IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1688
[2019] NZHC 14

UNDER	Part 18 of the High Court Rules Trustee Act 1956
BETWEEN	VICKI ANN TRIEZENBERG and PAUL MORLEY DODD Plaintiffs
AND	ALEXANDER CHARLES MASON First Defendant WENDY ANNE MASON Second Defendant

Hearing:	3 to 6 September 2018; updated submissions 14 September 2018
Counsel:	VTM Bruton QC and J Matheson for plaintiffs GJ Thwaite for defendants
Judgment:	17 January 2019
Reissued:	19 February 2019 (Removal of suppression orders)

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 17 January 2019 at 3:30 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:	Wilson McKay, Auckland GJ Thwaite, Auckland

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Introduction

[1] The first defendant (Mr Mason, now in his mid-80s) has had a dramatic and sad falling out with his two daughters, one of whom is the first-named plaintiff in these proceedings (Ms Triezenberg). Mr Mason has also fallen out with the second-named plaintiff (Mr Dodd), the family accountant since 1993.[1]

[2] The reason why these matters have come before the Court is because the plaintiffs and Mr Mason, together with Mr Mason's wife, the second defendant (Mrs Mason), have been the trustees of two family trusts settled by Mr and Mrs Mason some years ago. The falling out between the parties has compromised the operation of the trusts. As a result, the plaintiffs apply to remove Mr Mason as trustee. They also seek orders removing Mrs Mason as a trustee.

[3] It is common ground Mrs Mason ought to be removed. She has advanced Alzheimer's Dementia and is subject to a property order made under the Protection of Personal and Property Rights Act 1988. Mr Mason vigorously opposes his removal as trustee. Indeed, it became evident during the hearing that Mr Mason vigorously opposes the very nature and effect of the two trusts.

[4] Mr Mason is candid that he wants Ms Triezenberg out of his life, and both her and Mr Dodd out of the trusts. By deeds dated 11 March 2018, he purported to remove the plaintiffs as trustees and appoint his son, Mark Mason, in their place.[2] The plaintiffs dispute the validity of their purported removal. Mr Mason has in turn filed a counterclaim seeking a declaration that the deeds removing the plaintiffs as trustees are valid, together with an order declaring Mark was properly appointed a trustee in their place. In the event the plaintiffs' removal and Mark's appointment was invalid, Mr Mason seeks Court orders to that effect in any event.

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1 I will refer to Ms Triezenberg and Mr Dodd together as "the plaintiffs".

2 To avoid confusion with his father, I will refer to Mark Mason as "Mark". (I mean no disrespect by referring to Mark by his Christian name only.) Mark has broadly aligned himself with his father in the family dispute.

[5] The rift in the family was triggered by Mrs Mason's admittance to Middlemore Hospital and then St Andrew's Village (a residential care facility) in August/September 2015. Mr Mason blames Ms Triezenberg for these events. He blames Mr Dodd for the establishment of the trusts and he (i.e. Mr Mason) now feels he has lost control of his own assets. Mr Mason is also deeply hostile to Mrs Mason's property manager and welfare guardian (appointed by the Family Court in 2016), Mr Michael Allen. Much of the dysfunction in the trusts results from Mr Mason's objection to payment of various fees (including those of Mr Dodd and Mr Allen) and the costs of care for Mrs Mason (as overseen by Mr Allen).

[6] Mr Mason's deep-seated hostility towards his two daughters and Mr Dodd (along with others involved in either the trusts or Mrs Mason's care) was evident throughout the hearing. What is clear, however, and as Ms Bruton QC, senior counsel for the plaintiffs, confirmed at the hearing, is that the parties are at least agreed that while Mr and Mrs Mason are still alive, their care and welfare is the priority in both trusts.

[7] The evidence and the parties' submissions canvassed in some detail the difficulties and counter-allegations between the family members since Mrs Mason's admission to Middlemore Hospital and then St Andrew's Village. There are also ongoing proceedings in the Family Court. The focus for this Court is not the overall family dynamic or care and welfare issues in relation to Mrs Mason. It is necessary, however, to traverse the broader family dispute; it has largely driven the difficulties in the two trusts and casts light on the suitability of the parties in their ongoing roles as trustees.

[8] The key issues for determination in this judgment are:

(a) whether Mr Mason's purported removal of the plaintiffs as trustees in March 2018 was valid; and

(b) irrespective of the answer to the above, whether any or all of the current trustees ought to be removed.

[9] For completeness, I observe that Mr Mason's statement of defence purported to raise an issue as to Mrs Mason's capacity to settle the second of the two family trusts.[3] This was not the subject of any evidence or submission at the hearing. I accordingly proceed on the basis that any such issue has been abandoned and say nothing further on it in this judgment.

Factual background

The establishment of the Mamari Trust

[10] For many years, Mr Mason, with the support of Mrs Mason, carried out a family construction business specialising in insurance repairs and reinstatement. It was evidently quite successful, with Mr and Mrs Mason building up substantial personal assets.

[11] Mr Dodd has been the family accountant since late 1993. He explained that in or around that date, or early in 1994, Mr and Mrs Mason came to see him and asked for a family trust to be formed, evidently as a result of discussions they had had with friends who had a similar trust arrangement.

[12] A family trust, which I will refer to as the "Mamari Trust," was duly settled by deed dated 26 April 1994. The settlors were Mr and Mrs Mason, both of whom were also the trustees. The trust's beneficiaries include Mr and Mrs Mason, their three children, their grandchildren, any future spouse of Mr and Mrs Mason and each of Mr and Mrs Mason's parents. The family home at Takutai Avenue, Bucklands Beach, and later a commercial building at Captain Springs Road, Onehunga, were transferred into the trust, as well as various cash holdings.

[13] The Masons sold the family business in 1997 and retired. In 2002, they purchased a property at Banora Point in New South Wales, Australia.[4] From that time onwards, Mr and Mrs Mason began to split their time between Banora Point and the family home in Bucklands Beach. It was common ground that particularly when her

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[3] Paragraphs 1(a) and 2(a) of the statement of defence state that "*To the extent that* [Mrs Mason] was not of mental capacity to execute the Deed of Trust for the Mamari (No. 2) Trust", each of Ms Triezenberg and Mr Dodd does not hold office as trustee of that trust.

[4] This property has never been transferred into the Mamari Trust.

parents were overseas, Ms Triezenberg attended to various day-to-day and financial matters on their behalf. This included liaising with Mr and Mrs Mason's bank (ANZ) in relation to term deposits, general property maintenance, payment of utility bills, arranging and making payments of insurance and rates, and attendances on Mr Dodd in relation to Mr and Mrs Mason's personal accounts and those of the Mamari Trust. Mr Mason said that until 2013, he relied on and appreciated Ms Triezenberg's assistance in this regard.

Mrs Mason's diagnosis and establishment of Mamari (No. 2) Trust

[14] Mrs Mason was diagnosed in 2012 with early stage degenerative dementia. Sadly, both her parents had suffered from the disease, which meant Mrs Mason had a reasonable idea of the likely effects the diagnosis would have on her in the future. Ms Triezenberg explained that her mother discussed this with her at the time, and was concerned to ensure that her and Mr Mason's affairs were in order before her illness significantly worsened.

[15] Ms Triezenberg said that in November 2012, her parents asked her to speak with Mr Dodd and Finn Jorgenson, the family solicitor of some 55 years, about their affairs. This led to a meeting with Mr Jorgenson at his offices on 14 March 2013, attended by Mr and Mrs Mason and Ms Triezenberg. Mr and Mrs Mason settled a further trust as a result of this meeting.[5]

[16] Also on 14 March 2013, each of Mr and Mrs Mason appointed Ms Triezenberg as their attorney in respect of property affairs and personal care and welfare. Ms Triezenberg's sister, Michelle Richardson, was appointed as successor attorney. Mark did not feature in these arrangements. Mr Mason accepted that given what was then a good relationship with Ms Triezenberg and her assistance over the years in his and Mrs Mason's financial affairs, she was a "logical choice" to continue that assistance as he and Mrs Mason moved to the next phase of their lives.

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5 Mr Mason now takes issue with the advice he received at that time, though these matters do not fall within the scope of the claims before the Court.

[17] On 17 March 2013, Mr Jorgenson sent Mr Mason a draft deed for the new trust, which was eventually settled on 20 May 2013. I will refer to this second trust as the "Mamari (No. 2) Trust". Again, the settlors were Mr and Mrs Mason. The trustees were Mr and Mrs Mason, as well as the plaintiffs. The Mamari (No. 2) Trust had a narrower class of discretionary beneficiaries than the Mamari Trust, comprising Mr and Mrs Mason, their three children, Mr and Mrs Mason's grandchildren. The final beneficiaries were Mr and Mrs Mason's three children.

[18] On 29 May 2013, Mr and Mrs Mason forgave debts owing to them by the Mamari Trust of $1,853,665. The following day, they resettled $3.3 million of term deposits from the Mamari Trust to the Mamari (No. 2) Trust. On the same day, Mrs Mason made a new will appointing the plaintiffs as executors and trustees of her estate, and bequeathing to Mr Mason her chattels and interest in the Banora Point property in Australia. The residue of her estate was left to the Mamari (No. 2) Trust.

[19] Also on 30 May 2013, Mr and Mrs Mason signed a Memorandum of Guidance in relation to the Mamari Trust (it does not record on its face that it relates also to the Mamari (No. 2) Trust). It states that:

> The first responsibility of the Trustees shall be to consider on a regular basis the circumstances of each of [Mr and Mrs Mason] while they are respectively living … so that the comfort and welfare of each of [them] while they or either of them are respectively living is the primary consideration of the trustees.
>
> When [Mr and Mrs Mason] have both died then unless there is good reason to the contrary existing at that time, we request that the Trust be wound up and the assets distributed equally between our three children.

[20] The plaintiffs plead in their statement of claim that the Memorandum of Guidance was directed to the trustees of the Mamari (No. 2) Trust. Mr Mason admits this in his statement of defence. I also observe that from the contemporaneous correspondence from Mr Jorgenson to Mr Mason, the Memorandum of Guidance appears to have been intended for *both* trusts; Mr Jorgenson referred in a letter to Mr Mason dated 21 May 2013 to the benefit of having a memorandum of guidance in relation to both trusts and enclosed a draft for consideration.[6] No separate

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[6] The draft enclosure was not included with the letter in evidence. Mr Jorgenson's description in his 21 May 2013 letter of the contents of the draft memorandum is, however, consistent with that actually signed by Mr and Mrs Mason on 30 May 2013.

memorandum of guidance directed to the trustees of the Mamari (No. 2) Trust was, however, adduced in evidence.[7]

[21] I nevertheless proceed on the basis that the Memorandum of Guidance was intended and applies to both trusts. This reflects the pleadings in relation to the Memorandum of Guidance, its express terms and, as noted at the outset of this judgment, the parties' agreement that so long as each of Mr and Mrs Mason are alive, their comfort and welfare is the priority in both trusts.

[22] On 31 May 2013, Mr and Mrs Mason appointed the plaintiffs as additional trustees of the Mamari Trust. Also on 31 May 2013, Mrs Mason appointed Ms Triezenberg as her attorney in both trusts and Mr Mason appointed Mr Dodd in the same role.

[23] By the end of May 2013, the trusts' main assets were as follows:

(a) for the Mamari Trust, the family home (the 2017 QV of which is $1,540,000) and the Captain Springs Road property (the 2017 QV being $1,000,000); and

(b) for the Mamari (No. 2) Trust, the $3.4 million term deposits resettled into that trust from the Mamari Trust.

Mrs Mason's condition worsens – admission to Middlemore/St Andrew's

[24] Unfortunately, from late 2013, Mrs Mason's dementia worsened. Ms Triezenberg resigned from her full-time job in October 2013 to care for her two days a week. By mid-2014, part-time carers had also been employed to assist with Mrs Mason's care, and between Ms Triezenberg and the carers, in-home care was

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[7] Mr Dodd states in an earlier affidavit in these proceedings (sworn 18 July 2017) that at the time he was appointed a trustee of the Mamari (No. 2) Trust, he was "provided with a copy of the memorandum of guidance from [Mr and Mrs Mason] in respect of the No. 2 Trust, which made it clear that Alex and Wendy were the primary beneficiaries of the No. 2 Trust". Any such memorandum of guidance was not exhibited to Mr Dodd's affidavit, however, and he was not questioned about a separate memorandum at the hearing.

provided three days per week. At that time, care was paid for in part by monthly distributions to Mr and Mrs Mason of $2,000 from the Mamari (No. 2) Trust. By early January 2015, Mr Mason had employed a third part-time carer and trust distributions increased to $4,000 per month.

[25] Mrs Mason's health continued to decline over the ensuing months. She could become aggressive at times and despite the in-home care being provided, wandered unaccompanied from the family home on several occasions. On 12 July 2015, Mrs Mason was referred to Mental Health Services for Older People at the Counties Manukau District Health Board (CMDHB) for urgent review. On 10 August 2015, and with the agreement of all three children, Mrs Mason was admitted to Middlemore Hospital for assessment and respite care. Mr Mason reluctantly agreed to this, evidently on the basis of his understanding that Mrs Mason would spend no more than a few weeks away from the family home.

[26] On the day of her admission to Middlemore Hospital, Mrs Mason was certified mentally incapable due to advanced dementia. This activated Ms Triezenberg's enduring power of attorney (EPOA). Dr Jane Casey, an experienced psychiatrist and psychogeriatician,[8] gave evidence at the hearing and confirmed the certification was good clinical process and certification could have, based on her review of the medical records, been given before that time. The certifying doctor's notes at the time record his opinion that Mrs Mason's condition required her to be in residential care at a dementia rest home.

[27] As discussed later in this judgment, Mr Mason has never fully accepted the extent or severity of his wife's condition. He was reluctant for her to be admitted to Middlemore Hospital, and during Mrs Mason's time there, was evidently difficult and at times aggressive with hospital staff. This attitude and approach unfortunately continued over time, and towards a range of different health professionals and carers. As Dr Casey observed at the hearing, having had a significant degree of interaction with both Mr and Mrs Mason:

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[8] Dr Casey was originally engaged by Mr Mason in 2015 to provide an opinion on Mrs Mason's state of health. As noted below (at [43]-[44]), a later Family Court order required Dr Casey to carry monthly reviews of Mrs Mason's condition.

> ..the crux of everything is that Alex has a view, an understanding of Wendy's illness, the evolution of it, the prognosis, that is different from everybody else and Alex is of the strong and understandable belief that he is the person who knows best for Wendy and can provide the best care for Wendy.

[28] Dr Casey also stated that:

> Alex has a severe denial of the nature and progression of the illness and this lack of acceptance has or inability to get to acceptance has been – has created all the barriers to Wendy's ongoing care.

[29] Not long after her admission to Middlemore Hospital, a family meeting was held to discuss Mrs Mason's condition and ongoing care. The clinical team recommended Mrs Mason be admitted to residential care specialising in dementia care. On the basis of the clinical team's advice, Ms Triezenberg eventually agreed to this course. Ms Richardson supported her in that decision, as did Mark. Mrs Mason was accordingly discharged from Middlemore Hospital on 1 September 2015 and transferred to St Andrew's Village.

[30] Mr Mason was vehemently opposed to Mrs Mason being placed in residential care rather than returning home. Dr Karen Cairns, a consultant psychiatrist at Middlemore Hospital, recorded in her notes at the time that "Mr Mason presented with significant difficulties in accepting the fact that Mrs Mason required residential care and remained fixed on her returning home". On 2 September 2015, Mr Mason, understandably very upset by these events, wrote a "mock" death notice for Mrs Mason and posted it on the noticeboard at the hospital and sent a copy to each of his children.

[31] Mrs Mason's transfer to St Andrew's Village led to the complete breakdown of his relationship with Ms Triezenberg and Ms Richardson, together with all medical professionals who recommended that step for Mrs Mason.

[32] I interpolate to observe that while Ms Triezenberg, as holder of Mrs Mason's EPOA, formally made the decision to transfer Mrs Mason to St Andrew's Village, this was on the basis of the medical specialists' recommendations at the time. On the evidence before me, there was no doubt Mrs Mason's home care arrangements were not responding adequately to her worsening condition. And while as discussed below,

Mrs Mason later returned home and, in Dr Casey's words, "blossomed" while there, this was on the basis of a newly established 24/7 in-home care package by an external nursing agency. Accordingly, while Mr Mason blames Ms Triezenberg for Mrs Mason's admission to St Andrew's Village, that sentiment is misconceived, given Ms Triezenberg was acting on specialist medical advice given to her at the time.

Issues following Mrs Mason's admission to St Andrew's

[33] In the months following Mrs Mason's transfer to St Andrew's Village, Mr Mason wrote many lengthy letters to, among others, Ms Triezenberg and Mr Dodd, some of which were threatening and insulting.[9] Mr Mason's deteriorating relationship with Ms Triezenberg led to her issuing trespass notices against him and police complaints.

[34] In December 2015, Mr Mason commenced proceedings in the Family Court seeking orders revoking Ms Triezenberg's EPOA and that he be appointed Mrs Mason's welfare guardian. Ms Robyn von Keisenberg was appointed as lawyer for Mrs Mason.

[35] Mr Mason was also presenting difficulties for the staff at St Andrew's Village. He was appalled at what he perceived to be the conditions at St Andrew's and what he saw as Mrs Mason's declining condition while there. In April 2016, solicitors for St Andrew's wrote to Mr Mason's then barrister about Mr Mason's behaviour at the Village. By July 2016, the Chief Executive Officer of St Andrew's Village had given a "final warning" in relation to Mr Mason's behaviour (generally described as aggressive and rude towards St Andrew's staff). On 2 September 2016, St Andrew's advised it would be terminating Mrs Mason's care effective as of 2 November 2016.

[36] In relation to the trusts, in June 2016, the plaintiffs commissioned an investment report from Rutherford Rede Ltd on options for investment of the $3 million in the Mamari (No. 2) Trust, which was soon to come off term deposit. The report noted that reductions in interest rates had reduced the income being generated

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[9] Mr Dodd had no involvement in Mrs Mason's assessment and transfer to St Andrew's Village. However, Mr Mason had fallen out with him given what he perceived to be Mr Dodd's responsibility for the settling of the two family trusts.

by the cash held by the trust. Rutherford Rede proceeded on the basis that the trust assets would need to generate an annual income of at least $160,000 for Mr and Mrs Mason.[10] Rutherford Rede recommended a diversified investment strategy, which was accepted by the plaintiffs but not Mr Mason.

[37] Issues also arose between the trustees of the Mamari (No. 2) Trust in relation to payments out of the trust's bank accounts. The agreed ANZ mandate required only two trustee signatures. Mr Mason's solicitors wrote to ANZ in July 2016 notifying the bank that from that time onwards, no withdrawals should be made from the accounts without unanimous approval by all trustees (though noting that payments for Mrs Mason's care at St Andrew's Village should continue). The new requirement for written approval from all three trustees led to significant difficulties in authorising subsequent payments for Mrs Mason's care.

[38] Also at this time, a number of trustee resolutions were passed in relation to the Mamari (No. 2) Trust, to the effect that:

(a) The trust bank accounts could only be operated with unanimous written authority of the trustees;

(b) Mrs Mason's care costs would be met by the Mamari (No. 2) Trust;

(c) All reasonable and ordinary expenses incurred in the administration of the trust would be approved provided that invoices were provided to the trustees in advance of payment;

(d) A payment of $100,000 would be made to each of Mr Mason and Ms Triezenberg for the purpose of funding the ongoing Family Court litigation;

(e) There would be ongoing payments from the trust to Mr Mason of $4,000 per month; and

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[10] Mrs Mason's then residential care cost approximately $80,000 per annum. The report also noted that independently of the trusts, Mr and Mrs Mason owned the Australian property with a stated value of AUD600,000, and a share portfolio with JB Were with a stated value of $520,000.

(f) all existing and future "MEDACS Nursing" invoices for Mrs Mason's care at St Andrew's would be paid (provided all trustees were provided with copies of the invoices prior to payment).

[39] Mr Mason accepted that he later went back on the above resolution in relation to payment of the MEDACs invoices. He viewed the services provided as "totally unnecessary and at an incredible cost".

[40] In September 2016, Ms Triezenberg transferred $117,000 from her mother's personal bank account to an ASB account which she sought to open in both her and her sister's names. Mr Thwaite, counsel for Mr Mason, relies on this as one ground for why Ms Triezenberg is not fit to be a trustee. I return to this matter later in this judgment.[11] But Ms Triezenberg explained that given the family had been notified by St Andrew's Village that Mrs Mason's care was to end in November 2016, and was concerned at where Mrs Mason would go and how her future care would be paid for (given the ongoing dispute with Mr Mason), she and Ms Richardson agreed it would be prudent to set aside some funds to ensure future care needs would be met. Given Ms Richardson lived in Australia, however, a bank account could not be opened in both their names. Ms Triezenberg therefore asked Mr Dodd if the funds could be placed in his trust account, to which he agreed. The funds were accordingly transferred to Mr Dodd's interest-bearing client trust account to the credit of Mrs Mason.

[41] Mr Thwaite sought (though somewhat faintly) to make something of the fact that these funds passed for a time through Ms Triezenberg's personal account at ASB (though did not make any express allegation that Ms Triezenberg might have sought to use the funds for her own personal benefit). I observe that had Ms Triezenberg's real goal been to secure these funds for her own benefit, it is doubtful she would have sought to transfer them into a joint bank account of her and her sister, or thereafter transferred them to Mr Dodd for deposit into his trust account to Mrs Mason's credit.

[42] These funds were later used to pay various costs, including in relation to Mrs Mason's care, Dr Casey's fees, Mr Allen's fees and some legal fees incurred by the plaintiffs in relation to these proceedings. Mr Allen, as Mrs Mason's property

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[11] See [147] below.

manager and welfare guardian, approved the expenditure. Mr Thwaite submits the circumstances surrounding this expenditure, and what is said to be non-disclosure of the arrangement in court documents, further casts doubt on the appropriateness of the plaintiffs continuing as trustees. I return to this topic later in this judgment.[12]

Family Court proceedings and settlement agreement

[43] Mr Mason's application to revoke Ms Triezenberg's EPOA and have himself appointed Mrs Mason's welfare guardian was due to be heard over a five-day hearing in the Family Court commencing on 31 October 2016. Given the impending hearing, and the impending termination of Mrs Mason's care at St Andrew's Village with no agreement having been reached on where she would go upon discharge, a family mediation was held on 22 and 23 September 2016. A resolution was reached and a settlement agreement entered into. The settlement agreement provided (among other matters) that:

(a) Mrs Mason would be transferred home, with 24/7 care to be provided by an external nursing agency;

(b) Mrs Mason's costs of care would be met by the Mamari (No. 2) Trust;

(c) Ms Triezenberg's EPOA would be terminated;

(d) Mr Allen would be appointed Mrs Mason's property manager and welfare guardian with his fees to be met by the Mamari (No. 2) Trust;

(e) Each party's professional costs would lie where they stand and be paid by the Mamari (No. 2) Trust;

(f) Both trusts would be reviewed by SurePlan Ltd who would make recommendations as to the management of the trusts;

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12 See [52]-[53], [142] below.

(g) All trustees would stand down and professional trustees would be appointed on the agreement of all of the trustees; and

(h) Dr Casey would conduct monthly assessments of Mr and Mrs Mason.

Steps taken pursuant to the settlement agreement

[44] Interim personal orders were subsequently made by the Family Court by consent, implementing those aspects of the settlement agreement relevant to the Family Court proceedings. These included orders as to Mrs Mason's ongoing care at the family home, revoking Ms Triezenberg's EPOA and appointing Mr Allen as Mrs Mason's welfare guardian and property manager.

[45] Mrs Mason was transferred from St Andrew's Village to her home on 20 October 2016. In accordance with the settlement agreement, Mr Allen arranged for in-home care for Mrs Mason from Kate McLean Homecare Ltd (Kate McLean).

[46] The settlement agreement envisaged that all three trustees would stand down and be replaced with professional trustees (to be agreed by the plaintiffs and Mr Mason). Some steps were taken to implement this aspect of the agreement, as replacement trustees were proposed by Mr Mason (an accountant) and the plaintiffs (a lawyer with expertise in trust matters). However, Mr Mason objected to the hourly rate of the trustee proposed by the plaintiffs and the matter was not advanced further. As replacement trustees could not be agreed, no steps were taken by any of the existing trustees to stand down.

[47] As required by the settlement agreement, SurePlan reviewed the two trusts and produced a report dated 9 November 2016. In relation to the Mamari Trust, the report noted there was no tenancy agreement for the Captain Springs Road property and the then current rental yield appeared to be below market. It recommended a formal tenancy agreement be put in place and a rent increase sought. In relation to the Mamari (No. 2) Trust, it described the $3 million then on term deposit as "wasting money" given the very low term deposit rates. It noted Rutherford Rede's earlier investment advice (with which the report writer concurred), but recorded that the advice had not been able to be implemented given Mr Mason did not agree with it.

Issues continue despite Mrs Mason's return home

[48] It was not in dispute that Mrs Mason's general condition improved on her return home with the new 24/7 care package in place. Despite this, however, issues quickly arose around payment of Kate McLean's invoices by the Mamari (No. 2) Trust. Mr Mason refused to approve invoices, sometime at all or at least in a timely fashion, or would approve payment but then "withdraw" approval when ANZ sought confirmation of the trustees' agreement to the payment. Ms Triezenberg described how the Mamari (No. 2) Trust was constantly in default in relation to Kate McLean's fees.

[49] Mr Mason also quickly turned against Mr Allen as Mrs Mason's property manager and welfare guardian, and his fees were also unpaid. Some of Mr Dodd's fees, as well as Dr Casey's, also went unpaid. The central issue was Mr Mason's refusal to approve, either at all or in a timely fashion, the various invoices. Dr Casey's reports to the Family Court in the months following Mrs Mason's return home were generally positive as to her condition, but raised concerns about aspects of Mr Mason's care of her, and his attitude to the Kate McLean caregivers, various medical professionals, and generally the cost of Mrs Mason's care (which Dr Casey described as "a serious bone of contention for Alex and unfortunately can dominate his thought content, dialogue and screeds of correspondence").

[50] The position did not improve in 2017, despite the comprehensive settlement agreement which had been reached. From the latter part of 2016 and into 2017, some invoices which the Mamari (No. 2) Trust would have otherwise paid were being met by the funds Mr Dodd held to Mrs Mason's credit in his trust account. Mr Dodd explained that Mr Allen had agreed to authorise the payments pending reimbursement to Mrs Mason from the trust. They included some of Mr Allen's fees; care agency invoices; Dr Casey's fees; three invoices for Mr Dodd's fees as professional trustee and some early litigation fees concerning these proceedings. It was common ground that the use of these funds represented a loan from Mrs Mason to the Mamari (No. 2)

Trust (and a corresponding debt due from the trust to Mrs Mason).[13]

[51] In relation to payment of early litigation costs, Mr Allen explained that he agreed to those being paid out of the funds held on Mrs Mason's behalf given a key concern from his perspective was the ongoing difficulties in relation to Mrs Mason's care, and the need for prompt and proper payment for it. Mr Allen said:

> … the constant disputes over payment and the discord that Mr Mason was causing with the carers, caused me to agree with the opinion of Ms Triezenberg and Mr Dodd that he needed to be removed as a trustee, and his removal was in Mrs Mason's best interests. This given the cost of her care, her limited personal estate and the fact that her long-term care could only be afforded by payment by the Mamari (No. 2) Trust.
>
> However, because of the discord between the trustees, Ms Triezenberg and Mr Dodd were not able to pay their litigation costs. So, I agreed to loan the trustees funds from Mrs Mason's estate for the litigation…

[52] It was put to Mr Dodd by Mr Thwaite that he had concealed the fact of the loan in materials presented to the High Court in this litigation. I am satisfied Mr Dodd did not conceal or seek to conceal this information. Mr Dodd had exhibited to an earlier affidavit sworn by him in these proceedings various items of correspondence concerning the payment of costs, including costs of Mrs Mason's care and litigation fees. One of the items of correspondence annexed to Mr Dodd's affidavit was a letter from the plaintiffs' then solicitors, responding to a schedule of debts owed by the Mamari (No. 2) Trust provided by Mr Mason's solicitor. The letter stated:

> I indicated to you last week that Mr Dodd would review that schedule and provide a reconciliation of the trusts' debts. That was necessary because some of the debts which Mr Mason refused to pay have had to be paid by Mrs Mason's welfare guardian out of Mrs Mason's dwindling savings to ensure her care is not withdrawn and for the administration of the trusts.

[53] The letter went on to categorise those payments, summarising the position as being that "Mrs Mason has a debt of $144,450.02 owing to her from the trusts".[14] The enclosed schedule of payments was also headed "Funds paid from Wendy Mason

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13 That loan has now been repaid as a result of court orders sought by the plaintiffs authorising various payments to be made out of the Mamari (No. 2) Trust, including these early litigation costs; *Triezenberg v Mason* [2018] NZHC 186 (Venning J) and *Triezenberg v Mason* CIV-2017-404-001688 (minute of Woolford J dated 28 June 2018).

14 The letter also noted various amounts Mr Mason had paid on his own account and which would also require reimbursement to him from the Mamari (No. 2) Trust.

personal funds to be repaid by way of distribution from Mamari No. 2 Trust". The position in relation to these funds was accordingly clear to both Mr Mason and in the materials placed before the Court.

[54] In April 2017, difficulties surfaced in relation to the Mamari Trust. Mr Dodd confirmed that until that point in time, things had run smoothly in that trust. Following the SurePlan review, however, Mr Dodd sought from Mr Mason a copy of any existing lease agreement for the Captain Springs Road property, which was not forthcoming. Mr Mason said he did not want Mr Dodd involved at all in the Captain Springs Road property. Mr Dodd obtained a rental valuation which indicated a higher rent should be able to be achieved. In any event, the then tenant vacated the premises and Mr Mason engaged a real estate agent to locate a new tenant, which was secured at a rental above that indicated by the rental valuation.

[55] All parties are pleased with this outcome. Mr Dodd's actions regarding the tenancy agreement and rental valuation were not, however, welcomed by Mr Mason, which he viewed as Mr Dodd meddling in matters that did not concern him. Mr Mason described Mr Dodd in related email correspondence at the time as the "wrecker of family's [sic]" and stated "I hire you I fire you". Mr Mason accepted in cross-examination, however, that when he asked for a copy of any tenancy agreement, Mr Dodd was simply doing his job as a trustee.

[56] By April 2017, the position regarding Mrs Mason's care by Kate McLean was becoming serious. Kate McLean had written in March and April 2017 complaining at unpaid invoices. In its letter to Mr Allen dated 13 April 2017, the agency concluded:

> As you will appreciate, through no fault of your own, the conduct of this account has been extremely frustrating and I cannot imagine a reason that our company would want to continue to extend credit to Alex Mason.

[57] Unfortunately, by email dated 15 May 2017, Kate McLean notified Mr Allen that it would be withdrawing its home care of Mrs Mason as of 24 May 2017. Twelve reasons were cited for the decision to withdraw, all related to Mr Mason. The agency noted it was the first time the agency had decided to withdraw from care. In her report to the Family Court of 15 May 2017, Dr Casey recorded that the matter had reached a "crisis situation".

[58] In early June 2017, the plaintiffs and Mr Allen discussed how to regularise payment for Mrs Mason's care. It was proposed that the trustees of the Mamari (No. 2) Trust would resolve to make a distribution to Mrs Mason of $200,000 for the purposes of her ongoing care needs.[15] Mr Dodd and Mr Allen explained that they hoped this would enable a more simplified approach to payment for Mrs Mason's care, given the difficulties encountered in ensuring payments directly from the Mamari (No. 2) Trust.

[59] On 12 June 2017, Ms Triezenberg sent Mr Mason a trustee resolution, signed by her and Mr Dodd, concerning the proposed $200,000 distribution. The resolution provided that:

(a) $200,000 be transferred from the trust to SurePlan's account in the name of Mrs Mason;

(b) Monthly and annual statements showing all debits and credits to that account would be provided to the trustees of the Mamari (No. 2) Trust; and

(c) That the funds were to be used to pay for Mrs Mason's care needs "as well as any invoices associated with her care as deemed [a] reasonable expense by the Court Appointed Property Manager".

[60] Mr Mason did not respond to the proposal.

[61] Mr Allen arranged for Kate McLean to extend their services until 17 June 2017, so he could arrange replacement care.

[62] At around the same time, Dr Casey sought the Family Court's permission to withdraw from her role in monitoring Mr and Mrs Mason and reporting to the Family

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[15] Mr Allen explained that such an arrangement had in fact been proposed by Dr Fisher, the then clinical head of Mental Health Services for Older People at Middlemore Hospital, who also reported on Mrs Mason's care and condition to the Family Court. In Dr Fisher's report to the Family Court, which was produced in evidence at the hearing before me, Dr Fisher recommended that to prevent Mr Mason from undermining arrangements for Mrs Mason's care, "suitable funds are made available for the care of [Mrs Mason], and placed in some account or vehicle, with authority for one person, such as the Manager of Property, to pay the accounts. I have no view on how this should be organised, but [Mr Mason] should not be involved in 'signing the cheques'."

Court. At the hearing before me, Dr Casey explained that she felt in an untenable position given the discord within the family. She noted the significant difficulties in working with Mr Mason, but also felt that Ms Triezenberg and Ms Richardson were somewhat "rigid" in their views as to the level of care required by Mrs Mason. Dr Casey noted in her report to the Family Court of June 2017 that in her 30-year career, this was the first time she had withdrawn from a case "in such terrible and sad circumstances". In her evidence before me, Dr Casey described what was the "final straw" for her, namely an intended meeting between her, Mr Allen and Mr Mason to discuss potential care packages and to review curriculum vitae of possible new in-home carers. She said the meeting was "hi-jacked" by Mr Mason. Dr Casey described how when she and Mr Allen arrived at the home:

> ..we went into the lounge where we normally would meet, there were numerous chairs in a circle and various people arrived, neighbours, bowling club, carers, people who had responded to the advert, and here we were trying to work out a way to care for Wendy and people were expecting me to answer questions on a confidential matters [sic] in relation to Wendy that we were discussing her or people were trying to get me to discuss her care with people that had no legal or clinical right to have that information and I found that was really the final straw for me that this was not respecting Wendy's privacy or rights. Wendy was upstairs at the time and unaware that this was going on, but was the most distressing and awful event for me to witness.

[63] In any event, Mr Allen arranged for Graceful Care Ltd (Graceful Care) to replace Kate McLean in providing in-home care to Mrs Mason. Issues quickly arose, however, over payment of their invoices. On 21 July 2017, Graceful Care complained about approximately $18,000 in outstanding fees. On the same day, Mr Dodd re-sent Mr Mason the 12 June 2017 resolution regarding the $200,000 distribution.

[64] In her final report to the Family Court dated 22 July 2017, Dr Casey noted the ongoing issues with payment for Mrs Mason's care, and Graceful Care's notification that if their (then) outstanding fees were not paid by 26 July 2017, care services would cease on 28 July 2017. Dr Casey observed "once again we are in an '11th hour' situation where Wendy may be without carers in the home…". She also noted that in order to reduce the intensity of the in-home care and associated cost, it had been discussed whether agency care was required overnight, or whether a live-in border might be considered to assist with the care. Dr Casey stated she was not certain of the viability and safety of such an arrangement and that she would have concerns for any

person "who is not accountable to an agency, a Welfare Guardian or to the Court being exposed to the dynamics and behaviour in this home."

These proceedings commenced and more recent events

[65] On 24 July 2017, the plaintiffs commenced these proceedings.

[66] In August 2017, Mr Mason agreed to an automatic payment for Graceful Care's ongoing fees. As a result, the potential $200,000 distribution was not pursued.

[67] A hearing of Mrs Mason's application for final personal orders in the Family Court was reconvened on 17 August 2017. The terms of the final personal orders were agreed by all interested parties, save for Mr Mason, who abided the Court's decision. Mr Mason later appealed the Family Court's decision to this Court, but in a judgment delivered on 9 March 2018, van Bohemen J dismissed the appeal.[16]

[68] Events in the latter part of 2017 and early 2018 can be more briefly summarised:

(a) In late September 2017, the plaintiffs filed an interlocutory application for orders providing access to trust funds in connection with these proceedings. That application was opposed by Mr Mason.

(b) Trustee meetings were held in October and November 2017, attended by the three trustees and their solicitors, though little progress was made. There was considerable dispute over the accuracy of the resulting meeting minutes, which led to further extensive legal correspondence and argument.

(c) On 22 December 2017, through discussions between Mr Dodd and Mr Mason, it was proposed that all trustees resign and Guardian Trust be appointed as replacement trustee, or alternatively Mr Mason remain as trustee with Guardian Trust as his co-trustee. However, after taking

16 *Mason v Mason* [2018] NZHC 375.

legal advice, Mr Mason's proposal was that he would use reasonable endeavours to arrange the appointment of Guardian Trust as a co-trustee, conditional on Mr Allen resigning as Mrs Mason's property manager and welfare guardian. This was not accepted by the plaintiffs.

(d) Further discussions to try to resolve matters were held at Mark's home in mid-January 2018. Mark physically assaulted Ms Triezenberg at that meeting. The meeting was later reconvened at Mr and Mrs Mason's home but no progress was made.

(e) In a judgment delivered on 19 February 2018, Venning J granted the plaintiffs' application for orders regarding payment of litigation costs from trust funds.[17] Venning J ordered that:

> The funds held on deposit with the ANZ Bank under the name of the Mamari No. 2 Trust are to be made available to the plaintiffs and defendants for payment of their respective counsel and instructing solicitors' outstanding fees and disbursements and for ongoing fees and disbursements in these proceedings in the first instance.

The reasonableness of the quantum of the fees was reserved until after resolution of the substantive hearing in these proceedings.

(f) In February 2018, the plaintiffs filed an amended statement of claim in these proceedings, seeking (amongst other things) that all trustees be removed and replaced with Guardian Trust.

(g) In March 2018, Mrs Mason suffered a decline in her health and was admitted to Middlemore Hospital where she was diagnosed with pneumonia. Mr Mason blames one of the Graceful Care carers for this, suggesting she passed on a cold to Mrs Mason.

(h) Mrs Mason was discharged from Middlemore Hospital to Abridge Rose Manor on 13 March 2018. The cost of Mrs Mason's care is

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17 *Triezenberg v Mason* [2018] NZHC 186.

approximately $1,200 per week, paid by way of an automatic payment by the Mamari (No. 2) Trust.

(i) Also in March 2018, the plaintiffs and Mr Mason passed a resolution concerning various payments to be made from the Mamari (No. 2) Trust, namely that:

(i) Mr Mason would be paid approximately $77,000 which had incorrectly been paid to the trust by Mr Mason's former solicitors, rather than to Mr Mason directly;

(ii) Mr Dodd would be paid approximately $94,000 for unpaid fees over the previous one and a half years; and

(iii) Mr Dodd agreed that in his capacity as trustee, he would not charge any further fees to the trust which related to the ongoing litigation until resolution of these proceedings.[18] Mr Dodd said he had proposed this to Mr Mason in a meeting with him shortly before the resolution was signed, given as a trustee, he was very concerned at the amount of time being spent on the litigation and the resulting cost to the trust.

(j) On 11 March 2018, Mr Mason executed deeds by which he purported to remove the plaintiffs as trustees of both trusts and replace them with Mark. This was on the basis that:

(i) the relief sought in the plaintiffs' amended statement of claim evinced a desire on the part of each of Ms Triezenberg and Mr Dodd to be discharged from their role as trustee; and

[18] This did not preclude Mr Dodd from charging fees for attendances at trustee meetings and for preparation of accounts or GST returns.

(ii) in the circumstances then existing, Mr Mason held the sole power of removal and appointment under the trust deeds.[19]

(k) Finally, and despite Venning J's judgment and the terms of the order made and set out at (e) above, Mr Mason did not agree with protocols proposed by the plaintiffs to implement the order. This led to the plaintiffs filing a further interlocutory application to enable the various payments to be made. Mr Mason opposed the application on numerous grounds, including some which appeared to revisit matters already canvassed in Venning J's judgment. Ultimately however, agreement was reached shortly before the hearing of the application as to how the various costs could be paid. Orders reflecting the agreed position were made by Woolford J on 28 June 2018.

The current position

[69] The current position in both trusts is relatively settled.

[70] All parties are content with the arrangements in relation to the Mamari Trust assets, and in particular, the rental of the Captain Springs Road property. The large majority of the rental is paid out to Mr Mason.

[71] Mrs Mason's costs of care at Abridge Rose Manor are being met by way of an automatic payment from the Mamari (No. 2) Trust. The key outstanding issue within that trust is the investment of what is now approximately $2.2 million in cash on deposit with ANZ.

[72] The Family Court proceedings sadly continue. A hearing is due to take place in late January 2019 on Mr Allen's application for orders in relation to certain assets held jointly by Mr and Mrs Mason, and Mr Mason's application to remove and replace Mr Allen as Mrs Mason's property manager and welfare guardian.

[73] I turn now to address the legal issues requiring determination.

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[19] The validity of the 11 March 2018 deeds is determined later in this judgment; see [85] to [113] below.

A preliminary "red herring" – a purported arbitration agreement

[74] I deal first with what I consider to be a red herring raised in Mr Mason's pleadings and submissions; namely that a clause in the Mamari Trust deed permitting disputes between the trustees to be referred to an independent person for determination, ousts the Court's jurisdiction in this case in relation to that trust.

[75] Clause 15 of the Mamari Trust deed relevantly provides as follows:

> …if a decision is reached [by the trustees] which is not unanimous or there shall be an equality of votes among the Trustees the dissenting minority of the Trustees or any Trustee as the case may be shall be entitled by notice in writing given to the other Trustees within seven (7) days after the date of the non unanimous decision or failure to reach a decision to have the matter referred to an independent person to be agreed upon by the Trustees and in default of agreement nominated for that purpose by the President for the time being of the Auckland District Law Society and the decision of such independent person in relation to the matter in question shall be final and binding on all of the Trustees who shall be bound to implement such decision…

[76] Mr Mason says the clause amounts to an arbitration agreement and therefore pursuant to arts 5 and 8 of the First Schedule to the Arbitration Act 1996, this Court has no jurisdiction and those aspects of the proceedings which relate to the Mamari Trust ought to be stayed.[20]

[77] This argument fails for two reasons.

[78] First, cl 15 is not an arbitration agreement for the purposes of the Arbitration Act. In this context, I note that, despite submitting at the hearing that cl. 15 is not an arbitration agreement, in their reply to Mr Mason's statement of defence, the plaintiffs state that:

> …**the arbitration clause at cl 15 of the Trust Deed** relates only to "any matter to be determined by the Trustees." The issue in these proceedings as

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[20] Article 5 of the First Schedule to the Arbitration Act 1996 provides that "In matters governed by this schedule, no court shall intervene except where so provided in this schedule." Article 8(1) provides that: "A court before which proceedings are brought in a matter **which is the subject of an arbitration agreement** shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred." [Emphasis added.]

> to who the trustees ought to be is a matter solely within the jurisdiction of the High Court.
>
> [Emphasis added]

[79] Whether or not an agreement amounts to an "arbitration agreement" for the purposes of s 2 of the Arbitration Act is, however, a matter of law. Section 2 of the Act defines an "arbitration agreement" as:

> [A]n agreement by the parties to **submit to arbitration** all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> [Emphasis added]

[80] Clause 15 does not refer to or purport to refer trustee disputes to arbitration; rather, it (twice) refers to disputes being referred to an "independent person". The deed was clearly drafted by a lawyer, or at least with significant legal input. It would have been straightforward for the settlors to have referenced arbitration in cl 15 had they intended trustee disputes to be resolved by way of arbitration. They did not. I accordingly do not consider cl 15 is an "arbitration agreement" for the purposes of s 2 of the Arbitration Act. It is more akin to a referral to expert determination.

[81] Second, even if cl 15 were an arbitration agreement, the issues arising in these proceedings do not fall within the scope of the clause in any event.

[82] Clause 15 (headed "Decisions of Trustees") refers to "the matter" being referred to the independent person. "The matter" is in turn a decision of the trustees in relation to the exercise of any of their powers, authorities or discretions, or in respect of any other matter "to be determined by the Trustees" in any way related to the administration of the Mamari Trust, which is not unanimous or where there is a failure to reach such a decision.

[83] These proceedings concern the appointment powers under the trust deeds, as well as whether the Court should exercise its jurisdiction under the Trustee Act and/or its inherent supervisory jurisdiction in relation to who the trustees of the two trusts ought to be. The proceedings do not concern or seek to resolve decision-making by the trustees.

[84] As the issues requiring determination in these proceedings fall outside the scope of cl 15, there is no bar within the Arbitration Act to the Court adjudicating on them. At most, the fact no trustee has sought to utilise the dispute resolution mechanism in cl 15 might be relevant to whether it is expedient for the Court to exercise its supervisory jurisdiction in relation to that trust.

Did Mr Mason validly remove the plaintiffs as trustees?

The basis for the purported removal

[85] Mr Mason's position is as follows:

(a) As at 1 March 2018, Mrs Mason was incapable of acting in relation to either of the trusts, given her dementia (this is not in dispute);

(b) That at various times, and in particular by the filing of the February 2018 amended statement of claim, each of Ms Triezenberg and Mr Dodd expressed a desire to be discharged from their role as trustee;

(c) In those circumstances, Mr Mason had the sole power of appointment under the trust deeds; such that

(d) Pursuant to s 43 of the Trustee Act, Mr Mason had the power, which was duly exercised, to remove the plaintiffs as trustees and appoint Mark in their place.

[86] Section 43 of the Trustee Act relevantly provides as follows:

> **Power of appointing new trustees**
>
> (1) Where a trustee (whether original or substituted, and whether appointed by the court or otherwise) —
>
> …
>
> (c) **desires to be discharged from all or any of the trusts or powers reposed in or conferred on him**; or
>
> …

> **the person nominated for the purpose of appointing new trustees by the instrument (if any) creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees for the time being**, or the personal representatives of the last surviving or continuing trustee, may by deed appoint a person or persons (whether or not being the person or persons exercising the power) to be a trustee or trustees in the place of the first-mentioned trustee.
>
> [Emphasis added]

[87] The above gives rise to two sub-issues:

(a) Did either or both of Ms Triezenberg and Mr Dodd, prior to Mr Mason's deed dated 11 March 2018, desire to be discharged from their role as trustee?

(b) If so, did Mr Mason have the sole power of removal and appointment under either or both trust deeds, or pursuant to s 43 of the Trustee Act?

Did either or both of Ms Triezenberg or Mr Dodd desire to be discharged as trustee?

[88] Mr Thwaite submits that each of Ms Triezenberg and Mr Dodd expressed a desire to be discharged from their role as trustee, by

(a) In the case of Mrs Triezenberg:

(i) entering into the settlement agreement, which envisaged all trustees standing down and being replaced by Guardian Trust; and

(ii) filing the February 2018 amended statement of claim;

(b) In the case of Mr Dodd:

(i) signing the in principle settlement agreement on 22 December 2017; and

(ii) filing the February 2018 amended statement of claim.

[89] Turning first to Ms Triezenberg, I am not satisfied her entry into the 2016 settlement agreement expressed her desire to be discharged from the role of trustee for the purposes of s 43 of the Trustee Act.

[90] First, the settlement agreement represents a negotiated package of measures designed to bring the family and legal disputes to an end. While I accept the provision that all trustees stand down was not expressed to be conditional on the other aspects of agreement, it would in my view be quite artificial to separate it out from all other matters contained in the agreement and consider it in isolation for the purpose of s 43. Ms Triezenberg only agreed to stand down as trustee in the context of Mr Dodd and Mr Mason also standing down and all three being replaced by professional trustees agreed by the parties, together with all other aspects of the agreement being implemented.

[91] Second, removal of or resignation by a trustee is a significant step or decision in the context of any trust's administration. For that reason, any expressed "desire" to be removed for the purposes of s 43 ought to be clear and unambiguous.

[92] Presumably for this reason, cl 9 of the Mamari Trust in fact requires any trustee who is desirous of being discharged from the trust to give formal written notice to that effect. No such formal notice has been given by Ms Triezenberg. And while the Mamari (No. 2) Trust deed does not contain any express provisions concerning retirement or resignation, s 45 of the Trustee Act further reinforces the clarity expected in the case of a trustee wishing to be discharged from the trust, requiring a trustee to declare so by way of deed. Further, even if the trustee makes such a declaration by way of deed, the trustee is not deemed to have retired from the trust unless the co-trustees and any person with the power of appointment consent to the trustee's discharge.[21]

[93] I accept that s 43 does not itself state that any desire to be discharged from the office of trustee need be expressed by deed. But both s 45 and, in this case, cl 9 of the Mamari Trust deed confirm the clarity required in relation to any such significant decision. In my view, Ms Triezenberg's agreement that *all three* trustees stand down

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[21] Trustee Act 1956, s 45(1)(b).

and be replaced by professional trustees is far removed from an expression of desire to be discharged for the purposes of s 43.

[94] Much of the same comments apply to Mr Dodd's signature of the handwritten in principle agreement reached with Mr Mason on 22 December 2017. The matters agreed sought to resolve all matters then in dispute. Like Ms Triezenberg's entry into the settlement agreement, it would be quite wrong and artificial to isolate out of the 22 December 2017 arrangement Mr Dodd's agreement to stand down as a trustee. To put it another way, Mr Dodd did not express a desire to be discharged as a trustee per se, or in circumstances where Mr Mason would remain as sole trustee, or with Mark appointed as his co-trustee.

[95] The position is very similar in relation to Mr Mason's reliance on the relief sought by the plaintiffs in their amended statement of claim. It claimed as follows:

> **APPLICATION TO APPOINT NEW TRUSTEES – SECTION 51 TRUSTEE ACT 1956 AND/OR INHERENT JURISDICTION**
>
> 32. It is expedient for the Court to appoint a new trustee, either in addition to or in substitution for the existing trustees.
>
> **Particulars:**
>
> (a) Wendy is subject to a property order made under the Protection of Personal and Property Rights Act 1988 and thus cannot continue as a trustee;
>
> (b) The present trustees are unable to communicate or work together to reach decisions in the interests of the beneficiaries;
>
> (c) The present trustees are unable to pay trust expenses, in accordance with their legal obligations and in the interests of the beneficiaries, particularly Wendy.
>
> 33. It is inexpedient, difficult or impracticable for a new trustee to be appointed without the assistance of the Court.
>
> **Particulars:**
>
> (a) The appointors will not be able to agree on the exercise of their powers of appointment and the discharge and indemnification of any retiring trustees.
>
> 34. Perpetual Guardian (previously known as Guardian Trust) consents to its appointment as trustee.

THE PLAINTIFFS CLAIM:

A. An order removing Wendy Ann Mason as a trustee of the Mamari Trust, subject to the full indemnities provided in the Trust deed, and under the Trustee Act 1956;

B. An order removing Alexander Charles Mason as a trustee of the Mamari Trust and Mamari (No.2) Trust;

C. An order authorising and directing the plaintiffs to pay, from the Mamari (No.2) Trust, the expenses set out in the schedule hereto, together with such additional expenses that have been incurred by them since the filing of the amended statement of claim;

D. An order removing Paul Morley Dodd as a trustee of the Mamari Trust and the Mamari (No.2) Trust, subject to the full indemnities provided in the Trust deeds, and under the Trustee Act 1956;

E. An order removing Vicki Ann Triezenberg as a trustee of the Mamari Trust and the Mamari (No.2) Trust, subject to the full indemnities provided in the Trust deeds, and under the Trustee Act 1956;

F. An order appointing Perpetual Guardian as the sole trustee of the Mamari Trust and the Mamari (No.2) Trust;

G. An order that the power of appointment and removal of trustees of the Mamari Trust is amended so as to vest that power in the trustee of the Mamari Trust.

H. An order that the power of appointment and removal of trustees of the Mamari (No.2) Trust is amended so as to vest that power in the trustee of the Mamari (No.2) Trust;

I. Costs on an indemnity basis.

[96] I accept Ms Bruton's submission that this pleading cannot be read as Ms Triezenberg and/or Mr Dodd evincing a "desire to be discharged" within the meaning of s 43 of the Act. Rather, the plaintiffs sought the assistance of the Court, pursuant to either the Trustee Act or its inherent jurisdiction, and the various forms of relief sought at paragraphs A to I of the prayer for relief proposed a range of potential outcomes to the plaintiffs' claims should the Court find them made out.

[97] Mr Mason's 11 March 2018 deeds were premised on each of the plaintiffs having expressed a desire to be discharged for the purpose of s 43 of the Trustee Act. I have found that neither Ms Triezenberg nor Mr Dodd expressed such a desire. That is sufficient to conclude that the 11 March 2018 deeds were ineffective in removing the plaintiffs as trustees.

[98] The validity of the 11 March 2018 deeds gives rise to a further issue, however, namely whether Mr Mason had the power to remove the plaintiffs from their position as trustees and replace them with Mark in any event, irrespective of whether either or both the plaintiffs had expressed a desire to be discharged. This requires consideration of the relevant terms of each trust deed.

As of 11 March 2018, did Mr Mason have the sole power of appointment under the Mamari Trust deed?

[99] Clause 7 of the Mamari Trust deed provides:

> The power of appointment of new Trustees hereof shall be vested in the Settlors during their lifetimes and after the death of the first of the Settlors to die then in the surviving Settlor and after the date of death of the surviving Settlor in the administrator or executor for the time being of the surviving spouse's Will and if at any time after the death of the surviving Settlor and the winding up of that person's estate there shall be no such administrator or executor able or willing to act then in the person or persons in whom the statutory power is vested by the Trustee Act 1956 or any statutory modification therefore for the time being in force.

[100] The power of removal of trustees is vested in the person or persons in whom the power of appointment is vested (cl 8). Clause 7 is accordingly the controlling provision.

[101] Pursuant to cl 7, and so long as both Mr and Mrs Mason are both living, each holds a power of appointment, to be exercised jointly with the other. As, however, Mrs Mason is incapable of exercising her power of appointment, s 43 of the Trustee Act applies.

[102] Mr Thwaite submits that for the purposes of s 43, and given Mrs Mason, as holder of the joint power of appointment, is not able and willing to act on that power, Mr Mason as the sole surviving or continuing trustee has the power – and responsibility – to appoint a new trustee.

[103] In respect of *Mrs Mason's* power of appointment, however, Mr Mason is not "the person nominated for the purpose of appointing new trustees" – it is Mrs Mason, who, as stated, is incapable of exercising that power. As such, and for the purposes of s 43, the continuing or surviving trustees hold her power of appointment and removal,

to be exercised jointly with Mr Mason. Accordingly, the power of appointment vests jointly with Mr Mason on the one hand, and Mr Mason and the plaintiffs on the other.

[104] As a result, Mr Mason's purported sole removal of the plaintiffs and the appointment of Mark as a new trustee was not a valid exercise of the power of appointment and removal under the Mamari Trust deed. The trustees of that trust accordingly remain Mr Mason, Ms Triezenberg and Mr Dodd.

As of 11 March 2018, did Mr Mason have the sole power of appointment under the Mamari (No. 2) Trust deed?

[105] The Mamari (No. 2) Trust contains detailed provisions concerning the appointment and removal of trustees:

> **17 APPOINTMENT AND REMOVAL OF TRUSTEES**
>
> 17.1 **Settlor's powers of appointment and removal:** Each Settlor shall have the powers, exercisable from time to time, to appoint one Trustee and to remove every Trustee appointed by that Settlor. For the purposes of this clause **Alexander Charles Mason** shall be deemed to have appointed himself and **Wendy Anne Mason** shall be deemed to have appointed herself.
>
> 17.2 **Transfer of powers of appointment and removal:** A Settlor may, be deed or will, and on such terms and conditions as the Settlor thinks fit, transfer the power of appointment and removal held by that Settlor to any other person. Where such a transfer is made, it shall apply to both the powers of appointment and removal set out in clause 17.1 and in clause 17.4, which are held by the Settlor.
>
> 17.3 **Death, disability and unwillingness to act:**
>
> (a) If a Settlor dies, subject to the terms of any transfer of the powers of appointment and removal held by that Settlor, those powers shall, from the date of the Settlor's death be exercisable by the legal personal representatives of the Settlor and after the final distribution of the estate of the Settlor, by the Trustees.
>
> (b) If a Settlor is unable or unwilling to act, the Settlor's power of appointment and removal of Trustees shall be exercisable:
>
> (i) If the Settlor shall have appointed an attorney or attorneys under an enduring power of attorney in relation to property, by that attorney or those attorneys (who shall execute any document required upon the exercise of his, her or their powers under this subclause in the manner prescribed in the terms of his, her or their appointment as attorney or attorneys);
>
> (ii) If the Settlor shall not have appointed an attorney or attorneys under an enduring power of attorney in relation to property, by the Trustees.
>
> (c) If a settlor shall have transferred the powers of appointment and removal of Trustees held by that Settlor to another person, and that person dies or is unable or unwilling to act, those powers shall, subject to the terms of the transfer, be exercisable:

(i) By the Settlor who originally held those powers if that Settlor is then living; or

(ii) if that Settlor is not then living, by the legal personal representatives from time to time of that Settlor, and after the final distribution of the estate of that Settlor, by the Trustees.

17.4 **Additional and advisory Trustees:** The holder or holders of the powers of appointment and removal of Trustees shall jointly (if more than one) have the power to appoint and remove such additional and advisory Trustees as the holder or holders may determine. **Paul Morley Dodd** and **Vicki Ann Triezenberg** shall be deemed to have been appointed an additional Trustee pursuant to this clause.

…

17.7 **Means of appointment and removal:** Exercise of the powers of appointment and removal shall always be by deed but, in the case of the powers held by either of the Settlors, may be by will. Where the power of removal is vested in the Trustees, the power of removal may be exercised by a majority of not less than 75% of the Trustees."

[106] Mrs Mason accordingly holds a power of appointment to appoint one trustee and remove any trustee appointed by her (cl 17.1). Pursuant to this power of appointment, Mrs Mason appointed herself a trustee and accordingly has the power to remove herself and appoint a replacement trustee. Mr Mason holds a similar power.

[107] Mrs Mason also holds the power to appoint and remove additional trustees (cl 17.4). This is to be exercised jointly with Mr Mason. The plaintiffs were deemed to have been appointed additional trustees pursuant to cl 17.4. The power to remove them is accordingly to be exercised jointly by Mr and Mrs Mason.

[108] By the time of her admission to Middlemore Hospital, Mrs Mason was unable to exercise her power of appointment and removal. Pursuant to cl 17.3(b)(i), and at least until 26 September 2016 (when Ms Triezenberg's EPOA was revoked by consent by the Family Court), Mrs Mason's power of appointment and removal accordingly vested in Ms Triezenberg. There was no real dispute about this. The position after the revocation of Ms Triezenberg's EPOA is, however, less clear.

[109] Clause 17.3(b) does not expressly address the scenario in which a settlor *has* appointed an attorney, but that appointment has later been revoked or otherwise terminated. On one view, given Mrs Mason had appointed an attorney, cl 17.3(b)(i) applies. I consider, however, the better reading of cl 17.3(b) is that once any appointment of an attorney has been revoked, the settlor is deemed, for the purpose of cl 17.3(b)(ii), to "not have appointed an attorney". To conclude otherwise would result

in a person no longer having the power to act on the settlor's behalf, nevertheless having the (significant) power of appointment and removal of trustees. I do not consider that to have been an intended consequence of the provisions of cl 17.3(b).

[110] Accordingly, upon Ms Triezenberg's EPOA being revoked, cl 17.3(b)(ii) applied. Mr Thwaite submits that from that time, the general power of appointment and removal under cl 17.4 vested solely in Mr Mason, as the sole person with the power to appoint and remove trustees. I do not agree. The submission does not reflect that the power of appointment and removal is a power granted to *each* settlor, though cl 17.4 requires such power to be exercised jointly.

[111] Who has the power to exercise Mrs Mason's power of appointment jointly with Mr Mason for the purposes of cl 17.4 is determined by cl 17.3(b). Given Mrs Mason's incapacity, cl 17.3(b)(ii) provides that her power of appointment and removal is to be held by "the Trustees". "Trustees" is defined in the deed as "the trustee or trustees for the time being of the Trust, whether original, additional or substituted". As at the time of Mrs Mason's incapacity, each of Ms Triezenberg and Mr Dodd were "Trustees" for the purposes of cl 17.3(b)(ii). Following the revocation of Ms Triezenberg's EPOA, Mrs Mason's power of appointment and removal vested in Mr Mason, Ms Triezenberg and Mr Dodd.

[112] Mr Mason on the one hand, and Mr Mason, Ms Triezenberg and Mr Dodd on the other, accordingly hold the joint power of appointment and removal of any additional trustees under cl 17.4. Where the power of removal is vested in the trustees, exercise of that power requires the approval of not less than 75 percent of the trustees.[22] The deed is silent as to the majority required for the exercise of a power of appointment which is held by the trustees. In such circumstances, cl 12.6 would require a decision on the exercise of that power to be unanimous.

[113] In light of the above, Mr Mason's purported sole removal of the plaintiffs and appointment of Mark in their place was also invalid. The trustees of the Mamari (No. 2) Trust continue to be Mr Mason, Ms Triezenberg and Mr Dodd.

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22 Clause 17.7.

Should any or all of the current trustees be removed and replaced?

Legal principles

[114] There is no real dispute between the parties as to the applicable legal principles, which are well settled.

[115] Removal and substitution of trustees pursuant to s 51 of the Trustee Act and the Court's inherent jurisdiction was comprehensively summarised by Winkelmann J in *Green v Green*:[23]

> [598] The Court has jurisdiction under s 51 of the Trustee Act 1956 to appoint and substitute trustees, which includes the power to remove by substitution. Section 51 relevantly 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;
>
> …
>
> [599] There is the suggestion in some texts that the jurisdiction is not available where there is a dispute as to facts or where the trustee is willing and able to continue. However there is nothing in the statutory language to suggest such a limitation. The notion that this jurisdiction is so limited may originate from early cases in which the concern was with the proper form of pleading. Those concerns obviously no longer apply here.
>
> [600] In any case, the Court also has an inherent jurisdiction to remove trustees as part of its general jurisdiction to supervise the administration of trusts.
>
> [601] When exercising its jurisdiction to remove trustees the Court is guided by the welfare of the beneficiaries. As the Privy Council stated in *Letterstedt v Broers*:

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[23] *Green v Green* [2015] NZHC 1218 at [598]-[606]. More recently, see *Peng v Rothschild Trust (Schweiz) AG* [2017] NZHC 25 at [38] where similar principles were stated.

> In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

[602] As well as the welfare of the beneficiaries, the security of trust property and the satisfactory execution of the trusts are recognised as guiding principles in the exercise of the Court's jurisdiction. Dixon J stated in *Miller v Cameron*:

> The jurisdiction to remove a trustee is exercised with a view to the interests of the beneficiaries, to the security of the trust property and to an efficient and satisfactory execution of the trusts and a faithful and sound exercise of the powers conferred upon the trustee. In deciding to remove a trustee the Court forms a judgment based upon considerations, possibly large in number and varied in character, which combine to show that the welfare of the beneficiaries is opposed to his continued occupation of the office. Such a judgment must be largely discretionary. A trustee is not to be removed unless circumstances exist which afford ground upon which the jurisdiction may be exercised. But in a case where enough appears to authorize the Court to act, the delicate question whether it should act and proceed to remove the trustee is one upon which the decision of a primary Judge is entitled to especial weight.

[603] As the Court of Appeal recognised in *Medlessohn & Schmid v Centrepoint Community Growth Trust* the settlor's intentions, neutrality between beneficiaries and promotion of the purposes of the trust are also relevant circumstances.

[604] In considering whether a trustee should be removed it is not necessary to establish that there has been a breach of trust, but equally establishing a breach of trust will not necessarily be sufficient to justify the removal of a trustee. Inconsequential mistakes should not be allowed undermine a settlor's intention. Nor will a trustee be removed simply because of a position of conflict between duty and interest. Whether or not a position of conflict will justify removal depends on the nature of the conflict and the other circumstances of the case.

[605] As to incompatibility between trustees and beneficiaries the Court of Appeal in *Kain v Hutton* said:

> …mere incompatibility between trustees and beneficiaries is not enough … Any incompatibility must be at such a level that the proper administration of the trust is seriously adversely affected and it has become difficult for a trustee to act in the interests of the beneficiary…

[606] What is apparent therefore, is that each or any of the existence of conflicts of interest, misconduct on the part of the trustee, incompatibility or hostility between trustees and beneficiaries can be reasons for removing a trustee, but whether removal is appropriate in a particular case will depend on whether any of those factors are present to a sufficient extent to undermine the satisfactory execution of the trust for the welfare of the beneficiaries.

[Footnotes omitted]

[116] Trustees are not to be lightly removed. The courts are generally reluctant to remove trustees if other avenues can be found to remedy a perceived risk.[24] Further, incompatibility between trustees and beneficiaries is not enough to justify removal. Any incompatibility must be at such a level that the proper administration of the trust is seriously adversely affected and it has become difficult for a trustee to act in the interests of the beneficiaries.[25]

Should the Court interfere at all?

[117] Save for the agreed position that orders ought to be made removing Mrs Mason as a trustee of both trusts, I first consider whether there is any need for the Court to intervene at all in the present trust arrangements. As noted above, trustees are not to be removed lightly. Mr Thwaite emphasised that the overall situation is now more settled and there is at present little to be done in each trust. He notes that:

(a) In the Mamari Trust, the property at Captain Springs Road is rented at a level acceptable to all trustees. That rent is used to fund the monthly distributions to Mr Mason. When he is in New Zealand, Mr Mason continues to occupy the family home, a situation with which all trustees are comfortable. Mr Dodd and Ms Triezenberg acknowledge that as matters currently stand, there are no outstanding issues in this trust.

(b) In the Mamari (No. 2) Trust, the only real outstanding issue is what is to be done with the trust's significant cash holdings, currently on deposit with ANZ. Mrs Mason is currently residing at Abridge Rose Manor and an automatic payment is in place regarding her costs of care. All significant debts owed by the trust have been paid, including money due to be reimbursed to Mrs Mason personally.

[118] Despite the present position being tolerably settled, I consider it an inescapable conclusion that the Court ought to exercise its supervisory jurisdiction in relation to these trusts. I say this for the following reasons.

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[24] *Re C P Clifton Children's Trust, Clifton v Clifton*, HC Auckland, CIV-2004-404-4185, 5 November 2004, at [35] per Paterson J.

[25] *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [267].

[119] First, I have no doubt the current position, including what Mr Thwaite points to as Mr Mason's stewardship of the trusts in recent times, has only been achieved given the spectre of the present proceedings and the not insignificant recourse and assistance the parties have had from a range of lawyers (at a significant cost to the Mamari (No. 2) Trust). It should not be necessary for trustees to have legal advisers constantly "sitting at their shoulder" to regularise matters, or to try to keep an even keel, a situation I have no doubt would be required if the current arrangements were to continue.

[120] Second, since Mr Mason's purported removal of the plaintiffs as trustees, he has not had to engage regularly or directly with them. Given the conclusion I have reached as to the purported deeds of removal and appointment dated 11 March 2018, Mr Mason will again be in the position of co-trustee with the plaintiffs. He will need to engage professionally and cooperatively with them. The trustees cannot continue to engage with each other in the administration of the trusts via lawyers. The costs to the trust are inappropriate and unsustainable. I do not see any prospect of the three trustees being able to work together on an ongoing basis. The position is well past the point of mere incompatibility. The operation of the trusts has been significantly and seriously impaired and trust assets significantly eroded, ultimately to the beneficiaries' detriment.

[121] Third, how events will transpire in the short to medium term is unknown. Mrs Mason's condition may well require changed care requirements. Mr Mason's inflexibility in that regard, and his inability to fully accept her condition may well continue to impede proper and prompt care arrangements being put in place. It would be, to put it bluntly, quite unacceptable for another "11th hour" crisis to emerge in relation to Mrs Mason's care, which can only realistically be funded by the Mamari (No. 2) Trust. And the trustees are already in dispute as to the investment of that trust's assets, though all seem to accept it is not prudent for the cash funds simply to sit indefinitely on term deposit. Further, the tenant at Captain Springs Road may unexpectedly quit the tenancy, requiring cooperation and decision-making by the trustees on arrangements going forward.

[122] A range of matters could therefore occur requiring flexibility, cooperation and substantive decision-making between the trustees. I do not consider the current trustees could achieve this. And while there is a mechanism within the Mamari Trust to resolve trustee deadlock, given the inevitability of disputes, it is inappropriate in my view for the Court to refrain from exercising its supervisory role by effectively "parking" the dysfunction between the trustees in reliance on the dispute resolution mechanism. Any future disputes will inevitably cause disruption and delay, and recourse to that provision (and the costs involved) will further erode trust assets.

[123] For these reasons, the current combination of trustees is unsustainable. I accordingly turn to consider whether any or all of Mr Mason and the plaintiffs ought to be removed.

Should Mr Mason be removed as trustee?

[124] I have reached the clear, though somewhat reluctant, conclusion that Mr Mason ought to be removed as trustee of both trusts. I say reluctant, as I recognise and accept that Mr Mason is one of two settlors of the trusts. That fact does not, however, outweigh that in my view, it is no longer appropriate for him to carry out the role of trustee. My reasons are as follows.

[125] First and perhaps most importantly, it became clear over the course of Mr Mason's evidence that he disputes and does not believe in the very concept of the two trusts. His view is essentially that the trust assets are his (and Mrs Mason's) and he ought to be able to do with them as he likes. He quite candidly accepted in cross-examination that the reason he is unhappy with Ms Triezenberg and Mr Dodd is that they will not let him do whatever he likes with trust assets.

[126] This displays a lack of understanding on Mr Mason's part of the role and duties of a trustee, including the duty to administer the trust assets for the benefit of all beneficiaries. Ultimately, a person who does not accept or believe in the very concept of the trust of which they are a trustee is the antithesis of who ought to be a trustee.

[127] Second, trustees must be flexible to deal with changing markets, active management of assets, the changing needs and circumstances of beneficiaries and any

changes to their co-trustees. They must give active consideration to their management of the trust assets and the exercise of their discretions.[26]

[128] I do not consider Mr Mason is now well-placed to adopt such an approach. As Dr Casey explained, he has a rigidity in thinking, or more colloquially, a very "black and white" approach, displayed by many of the issues which have arisen both within and around the trusts. A particular concern is Mrs Mason's ongoing needs, as a highly vulnerable and needy beneficiary. I should emphasise that I am in no way suggesting Mr Mason does not have Mrs Mason's best interests in mind. He *clearly* wishes to do what he sees as the very best for his wife. However, his inability to accept the full extent and nature of her condition shapes what he perceives to be her best interests. While her care at present is adequately managed, as Dr Casey explained, Mr Mason's lack of acceptance of Mrs Mason's condition has created all the barriers to her care to date. Mrs Mason's ongoing care will clearly be a focus for the Mamari (No. 2) Trust trustees in the short to medium term.

[129] Third, Mr Mason exhibits extreme hostility to both Ms Triezenberg and Mr Dodd as co-trustees, as well as Ms Triezenberg and Ms Richardson who are beneficiaries of the trusts. I am satisfied Mr Mason is no longer capable of giving consideration to some of the beneficiaries (Ms Triezenberg and Ms Richardson) in a fair and impartial manner. He stated that he had "good reason" to ignore some of the beneficiaries.

[130] In terms of the day-to-day administration of the trusts, Mr Mason's deep hostility towards his co-trustees presents real issues for their ongoing administration. The hostility has resulted in significant dysfunction in the trusts and unsustainable dissipation of trust assets. While I fully accept that no such scenario will be a totally "one-way street", I have no doubt Mr Mason is the primary cause and source of the problem.

[131] I will therefore make orders removing Mr Mason as trustee of the Mamari and Mamari (No. 2) Trusts.

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[26] Greg Kelly and Chris Kelly *Garrow and Kelly Law of Trusts and Trustees* (7th ed, LexisNexis, Wellington, 2013) at [19.26]-[19.29].

[132] For completeness, I have also given close consideration to whether an alternative solution would be for Ms Triezenberg and Mr Dodd to be removed and a professional trustee appointed as Mr Mason's co-trustee. I have not adopted this approach for two primary reasons.

[133] First, for the reasons set out in the following section of this judgment, there is in my view no principled basis upon which to remove Ms Triezenberg and Mr Dodd as trustees. The removal of trustees should be for sound and principled reasons, not simply as a matter of convenience or to ease the anxiety of a particular party.

[134] Second, even if Ms Triezenberg and Mr Dodd were removed and a professional trustee appointed in their place, I do not consider this would solve or remove the issues which have presented in the trusts to date. As noted above, Mr Mason does not accept the very nature of the two trusts, which will not be resolved by the introduction of yet another "stranger" into the Mason family affairs. Further, I have no doubt Mr Mason will soon fall out with any independent trustee appointed who does not fully agree with or adopt his proposed course of action. The history of these proceedings and the broader family dispute demonstrates a lengthy and unfortunate list of those Mr Mason has fallen out when they did not agree with him:

(a) Obviously his two daughters, to whom he was previously very close, over their divergent views as to Mrs Mason's care needs;

(b) Mr Dodd, the family accountant of some 25 years;

(c) Mr Jorgenson, the family solicitor of some 55 years;

(d) All medical professionals and specialists who have taken a different view to Mr Mason in relation to Mrs Mason's medical condition and needs (including the family GP of some 30 years and the specialists at Middlemore Hospital);

(e) The St Andrew's Village management and staff;

(f) Mr Mason's former barrister Robert Hacking, who gave evidence at the hearing as to unpaid fees (in respect of which legal action is being taken against Mr Mason) and Mr Mason's complaint about him to the Law Society (which was dismissed);

(g) Mr Allen, soon after he was appointed Mrs Mason's property manager and welfare guardian;

(h) Kate McLean Ltd, who ultimately terminated its care of Mrs Mason;

(i) Dr Casey, who terminated her involvement in the family, the "hi-jacked" meeting discussed earlier being the final straw;

(j) Graceful Care Ltd, who Mr Mason blames for Mrs Mason's decline in March 2018; and

(k) Perhaps almost as sad as Mr Mason's falling out with immediate family members, Mr Mason's long-term and very close friend (being best man at his wedding several decades ago), who attended the family mediation with Mr Mason and who evidently spoke positively about Mr Allen. Mr Mason made it clear at the hearing that he will never again communicate with his former friend. He also said he would no longer communicate with a person he referred to as his "second best friend", who he said had made comments to his daughters which upset him.

[135] I unfortunately cannot see the picture being any different in the case of an independent and professional co-trustee who does not agree fully with Mr Mason.

Should either or both of Ms Triezenberg and Mr Dodd be removed as trustee?

[136] I have also considered whether it would be expedient simply to remove all three trustees and appoint a professional trustee in their place, such as Guardian Trust. I was provided with an affidavit in which Guardian Trust consent to being appointed. Such a course would align with the position agreed in the 2016 settlement agreement

but never implemented. It was also a potential outcome proposed in the plaintiffs' earlier pleadings.

[137] While I was initially attracted to such an outcome, on reflection, I have reached the conclusion that it is not necessary or appropriate. The primary reason is that as explained below, I have concluded there is no principled basis upon which to remove the plaintiffs as trustees. Further, in the absence of a principled reason to remove and replace trustees, injecting a new trustee into the trusts will cause the trusts to incur further unnecessary costs as the new trustee "comes up to speed" with the history and present status of the trusts.

[138] Turning to each of Ms Triezenberg and Mr Dodd, they were handpicked by Mr and Mrs Mason, the latter who is now unable to speak for herself, to be trustees of the two trusts for the next phase of the Mason's lives. Mr Mason accepted that Ms Triezenberg was a logical choice for this role, given her earlier assistance with his and Mrs Mason's (and the Mamari Trust's) financial affairs. Mr Mason's present hostility towards Ms Triezenberg stems primarily from their divergent views on Mrs Mason's care needs and what Mr Mason sees as Ms Triezenberg's actions in having Mrs Mason admitted to St Andrew's Village. Dr Casey expressed the view that Mrs Mason's admission to St Andrew's Village seemed to come about quite quickly after her admission to Middlemore Hospital. Despite Mr Thwaite's submissions to the contrary however, these events do not undermine Ms Triezenberg's role *as trustee*. As noted, Ms Triezenberg was acting on the advice and recommendations of the Middlemore Hospital clinical team at the time, a point Mr Mason does not appear to acknowledge or accept.

[139] Mr Mason has lost trust in Mr Dodd as a result of what he now says was incorrect advice provided by him as to Mr Mason's ability to control the operation and assets of the trusts. Mr Mason appears to have had full legal advice given to him at the time at least the Mamari (No. 2) Trust was established. However, none of these issues were fully explored in the evidence (for example, the solicitor advising Mr and Mrs Mason in 2013 was not called give evidence), nor do they require determination on the pleadings in any event. No orders are sought by Mr Mason in relation to the validity or termination of the trusts. Mr Mason's present lack of trust in Mr Dodd for

what he sees as poor advice in the past does not provide a sound basis for Mr Dodd's removal as trustee. Mr Dodd also gave evidence that he is a professional trustee of some 48 trusts, and has not experienced any issues in any other of those trusts.

[140] Further, having considered all the evidence, I am satisfied that each of Ms Triezenberg and Mr Dodd have worked hard to conscientiously carry out their role as trustees. It would have been very easy for them to "throw in the towel", but they have persevered in extremely difficult circumstances. They have sought to include Mr Mason in trustee decision-making. They have taken professional advice on the investment of the Mamari (No. 2) Trust assets and as Mr Mason ultimately accepted, Mr Dodd was simply doing his job as trustee when examining the position of the Captain Springs Road property. Ms Triezenberg and Mr Dodd impressed me as balanced and careful witnesses. They have worked closely and cooperatively with Mrs Mason's welfare guardian to ensure Mrs Mason's care needs are fully met and paid for. They have had recourse to the Court when circumstances made it inevitable the Court's intervention was required.

[141] Mr Thwaite referred to a range of matters which in his submission, make the plaintiffs unsuitable to continue as trustees.

[142] I have already referred above to the suggestion that Mr Dodd concealed certain matters from the High Court, which I do not accept.[27] Mr Thwaite says the loan from Mrs Mason to the plaintiffs was also concealed by Mr Allen from the Family Court. However, the propriety or otherwise of Mr Allen's actions is not a matter I can or need to adjudicate on. Those are matters for the Family Court. Further, Mr Dodd cannot be responsible for any suggested failing by Mr Allen in his disclosure to the Family Court.

[143] Mr Thwaite further submits that Mr Dodd has improperly charged for his time in acting as a trustee, rather than simply charging for his time in providing accountancy services to the trusts. He says this places Mr Dodd in a position of conflict, which also infects Ms Triezenberg's position, given she is unlikely to instigate action on behalf of the trusts to recover the funds.

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[27] See [42], [52]-[53] above.

[144] However, as a professional trustee, Mr Dodd is entitled to charge for his time in engaging in trustee services (i.e. in addition to providing accounting services to the trusts). Clause 14 of the Mamari Trust provides as follows:

> The Trustees may employ on such terms and conditions as they think fit and to remunerate and discharge managers, servants and agents including any one or more of the Trustees **and** any Trustee … being a solicitor, **accountant** or other person engaged in any profession or business shall be entitled to charge and be paid all professional or other charges for any business or act done by him or her or his or her firm in connection with the Trusts including acts which a Trustee could have done personally.
>
> [Emphasis added]

[145] The Mamari (No. 2) Trust deed (cl 20.1) contains a similar provision:

> Any Trustee or advisory trustee of the Trust engaged in any profession, business or trade may act in that capacity in connection with the affairs of the Trust, **and** any such Trustee or advisory trustee, and any other Trustee or advisory trustee of the Trust, may charge and be paid all reasonable and proper charges for all services rendered, business transacted, responsibility involved, time spent and all acts done by that Trustee, advisory trustee, or by any firm or entity of which that Trustee is a member, employee or associate in connection with the affairs of the Trust.
>
> [Emphasis added]

[146] These provisions do not limit a professional trustee to charging for time spent providing, in this case, accountancy services to the trusts, and Mr Thwaite did not expand on how they ought to be interpreted as such. Plainly very few persons would be prepared to act as professional trustees in family trusts of which they are not a part without being able to charge for their reasonable time incurred in the provision of trustee services.

[147] Mr Thwaite next submits that Ms Triezenberg took $117,000 from Mrs Mason's account and "put [it] into a private account" so as to limit the funds available to any property manager. I accept, however, Ms Triezenberg's explanation of her and her sister's motivation in this regard, given the circumstances then existing in relation to her mother's care.[28] I have also addressed earlier the suggestion inherent in the reference to the funds being deposited into a "private account".[29]

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[28] See [40] to [42] above.
[29] See [41] above.

[148] Mr Thwaite points to the fact that for a time, the plaintiffs sought advice in relation to these proceedings from Sellar Bone & Partners, the solicitors for each trust. He says there was an obvious conflict of interest and the fact advice was sought from that firm means the plaintiffs are not suitable to continue as trustees. I am not persuaded that is the case. Rather than being a matter for the plaintiffs to consider, whether and in what circumstances Sellar Bone could act, and considered they could act, was properly a matter for them. No evidence was before me from or on behalf of Sellar Bone as to the circumstances in which they came to advise the plaintiffs. I do not consider this matter reflects personally on the plaintiffs in their role as trustees.

[149] Mr Thwaite also says the plaintiffs are "beholden" to Mr Allen for the loan made to them (on Mrs Mason's behalf) making them unable or unwilling to challenge the fees charged by Mr Allen for his work as property manager.[30] However, the loan was made in circumstances which I do not consider calls into question the plaintiffs' honesty or fitness to remain as trustees, or renders them "beholden" to Mr Allen. Further, in light of earlier court orders made in these proceedings as to payment of costs by the Mamari (No. 2) Trust, the loan has been repaid in any event. Mr Allen's conduct as property manager and welfare guardian is subject to the control and oversight of the Family Court. It is inappropriate for me to engage or rule on such matters, including Mr Allen's fees, in these trustee proceedings.

[150] Ms Triezenberg acknowledged she was not fully conversant in the terms of the trust deed provisions and considered all three siblings must ultimately receive the same amount of distributions. Mr Thwaite says these comments demonstrate she is not suitable to remain as trustee. However, the former point could no doubt be levelled at many non-professional trustees acting in family trusts. For example, Mr Mason accepted he was not aware of the technicalities with the trusts or the trust deed terms. I have no doubt Ms Triezenberg will be very familiar with the trust deeds' terms by the conclusion of this litigation and will, as and when required, seek professional advice and support. Further, her view as to equal distribution among siblings supports a conclusion that her currently strained relationship with her brother will not result in

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30 He does not charge for his time as welfare guardian.

her considering him, as a beneficiary, other than in a fair and impartial manner – as both she and Mr Dodd must do.

[151] Ms Triezenberg's comments as to equal distributions also reflect the Memorandum of Guidance given to the trustees by her parents, which expresses their wish that upon the last of them to pass away, the trusts will be wound up and the assets distributed equally among the three children. Both Ms Triezenberg and Ms Richardson said their parents had always tried to treat each of them equally, irrespective of their particular circumstances. Accordingly, while such matters obviously cannot constrain the trustees in the exercise of their duties and discretions as circumstances dictate, Ms Triezenberg's comments in this regard do not in my view mean she is unfit to continue to be a trustee.

[152] Mr Thwaite also submits the plaintiffs are motivated by "irrelevant" concerns, shown by the "free work" that Mr Dodd is carrying out and Ms Triezenberg's attitude to Mr Mason and an earlier caregiver of Mrs Mason. I have addressed above that Mr Dodd is no longer charging for any of his time which is associated with these proceedings. I do not consider this provides a basis for his removal. Rather, it shows Mr Dodd taking a pragmatic and sensible approach to what he (rightly) views as the unsustainable cost of the litigation to the trusts. Mr Thwaite's submission as to Ms Triezenberg's attitude to Mr Mason and the earlier caregiver does not advance matters. The fact Ms Triezenberg did not want an earlier caregiver to continue to care for her mother says nothing of her current ability to continue as trustee.

[153] Mr Thwaite also points to the proposal to make a distribution to Mrs Mason of $200,000, to be held by SurePlan on trust for Mrs Mason and administered by Mr Allen in relation to Mrs Mason's care. Mr Thwaite says that permitting Mr Allen to spend the money in his "absolute discretion and without even a need to report" constituted an impermissible delegation of the powers of trustees.

[154] I have addressed above the circumstances in which this proposal came about.[31] Given the intense difficulties in ensuring proper and prompt payment for Mrs Mason's care, I do not consider the proposal casts doubt on either of the plaintiffs' fitness to

[31] See [58]-[59] above.

remain as trustees. Rather, it was a pragmatic arrangement, initially proposed by Dr Fisher when reporting to the Family Court, to ensure Mrs Mason's care arrangements were not jeopardized in the future. The resolution making the distribution also would have required monthly and annual reports to the trustees of all debits and credits from the funds. The suggestion that Mr Allen could simply spend the funds in his absolute discretion and without the need to report is accordingly not made out.

[155] Mr Thwaite also points to the fact that payment to Mr Mason of the $77,000 owed to him by the Mamari (No. 2) Trust was "conditional" on Mr Mason's agreement to payment by the trust of Mr Dodd's outstanding fees. He says this further demonstrates the plaintiffs are unfit to act as trustees. I disagree. I accept that given there was no dispute the $77,000 was Mr Mason's money, it ought to have been promptly paid to him. But the context surrounding the payment, including that Mr Dodd had not been paid for nearly one and a half years, must also be taken into account. Ultimately, I accept Ms Bruton's submission that this was "understandable brinkmanship" in the prevailing circumstances.

[156] Finally, Mr Thwaite submits the plaintiffs have not had sufficient fidelity to the requirement in the Memorandum of Guidance that the trustees' primary duty is to ensure the comfort and welfare of each of Mr and Mrs Mason. He did not explain, however, how this is so. Rather, other than the various costs associated with the legal proceedings and Mr Allen, the only distributions from the trusts are for Mr and Mrs Mason's benefit. Mr Mason continues to receive all distributions from the Mamari Trust (being a monthly payment of $4,000) and continues to reside in the family home owned by that trust. Mrs Mason's care and wellbeing is clearly a – if not the – key concern for the trustees of the Mamari (No. 2) Trust. Both Mr Dodd and Ms Triezenberg show a keen awareness of the Memorandum of Guidance's principles, and the need to provide for each of Mr and Mrs Mason's ongoing comfort and well-being.

[157] Standing back and viewing Ms Triezenberg and Mr Dodd's conduct in the circumstances in which they have found themselves, and despite my initial view that an expedient outcome might be to also remove them and appoint Guardian Trust as sole trustee, I have concluded this would be an unprincipled and unnecessary step.

Detailed scrutiny of the operation of trusts over many years, in particular family trusts, is bound to show some instances where trustee conduct could have been improved. This case is no exception. I am not persuaded, however, that the various matters raised by Mr Thwaite, either individually or collectively, warrant the plaintiffs' removal. I am satisfied each of Ms Triezenberg and Mr Dodd understand their role as trustee and are cognizant of their duty to act in accordance with the welfare of all beneficiaries, taking into account the principles contained in the Memorandum of Guidance.

[158] I accordingly decline to make orders removing the plaintiffs as trustees.

Should Mark be appointed a further trustee of either or both the trusts?

[159] Given I have declined to make orders removing the plaintiffs as trustees, there is no clear necessity to appoint Mark a further trustee of the trusts. Mark's appointment has only been proposed and considered in the context of being a co-trustee with Mr Mason, neither trust deed permitting or envisaging a sole trustee (other than a professional corporate trustee).[32] For completeness, however, I have considered whether it is appropriate to appoint Mark as an additional trustee. I note the point was not pressed firmly by Mr Thwaite, who said that even if Mark had been validly appointed a trustee by the 11 March 2018 deeds, he was likely to be a "transitional figure" only.

[160] Other than some brief and circumstantial evidence as to Mark's suitability to act as trustee, I do not have any direct evidence on such matters. Mark did not give evidence at the hearing. Nor is there any evidence that Mark consents to being a co-trustee with Ms Triezenberg and Mr Dodd.

[161] Neither Mr or Mrs Mason appointed Mark as a trustee of either trust prior to this dispute arising, or as their attorney in either the trusts or pursuant to an EPOA – all such roles being allocated to Ms Triezenberg, Mr Dodd or Ms Richardson. While that might have been for reasons unconnected with Mark's perceived suitability for such roles (for example, he may have simply expressed a wish not to be involved),

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[32] Mamari Trust deed, cl 6; Mamari (No. 2) Trust deed, cl 12.4.

there is nevertheless no evidence before me that prior to the fracture of this family, Mark was considered suitable for the role of trustee.

[162] There is also the evidence of the physical altercation between Mark and Ms Triezenberg (initiated by Mark), which Mr Mason accepted had occurred. In addition, at the hearing itself, Mr Allen gave evidence of threatening conduct on Mark's part towards Mr Allen in the Court foyer. This led me to take the somewhat unusual step in civil proceedings of having court security attend inside and immediately outside the Court until matters had settled.

[163] In the absence of any real need at this time for a further trustee to be appointed in each trust, I am not satisfied I should make orders appointing Mark an additional trustee. I accept Mark's appointment might give some comfort to Mr Mason given his own removal as trustee, but that is not a proper basis for appointing a new trustee. That is particularly so given I envisage any such appointment could inject back into the trusts a similar level of hostility and dysfunction that has been so damaging to date.

[164] I accordingly decline to make an order appointing Mark as a trustee of either trust.

Result and next steps

[165] There will accordingly be orders removing each of Mr and Mrs Mason as trustees of the Mamari and Mamari (No. 2) Trusts.

[166] I also make a declaration that the purported deeds of 11 March 2018 are invalid and of no effect, in either removing the plaintiffs as trustees or appointing Mr Mark Mason as trustee.

[167] I decline to made the orders sought on Mr Mason's counterclaim and it is dismissed.

[168] The plaintiffs seek ancillary vesting orders, as well as orders amending the trust deeds to provide that the powers of appointment and removal vests in the trustees.[33] Vesting orders would appear appropriate.

[169] It is not clear, however, given my findings in this judgment as to the powers of appointment and removal under the trust deeds, that orders amending those provisions of the deeds are now required. The parties did not present detailed submissions on this issue and of course were not in possession of my findings on the relevant terms of the trust deeds.

[170] As Ms Bruton suggested at the conclusion of the hearing, I consider it sensible for the parties to be given an opportunity to draft and agree the precise form of the orders flowing from this judgment, including as to the vesting of the trust property. I make no orders on amendments to the trust deeds at this time. Unless the position is agreed, I propose to call for further, brief submissions on that issue. There will also need to be timetable orders made on the question of costs. To the extent the position cannot be agreed, a process and timetabling for review of the reasonableness of amounts paid to date by the Mamari (No. 2) Trust pursuant to the earlier orders of Venning and Woolford JJ will also need to be considered.

[171] The Registry is directed to convene a teleconference before me on the first convenient date **after 4 February 2018**. The parties are to confer and seek to agree the form of the orders to be made in light of this judgment, and timetable orders for any further submissions on amendments to the trust deeds, costs and review of the quantum of costs paid to date pursuant to Venning and Woolford JJ's earlier orders.

[172] In the event agreement is reached, a joint memorandum is to be filed **three working days** in advance of the teleconference. If agreement cannot be reached, separate memoranda are to be filed **two working days** in advance of the teleconference.

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Fitzgerald J

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[33] Orders authorising various payments from the Mamari (No. 2) Trust were not pursued.