20].

them and their children. The main asset of the trust was shares in a company which owned the family farm. The farm was valued at approximately $2 million, but was not particularly profitable. However, it paid a management fee to Mr Ward, who farmed it. The parties separated three years later, and their marriage was dissolved a further two years later. Mrs Ward made an application under s 182, successfully arguing in the Family Court that mirror trusts were an appropriate outcome. The case made its way to the Supreme Court, which ultimately considered that mirror trusts were appropriate. However, the essential difference between the trust in *Ward* and the DOFT is that the DOFT owns assets which can adequately provide for the beneficiaries. Mrs Ward was in a position where, through the payment of a management fee to Mr Ward to operate the farm, the trust assets were effectively being used for only his benefit.[43] This may have been appropriate during the course of their marriage, but was obviously relevant in considering the circumstances of Mrs Ward post separation. This important factor is absent from the circumstances of the parties, who have both been receiving payments from the DOFT, and will continue to do so. Also here, unlike in *Ward*, the Oldfield children are adults and not reliant on their parents as was the case in *Ward*. Whereas the interests of dependent children may be seen to align with those of their parents that is not always so in the case of adult children. Here the trust structure needs to operate in a way that discretely benefits all beneficiaries. A single trust will achieve this outcome better than two mirror trusts.

[61] Accordingly, I am satisfied the mirror trust proposal should be rejected and the parties continue with a single trust in the form of the DOFT. There will, however, need to be some alteration to the DOFT deed to remove the present contradictions and any other matters of concern that were identified during the hearing. Leave is reserved to the parties to address these matters at a later date.

[62] In addition, I note that the DOFT makes express provision for the appointment of an advisory trustee. Also, it provides that once one or both Mr and Mrs Oldfield have died the trustees should consult with advisory trustees on major transactions, which suggests an expectation that once one or both had ceased to be available the remaining trustees would benefit from input from advisory trustees. Thus, the

[43] At [41], [61].

appointment of an advisory trustee is consistent with an expectation contained in the trust deed.

[63] I consider there is merit in appointing an advisory trustee. It will go some way to alleviate Mr Oldfield's concerns about the Guardian Trust being the sole decision-maker. There is less potential for conflict with an advisory trustee because he or she can only proffer advice and the trustee is not obliged to follow this advice. Accordingly, it provides the second "head" that Mr Oldfield favours without the drawbacks. Mrs Oldfield does not oppose the idea of an advisory trustee. The Guardian Trust supports the idea. In principle, therefore, I consider that an advisory trustee should be appointed.

[64] The process for the appointment of an advisory trustee is set out at cl 11 of the DOFT, however, that calls in aid the same power as is provided to appoint trustees, which lies under the DOFT deed with Mr and Mrs Oldfield as settlors. Their ability to appoint trustees has been overtaken by the order van Bohemen J made appointing the Guardian Trust as trustee. I consider it is appropriate for the Court to also appoint the advisory trustee/s in the exercise of its discretion under s 182 of the FPA. However, before doing so I consider the parties should have the opportunity to be heard on how the appointment process might be achieved and who might be appointed to this role. Leave is reserved to the parties to address this issue.

[65] There is also the issue regarding whether the Court should order the payment of a lump sum to Mr and Mrs Oldfield. This is something that Mr Oldfield sought. The terms of the DOFT would permit the Guardian Trust to authorise lump sum payments to each of them. On the other hand, such payment is something the Court can also do. There is strength in the submission made on behalf of Mr Oldfield that at his stage in life he should not have to save from the $8,000 he receives monthly to pay for holidays and other matters of interest to him. The same applies to Mrs Oldfield. Had they each remained as trustees they may well have decided once the time for retirement from this role approached to make a large payment to themselves to afford them some independence from the DOFT.

[66] Whether the Court should order a lump sum payment as part of the s 182 exercise and if so how much should the payment be are matters that can be addressed later. Whilst the issue was addressed at the hearing there have been changes since then that must be considered before a decision can be made. The first step is to ascertain what funds are available. The recent acquisition and disposition of trust assets may bring some certainty here. Also, there may need to be an adjustment and redistribution as between Mr and Mrs Oldfield because of the DOFT paying their legal costs. Once their circumstances in relation to the various financial benefits they have received from the DOFT is ascertained everyone will then be in the position to ascertain what funds the DOFT has available and what portion of those funds may be available for a lump sum payment to Mr and Mrs Oldfield. Leave is reserved to the parties to return to Court on this issue.

[67] The appointment of an advisory trustee should be addressed promptly as there is a need to find replacement directors for DTL. The present directors each want to retire. The A and B shares Mr and Mrs Oldfield each own are to be sold and the DOFT has first right to acquire the shares, which it is expected to do. The purchase price is agreed and it is contemplated that DOFT can make the payment through adjustment of the current accounts of Mr and Mrs Oldfield. The details of how this is achieved are outside the scope of this interim judgment.

[68] Once the Guardian Trust acquires the DTL shares, this will be the time for considering the appointment of new directors. This is a decision that is best done by Guardian Trust having input from an advisory trustee. Accordingly, I consider the appointment of an advisory trustee is the next issue that should occupy the minds of the parties.

[69] The parties should give some thought to the steps to be taken to address the appointment of an advisory trustee. There is to be a telephone conference at 9.30 am in the week commencing 10 February 2020 to determine the procedure to be followed.

[70] At the telephone conference the parties should also expressly identify what of the remaining relationship property still requires orders of the Court. If the parties need further time to address this topic because of the need to obtain expert advice on

whether their property division is better managed by agreement than by Court order they will be given that time.

[71] If the parties cannot resolve the questions of costs for the hearing between themselves, they have leave to file memoranda on costs.

Duffy J

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