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

**I TE KŌTI MATUA O AOTEAROA**
**TĀMAKI MAKAURAU ROHE**

**CIV-2019-404-2019**
**[2019] NZHC 2548**

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| IN THE MATTER OF | The Trustee Act 1956 and the Administration Act 1969 |
| AND | |
| IN THE MATTER OF | an application by THE NEW ZEALAND GUARDIAN TRUST COMPANY LIMITED |

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| Hearing: | On the papers |
| Appearances: | V Bruton QC, N L Walker and N J Fenton for Applicant<br>A S Butler (counsel appointed to assist the Court) |
| Judgment: | 8 October 2019 |

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**JUDGMENT OF LANG J**
**[on application for substitution of trustees and administrators]**

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*This judgment was delivered by me on 8 October 2019 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date……*

[1] The New Zealand Guardian Trust Company Limited (Guardian) is a statutory trustee company constituted by the New Zealand Guardian Trust Company Act 1982 and its predecessors. Perpetual Trust Limited (Perpetual) is also a statutory trustee company currently constituted under the AMP Perpetual Trustee Company Act 1988. Both companies offer a range of services to private and corporate clients as trustees and administrators of both wills and trusts.

[2] Within the trustee services industry in which both companies operate there is a recognised distinction between services provided to private clients and those provided to corporate clients. As matters currently stand, Guardian provides services to both corporate and private clients. Perpetual by contrast only provides services to private clients.

[3] Perpetual and Guardian are effectively owned by a parent company called Complectus Limited (Complectus). Complectus acquired both Guardian and Perpetual in 2014. In providing services to private clients, both companies currently operate under the name "Perpetual Guardian".

[4] Perpetual and Guardian are in the process of rationalising the services they provide to private clients. This will involve Perpetual assuming responsibility for all trusteeships and other fiduciary responsibilities presently held by Guardian on behalf of private clients. Perpetual and Guardian consider this proposal will operate to their own advantage and will also provide benefits to existing clients.

[5] Guardian currently acts as trustee for 1,303 private trust clients. In addition, it acts as an executor and/or administrator of 887 estates. One method by which Perpetual could replace Guardian under these appointments would be for Guardian to resign its position under every appointment. Perpetual could then be appointed to replace it. This would obviously be an extremely cumbersome and time-consuming exercise. Guardian therefore seeks to take a shorter and much less complicated route. It seeks orders under s 51 of the Trustee Act 1956 and s 21 of the Administration Act 1969 substituting Perpetual for Guardian in relation to each of the appointments it currently holds for private clients.

**Procedural background**

[6] When Guardian commenced this proceeding, it sought leave on a without notice basis to commence the proceeding by way of originating application under Part 19 of the High Court Rules 2016. It also sought a direction dispensing with service of the proceeding on any other party. In addition, it sought an order that the file was not to be searched without the leave of the Court because of confidential information contained on the file in the form of Guardian's private client list and other commercially sensitive information. I granted each of those directions in a minute issued on 24 September 2019.

[7] Counsel for Guardian also asked the Court to determine the application on the papers and without hearing from any other party. The argument for Guardian under this head was that no parties who were potentially affected by the proceeding would be prejudiced in any way by the orders Guardian sought. Guardian made this submission on the basis that parties who are affected by the application will not notice any difference in the manner in which trusts and estates are being administered. Perpetual will continue to provide the same services to private clients that they are already receiving from the entity they know as Perpetual Guardian.

[8] I considered it appropriate to obtain confirmation that this was the case from an independent and appropriately qualified source. I therefore appointed Mr Andrew Butler, Barrister of Wellington, to act as counsel to assist the Court. Mr Butler's appointment was limited to advising the Court:

(a) whether, and if so to what extent, the proposed substitution of Perpetual for Guardian may adversely affect any beneficiary or class of beneficiaries of the trusts or estates for which substitution is sought; and

(b) how any identified adverse effects could be eliminated or ameliorated.

[9] I am grateful for the valuable assistance Mr Butler has provided at short notice. In broad terms he confirms there is no reason for the orders Guardian seeks not to be made. He has also made several recommendations designed to ensure the interests of

affected parties are not adversely affected. Guardian has now responded by incorporating Mr Butler's suggestions within its proposal.

**Jurisdiction**

[10] As I have already recorded, Guardian relies on s 51 of the Trustee Act 1956 and s 21 of the Administration Act 1969. Section 51(1) of the Trustee Act provides:

> **51 Power of Court to appoint new trustees**
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> (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) …

[11] Similarly, s 21(1) of the Administration Act 1969 provides:

> **21 Discharge or removal of administrator**
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> (1) Where an administrator is absent from New Zealand for 12 months without leaving a lawful attorney, or desires to be discharged from the office of administrator, or becomes incapable of acting as administrator or unfit to so act, or where it becomes expedient to discharge or remove an administrator, the Court may discharge or remove that administrator, and may if it thinks fit appoint any person to be administrator in his place, on such terms and conditions in all respects as the Court thinks fit.
>
> (2) …

[12] As Ms Bruton QC for Guardian points out, the authorities demonstrate that the approach the Court takes to applications under both sections is essentially the same. The Court will make orders when it is expedient to do so.[1] Importantly, however, the Court has a duty to ensure that trusts and estates that are affected by an application are properly administered or executed.[2] Furthermore, the interests of the beneficiaries will be paramount.[3] The Court should exercise its powers under both sections robustly and

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1 *Crick v McIlraith* [2012] NZHC 1290 at [16]; *Harsant v Menzies* [2012] NZHC 3390 at [57]; and see *Miller v Cameron* (1936) 54 CLR 572 (HCA) at 580-1.

2 *Broadbent v Broadbent* [2014] NZHC 254 at [20]; *Harsant v Menzies* above n 1; *Farquhar v Nunns* [2013] NZHC 1670 at [13](a); and *Kain v Hutton* CA23/01, 25 July 2002 at [19].

3 *Crick v McIlraith*, above n 1, at [16]; and *Frickleton v Frickleton* [2016] NZCA 408, [2017] 2 NZLR 154 at [33]; citing *Letterstedt v Broers* (1884) 9 App Cas 371 (PC) at 386 per Lord Blackburn.

not timidly. The ultimate question will be whether the appointment of the new trustee or executor "will be a suitable, practical and efficient means of advancing the interests of the trust or estate and its beneficiaries".[4]

[13] In this context the threshold is expediency. The applicant must show that the appointment of the new trustee is expedient and that it would be inexpedient, impractical or difficult to achieve the same outcome without the Court's assistance.[5] Expedience is clearly a lower threshold, however, than necessity and indicates that factors such as suitability, practicality and efficiency will be relevant.[6]

[14] The Court often exercises its powers under these sections when there is discord or hostility between trustees or between trustees and beneficiaries. The present case does not fall within that category. Rather, the application is advanced on the basis that it is expedient to make the orders sought because Guardian will otherwise be required to undertake a time-consuming, cumbersome and very expensive process to achieve the same result. It contends that none of the beneficiaries of the trusts and estates to which the application relates will be adversely affected by the proposal. It therefore submits the application should be granted.

**Decision**

[15] I accept that considerations of expedience strongly support the application being granted. It would clearly be far more practical and efficient for the orders to be made than for Guardian to be required to achieve the same outcome by the only available alternative means.

[16] As Mr Butler points out, the situation in the present case is not dissimilar to that in *Perpetual Trust Ltd v Lombard Finance & Investments Ltd*.[7] In that case Perpetual sought to divest itself of the services it provided to corporate clients. It sought to be replaced as trustee of affected trusts by another trustee company. Mallon J noted that, from a customer perspective, the appointment of the new trustee would

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4 *Crick v McIlraith*, above n 1, at [18].
5 *Broadbent v Broadbent,* above n 2, at [19].
6 *Crick v McIlraith,* above n 1, at [18]; *Harsant v Menzies,* above n 1, at [55].
7 *Perpetual Trust Ltd v Lombard Finance & Investments Ltd* [2013] NZHC 3521.

provide consistency and continuity to the management of the trusteeships. The principal director of the proposed new trustee had already been involved in the administration of Perpetual's corporate trustee business through an intermediary company that it had contracted to provide services to corporate clients.[8]

[17] Justice Mallon also accepted that it was appropriate to use s 51 of the Trustee Act 1956 because the alternate mechanism for substitution, which was effectively the same as that in the present case, would require the trustee to obtain the consent of a very large number of affected parties having a wide geographical spread.[9] Perpetual submitted that the effort involved in undertaking this process would not be justified "where the proposed appointment will not change the management of the trusteeship or have a material impact on investors."[10] The Judge held that there would be no prejudice to investors, creditors or others if Perpetual was permitted to resign its corporate trusteeships and be replaced by the new trustee.[11]

[18] In the present case Guardian and Perpetual clearly stand to derive the most benefit from the proposed rearrangement because it will enable them to rationalise their business interests in a cost-effective manner. It will also provide greater transparency to potential clients because one company will be solely responsible for private client business whilst the other will only be concerned with corporate business.

[19] Mr Butler has been able to discern two areas in which the proposal may provide Guardian's existing private client base with a degree of benefit. The first is that it will eliminate the potential for any conflict of interest to arise between the services Guardian provides to private and corporate clients. At present Guardian is required to deploy information barriers to address potential conflicts that may arise where private clients invest in corporate entities that Guardian supervises. The proposed restructuring will provide a structural solution to this problem.

[20] The second potential benefit arises out of the fact that Guardian's corporate business has a greater element of risk attaching to it than its private business. In the

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8 At [19](b).
9 At [20](b).
10 At [20](b).
11 At [25].

event that Guardian was to be sued by a corporate client, its potential liability is likely to be higher than would be the case if it was sued by a private client. As matters currently stand Guardian's private clients would not face direct financial consequences if Guardian was subject to a substantial claim arising out of its corporate business. Such a claim would, however, constitute a distraction for Guardian's senior staff that could affect the level and quality of service it could provide to its private customers. Any claim that threatened Guardian's solvency would also naturally have an impact on private clients because they would be forced to move their business to another service provider. These issues will obviously not arise if Perpetual assumes responsibility for all Guardian's private business.

[21] I agree with Mr Butler's assessment, however, that these can only be described as marginal benefits. The real issue for present purposes is whether there is any downside for Guardian's existing private business clients.

[22] The fact that all estates and trusts are currently administered under the name "Perpetual Guardian" means that settlors, beneficiaries, co-trustees and creditors will not notice any difference in practical terms once the proposal is implemented. Trusts and estates will continue to be administered in the same way as they have been to date, and fee structures will not be altered. Mr Butler therefore agrees with Guardian's assessment that the substitution of Perpetual for Guardian in Guardian's private business portfolio will result in a "like for like" administrative change that will have no appreciable negative impact for Guardian's private clients. He therefore confirms Guardian's view that the proposal does not involve any prejudice to beneficiaries, co-trustees, appointors, creditors or other stakeholders in trusts and estates to which the proposal will apply.

**Mr Butler's suggestions**

[23] Mr Butler made the following suggestions:

(a) Guardian should meet the costs of any settlor, co-trustee, protector or beneficiary who wishes to take legal advice in relation to the effect of the Court's orders and any documents they might need to sign as a result of the rearrangement.

(b) Guardian should meet the costs of any orders necessary to join Perpetual to litigation in which Guardian is currently involved.

(c) The draft agreement between Perpetual and Guardian contained a clause under which Perpetual indemnified Guardian in respect of future liabilities arising out of the transfer of the private client business to Perpetual. Mr Butler considered the wording used in the draft agreement was adequate to the task. He suggested Guardian should confirm that the wording of the indemnity clause in the final form of the agreement will not change in any material way from the clause contained in the draft agreement.

(d) Mr Butler noted that some settlors of trust property may have chosen Guardian because its solvency and assets position provided adequate protection. He said he was unable to compare the net asset positions of the two companies because he did not have access to that information.

(e) Mr Butler also queried whether Guardian may be required to maintain minimum assets or solvency positions under the Financial Markets Authority's supervisory regime in relation to its corporate business.

(f) Mr Butler noted that Guardian had provided details of insurance cover for its corporate business. It did not, however, provide information about the cover held by both companies in relation to work carried out for private clients.

[24] Guardian has filed a further affidavit responding to these suggestions and queries as follows:

(a) Guardian, Perpetual and/or their related entities (and not the trust or estate in question) will meet the reasonable legal costs of advice obtained by settlors, co-trustees, beneficiaries or other stakeholders regarding these issues provided that Perpetual, acting reasonably, has first consented to such advice being obtained.

(b) Guardian, Perpetual and/or their related entities (and not the trust or estate in question) will meet the reasonable costs of obtaining new party orders where this is necessary to join Perpetual to litigation in which Guardian is currently involved so long as Perpetual, acting reasonably, has first consented to such orders being sought.

(c) The final form of the agreement between Guardian and Perpetual has now been signed. This contains a clause that is effectively identical to that contained in the draft agreement.

(d) Neither Guardian nor Perpetual hold significant assets in their own rights (as opposed to assets held in their capacities as trustee or administrator of a trust or estate). As a result, the proposed rearrangement will not expose Guardian's existing private clients to any less protection than they currently enjoy. Perpetual's financial position is ultimately underpinned by the willingness of its owner, Complectus, to provide it with support. Complectus has provided a letter to Perpetual assuring it of Complectus's ongoing financial support.

(e) Guardian is not currently subject to any specific solvency or minimum asset requirements by the FMA.

(f) Guardian has now provided copies of insurance certificates relating to the professional indemnity cover in place for the Complectus group of companies. These cover the business activities undertaken by both Guardian and Perpetual. They confirm that Guardian's private clients are in the same position as those of Perpetual so far as professional indemnity insurance cover is concerned.

(g) Furthermore, the professional indemnity insurance currently held by Guardian for its corporate trust activities has an excess layer that only applies to the corporate business. Given that this does not presently benefit Guardian's private clients, such clients will not be affected by

the fact that the excess layer does not extend to work carried out by Perpetual for private clients.

[25] Mr Butler accepts that the material Guardian has now provided adequately addresses the matters he raised as potential concerns. Guardian has also provided amended draft orders incorporating, to the extent necessary, Mr Butler's suggestions.

[26] I am satisfied those stakeholders affected by the application will not suffer adverse effects if the orders are made. It is plainly expedient to make those orders under both s 51 of the Trustee Act 1956 and s 21 of the Administration Act 1969.

**Result**

[27] I make orders in terms of the draft orders filed by the applicant on 2 October 2019.

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Lang J

Solicitors:
Russell McVeagh, Wellington
Counsel:
V Bruton QC, Auckland
A S Butler, Barrister, Wellington