IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV 2006 406 293

BETWEEN	PATRICK DONOVAN First Plaintiff
AND	PATRICK DONOVAN AND MICHAEL BERNARD TONKS TURNER Second Plaintiffs
AND	KATHERINE FAY LYNSKEY First Defendant
AND	KATHY LYNSKEY WINES LIMITED Second Defendant

Hearing: 15 May 2009

Appearances: Q A M Davies for Plaintiffs
P J Radich for Defendants

Judgment: 26 June 2009 at 3.30pm

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Introduction

[1] The parties have been at this litigation since 2006. There are claims and counterclaims. The claims of the plaintiffs are pursued by Patrick Donovan in his personal capacity and by Patrick Donovan and Michael Turner in their capacity as trustees of the Donovan Trust. On 9 April 2009 Mr Turner and Mr Donovan executed a deed whereby Mr Turner purported to retire as trustee, leaving Mr Donovan as the sole continuing trustee. This application by the plaintiffs calls for a determination as to whether it is legally permissible for Mr Turner to so retire and to be removed from this proceeding as a plaintiff. If it is legally permissible, the issue

then as to whether the Court in the circumstances should permit Mr Turner's withdrawal from the proceeding, and, if so, on what terms.

Background

[2] Mr Donovan was based in the United States and travelled to New Zealand from time to time. He acquired a property in Marlborough as a vineyard, with the vineyard initially to continue under its existing lease to a third party ("Bellingham"). Mr Donovan asserts that it was his intention that he and Mr Turner in their capacity as trustees of the Donovan Trust would become owners of the vineyard. Ms Lynskey and her company were to have a role in vineyard development and consultancy. Ms Lynskey was also to have a right of purchase of grapes from the vineyard.

[3] The plaintiffs assert against the defendants negligence and breaches of contract of fiduciary duty. The defendants counterclaim for damages said to arise from breach of contract. Additionally, Ms Lynskey has relationship property proceedings against Mr Donovan (High Court, Blenheim , CIV -2007 406 -211).

[4] At one point Mr Donovan had effectively settled in New Zealand. In the course of the litigation, however, a point was reached where Mr Donovan's residence was no longer New Zealand, although he did intend to return from time to time. In that context, the defendants raised concerns as to the movement of assets out of the New Zealand jurisdiction. Mr Donovan caused to be placed into the trust account of his solicitors, on an interest bearing deposit, a sum of $400,000.00.

[5] By letter dated 19 June 2007 the plaintiffs' solicitors provided their undertaking to the defendants' solicitors in the following terms:

> a. That the sum of $400,000.00 will be held to the credit of the Donovan Trust (on interest bearing deposit) on the basis that the monies will not be dispersed unless or until the outcome of the substantive proceedings between Pat Donovan and Kathy Lynskey (both in relation to relationship property and breach of contract claims) is determined and then only in accordance with such

determination. For the avoidance of doubt determination includes any rights of appeal; or,

b. Agreement between the parties i.e., Donovan and Lynskey.

[6] There has been no determination of the substantive issues between the parties, either as to relationship property (CIV2007-406-211) or as to the contract issues (this proceeding).

[7] To date the second plaintiffs have been Messrs Donovan and Turner as trustees of the Donovan Trust. By deed dated 9 April 2009 Mr Turner purported to retire as trustee leaving Mr Donovan as sole trustee.

[8] The Trust Deed, in relation to the minimum number of trustees, contains in its schedule this provision:

> Minimum Number (of Trustees) (clause 13.3) (1)

[9] Clause 13.3 of the deed provides:

> The number of Trustees must be at least the Minimum Number.

[10] By the deed, Mr Donovan as settlor appointed two trustees originally, namely himself and Mr Turner. Mr Turner was named within the Trust Deed as the Independent Trustee. Under cl 5.2 of the deed the discretionary power to pay or apply any part of the income or capital of the trust fund to or for the benefit of any beneficiary is not able to be exercised by the trustees unless at the time of the exercise at least one of the trustees is an Independent Trustee.

[11] By cl 13.5 of the deed the person with the power of appointment (which has remained Mr Donovan) has amongst other powers the power to remove any trustee.

[12] Clause 20 of the deed is an interpretation clause which provides that words referring to the singular include the plural and the reverse. Accordingly, under the Interpretation Clause references to “the trustees” (of which there are many) apply equally to a single trustee.

Procedure for removal of a party

[13] I will deal first with the procedure for removal of a person as a party in the proceeding. I should consider the normal procedural requirements and practice in that regard. I will assume for the purposes of this immediate consideration that a trustee may retire and be discharged as intended by Mr Turner. Once I reach a conclusion as to whether the removal of Mr Turner can be justified in terms of practice and procedure, I will then turn to consider whether as a matter of the law of trusts Mr Turner may retire as a trustee of the Donovan Trust without being replaced.

[14] In their application, the second plaintiffs sought an order for the substitution of the first named second plaintiff (Patrick Donovan) (as the now sole trustee of the Donovan Trust). They also sought such other order as the Court sees fit to achieve that outcome.

[15] They place particular reliance upon the provisions of r 4.52 High Court Rules which is headed "New parties order". Sub-clauses (1) - (2) are particularly relevant and provide:

> **4.52 New parties order**
>
> (1) Subclause (2) applies if, after a proceeding has commenced, there is an event causing a change or transmission of interest or liability (including death or bankruptcy) or an interested person comes into existence, making it necessary or desirable—
>
> (a) that a person be made a party; or
>
> (b) an existing party be made a party in another capacity.
>
> (2) An application without notice may be made for an order that the proceeding be carried on between the continuing parties and the new party (a new parties order).

[16] For the plaintiffs, Mr Davies submitted that the purpose of r 4.52 is to cater for situations such as the present. He submitted that r 4.52 foresees events occurring after a proceeding has been commenced which cause a change of transmission of interest or liability which makes it necessary or desirable that a person be made a party or that an existing party be made a party in another capacity. He noted that in the present case the second plaintiffs came into the proceeding as trustees of the

Donovan Trust, which he described as "the de facto second plaintiff", and he equated the retirement of Mr Turner to a change or transmission of interest and liability. He submitted that the event of Mr Turner's retirement made it necessary "for the substitution of the second defendants in their capacity of co-trustees with Mr Donovan in his capacity as sole trustee".

[17] For the defendants Mr Radich noted that r 4.52(1) applies only where it is necessary or desirable:

> (a) That a person be made a party; or
>
> (b) An existing party be made a party in another capacity.

It was Mr Radich's submission that that should be the end of the discussion.

[18] I accept Mr Radich's submission to the extent that it is clear that r 4.52 does not apply to the situation of Mr Turner's retirement. In particular, I note:

> (a) The application is not truly an application for any person to be made a party. Rather it is an application for the removal of Mr Turner as a party (i.e. as a second plaintiff).
>
> (b) It is not an application to have an existing party made a party in another capacity. The second plaintiffs were parties to the proceeding because they were trustees of the Donovan Trust. In the sense that Mr Donovan is an existing party in the proceeding as second plaintiff, he continues to be a party in precisely that capacity. Mr Davies suggested there was a change of a capacity in that there are no longer co-trustees but rather a sole trustee. But that is not a change of capacity within the concept of the rule. The capacity, namely trusteeship, remains unaltered. All that has happened is that where it was once shared with another, it is now held by a sole trustee. Mr Radich submitted while Mr Turner may have become involved in the proceeding through his connection

> with the Donovan Trust, the legal reality is that he is a party in his personal capacity. I reject that submission. Mr Donovan clearly was not a party in his personal capacity. He was a party in his capacity as trustee of the Donovan Trust. I suspect that the point being made by Mr Radich would have been better expressed as that Mr Turner has a personal liability for matters such as costs in the sense that his liability is not limited to the assets of the trust (as may occur through express contractual provision). That said, in relation to this case, Mr Turner has been second plaintiff in his capacity as trustee.

[19] For these reasons, r 4.52 cannot be relied upon by the plaintiffs. It is unnecessary for me to decide whether, had a triggering event existed, the Court would have found it "necessary or desirable" to make an order of the kind sought. A similar consideration may apply in dealing with alternative approaches, which I will come to.

Devolution when proceeding pending

[20] Neither counsel referred me expressly to the provisions of r 4.51 High Court Rules but it is appropriate I mention it.

[21] Rule 4.51 provides:

> **4.51 Devolution when proceeding pending**
>
> A proceeding may be continued by or against a person to or on whom an estate or title is assigned, created, or devolved if the assignment, creation, or devolution takes place when a proceeding is pending.

[22] Rule 4.51 cannot be applied to the retirement of a trustee – retirement involves neither the assignment of an estate or title nor the devolution of an estate or title. Devolution occurs on the death of a person who holds a particular interest.

[23] Counsel referred me to the decision in *Colonial Patent Cheese Hoop Co Ltd v Alexander Harvey and Sons Limited* [1927] NZLR 459. In that case an order for

substitution of plaintiffs was made following the assignment of certain letters patent. An ex parte order had been made for substitution. Skerrett CJ considered the facts of the case required him to discharge the order unless certain conditions were complied with. The Court nevertheless recognised the jurisdiction to make the order under rr 456 and 457 (now rr 4.51 and 4.52) given that there had been an assignment of the rights involved in the action.

[24] I will return shortly to what the Chief Justice considered appropriate as conditions.

The striking out and addition of parties

[25] Mr Radich referred me to r 4.56 High Court Rules which deals with the striking out and adding of parties. His reason for referring to r 4.56 was to note that it expressly deals with the striking out of parties and to then lead on to a submission that r 1.6 High Court Rules could not be invoked in the present circumstances.

[26] Mr Radich however went on to submit that the present situation does not fall within r 4.56. His submission in that regard is correct - r 4.56 is plainly inapplicable to the present application in that Mr Turner was not a party improperly or mistakenly joined (see r 4.56(1)(a)).

[27] This latter submission of Mr Radich (that the present situation does not fall within r 4.56), with which I agree, indicates that Mr Radich's initial proposition (that r 4.56 expressly deals with the striking out of parties) is misleading in its generalisation.

Cases not provided for

[28] Rule 1.6 High Court Rules is headed "Cases not provided for". In r 1.6(1) it is provided:

> **1.6 Cases not provided for**

> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.

[29] No form of procedure has been prescribed specifically for the situation where one of a number of trustees retires and wishes to be removed from a proceeding which the trustees at the time are pursuing. I note that this observation applies whether at the time there are two, three or more trustees.

Discontinuance

[30] Part 15 subpart 4 High Court Rules deals with discontinuance.

[31] Rule 15.19 allows a plaintiff to discontinue a proceeding at any time before the giving of judgment or a verdict, subject to r 15.20.

[32] Rule 15.20(3) provides:

> **15.20 Restrictions on right to discontinue proceeding**
>
> **…**
>
> (3) A plaintiff may discontinue a proceeding in which there is more than 1 plaintiff only with the consent of every other plaintiff or with the leave of the court. If the plaintiff files a notice of discontinuance under rule 15.19(1)(a), the consent of every other plaintiff must be in writing.

[33] Rule 15.20(3) plainly provides for the situation involved in this case. This sub-clause envisages that one of a number of plaintiffs wishes to be removed as a party. It entitles that plaintiff to discontinue if he/she has the consent of every other plaintiff (which is plainly the case here) or with the leave of the Court, which would have given the Court the jurisdiction if Mr Donovan's discontinuance had been opposed.

[34] Rule 15.21(2) establishes that the discontinuance of a proceeding does not affect the determination of costs.

[35] Rule 15.22(1) allows the Court to make an order setting the discontinuance aside if the Court is satisfied that the discontinuance is an abuse of the process of the Court.

[36] The decision if Skerrett CJ in the *Colonial Patent Cheese Hoop Co Ltd* case above is instructive with regard to the right to discontinue. His Honour dealt with the concept of discontinuance at two points of his judgment. First, at pages 461 - 462 he said this:

> Probably in most of the cases no question arose as to the solvency of the new party and his ability to pay the costs of the action. The original plaintiff had an absolute right both in a Chancery suit and in a common-law action to discontinue his suit or action on the terms of being liable to pay the costs of the action up to the date of discontinuance. If any question as to the solvency of the new plaintiff who was to continue the action was brought before the Judge who made the ex parte order he would take care that the existing rights of the defendant were not affected by the order which he was asked to make.

Secondly, again at page 462, the Chief Justice (in explaining why he was in a position to deal with the application before him on its merits):

> In the second place, I think it is clear that the original plaintiffs cannot be made liable for the costs of the action after they have ceased to be plaintiffs. They have a right at any time to discontinue the action on payment of costs up to the date of the discontinuance. They cannot be compelled to continue the action and so continue liable for costs connected with it. It is true that it is suggested in the present case that the patent rights and choses-in-action sought to be recovered in the action are assigned to a plaintiff who is in an unsatisfactory financial position. I do not think, however, that there is any remedy for this. The assistance of the Court under our system of jurisprudence is open to any plaintiff who claims to have a right to relief, and it is only in special and exceptional cases that jurisdiction is found to require him to find security for the costs of the proceeding instituted by him.

[37] It is to be noted that the concern confronting (but not able to be resolved by) the Chief Justice was not whether the original plaintiff had the right to discontinue so as not to continue to be liable for costs thereafter, but rather the fact that the defendants would now be faced with a plaintiff who was in an unsatisfactory financial position. (The Court at that time had limited powers with regard to security for costs). The Court in 2009 has significant powers under r 5.45 to order security for costs precisely where there is reason to believe that a plaintiff will be unable to pay costs if the plaintiff is unsuccessful.

[38] In summary, a plaintiff generally has a right to discontinue but will be exposed to the Court's jurisdiction to award costs.

Has Mr Turner lawfully retired as a trustee? Does it matter?

[39] The respondents say that Mr Turner is precluded from retiring as a trustee without being replaced. The defendants rely particularly on the provisions of s 45(3) Trustee Act 1956. They say further that even if Mr Turner has validly retired as a trustee, the Court should not exercise its discretion to release him as a party because the defendant would be prejudiced by such release.

[40] Given that Mr Turner as plaintiff has a right to discontinue, it is in my view only the mechanism which the plaintiffs have chosen to adopt in this application – seeking a "New Parties Order" from the Court - that invokes the Court's discretion at all. If the Court were having to make an order by which a single trustee was being appointed, it would be a matter of concern to the Court if that person as trustee was precluded from acting in the absence of a second trustee.

[41] As counsel presented argument on this matter and the issue is not altogether clearly analysed in the New Zealand case law and texts, I now set out in some detail my analysis of the issue beginning with the legislative framework and considering also New Zealand and Commonwealth case law and academic writing. The conclusion which I reach is that if the settlor expresses in the trust instrument his/her intention that the trustees (or the appointor) may reduce the trustee numbers to one, then it does not matter that two or more trustees were in fact originally appointed.

The structure of Part 4 of the Trustee Act

[42] In the law of trusts, retirement is a means by which a trustee may be discharged from the trust. The trustee may also be discharged by a person having the power of removal under the trust instrument or by the High Court.

[43] Where there are two or more trustees and one is desirous of being discharged from the trust, he/she may do so subject to the provisions of s 45 of the Act. Any appointment in substitution may be made by the person having the power of appointment under s 43 of the Act. If the retiring trustee is unable to rely on s 45 of the Act and he/she has not been removed by the appointor, the trustee's course is to seek discharge by Court order with (if desired or necessary) appointment of some other person as trustee.

Sections 43(2)(c) and 45(3) of the Trustee Act

[44] Section 45 of the Act deals with "Retirement of Trustee". Section 45(1) provides:

> **45 Retirement of trustee**
>
> (1) Where there are 2 or more trustees—
>
> (a) If one of them by deed declares that he is desirous of being discharged from the trust; and
>
> (b) If his co-trustees and such other person (if any) as is empowered to appoint trustees by deed consent to the discharge of the trustee, and to the vesting of the trust property in the co-trustees alone—
>
> then, subject to the provisions of subsection (3) of this section, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall by the deed be discharged therefrom under this Act without any new trustee.

[45] Section 45(3) of the Act provides:

> (3) Except where only one trustee was originally appointed, a trustee shall not be discharged under subsection (1) of this section unless there will be either a trustee corporation or at least 2 individuals to act as trustees to perform the trust

[46] Section 43 of the Act deals with the "Power of appointing new trustees". Section 43(1) identifies who (apart from the Court) holds the power of appointing new trustees. Section 43(2) permits, in relation to appointments, certain steps including the increasing of numbers (ss (2)(a)) and the appointment of separate sets of trustees for distinct sub-trusts (ss (2)(b)). By s 43(2)(c) it is provided:

> (2) On the appointment of a trustee or trustees for the whole or any part of trust property—
>
> …
>
> (c) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than 2 trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section unless there will be either a trustee corporation or at least 2 individuals to act as trustees to perform the trust;…

[47] The legislative history indicates that s 45 has its predecessors in s 79 Trustee Act 1908 and in s 39 Trustee Act 1925 (UK) and that s 43 has its predecessors in s 78 Trustee Act 1908 and in ss 36 and 37 Trustee Act 1925 (UK).

Chancery recognition of settlor's right to determine trustee numbers

[48] In England, the Courts of Chancery had through the 19th Century developed their approach to issues of retirement and appointment of trustees under trust legislation. Those rules are reflected in the authorities referred to in *Laws of New Zealand, Trusts*, paragraph 162. Principles were developed as to the Court not confining itself to the original number of trustees, or insisting upon filling up the original number.

[49] Aspects of the practice in Chancery were referred to in the New Zealand case in *Re Rora Potaka* [1921] NZLR 435 (Chapman J). In that case, in a decision reflective of a more paternalistic approach of the part of the Courts of the day, Chapman J followed his invariable practice of refusing to appoint a single trustee even where there was only one trustee under the original settlement. That was a case, however, in which settled property was without a trustee at all and it had become necessary to apply to the Court for appointment.

[50] The Courts of Chancery nevertheless gave recognition to a settlor's intention to provide for one trustee where the instrument creating the trust said or indicated as much. The decision of the English Court of Appeal in *Peacock v Colling* (1885) 54 LT Ch 734, 54 ER 743, remains good authority for the proposition that if the

wording of the trust instrument indicates that the settlor contemplated only one trustee acting, then one trustee will suffice.

Powers as provided in the trust instrument

[51] The parallel provisions of s 43(2)(c) "Power of appointing new trustees" and s 45(3) "Retirement of Trustee, provide the modern legislative framework. They are to be read in conjunction with s 2(4) of the Act which provides:

> S 2(4) The powers conferred by or under this Act on a trustee who is not a corporation are in addition to the powers given by any other Act and by the instrument, if any; creating the trust; but the powers conferred on the trustee by this Act, unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

There is a similar provision in s 69(2) Trustee Act 1925 (UK) – it is not identical but for present purposes it is essentially the same. The materiality of the UK s 69(2) in the context of trustee retirement was recognised by Evans-Lombe J in *Adam & Company International Trustees Limited v Theodore Goddard* [2000] WTLR 349 at [7].

[52] In the United Kingdom the actions of trustees under the equivalent of the New Zealand s 43 and s 45 have been explained as involving the exercise of powers which are within the settlor's intention as expressed in the trust instrument. The English text, Underhill and Hayton *Law of Trusts and Trustees* 17th ed. (2007) Hayton and others at p 919 contains this discussion:

> 72.10 In *London Regional Transport Pension Fund Trust Ltd v Hatt* [[1993] Pens LR 227 at 260 – 262] it was held, despite earlier doubts, that s 37(1)(c) was subject to a contrary intention expressed in the trust instrument, and that this should also follow for s 39. The judge recognised that the 1925 Act was a consolidating Act, but nonetheless looked at the previous law, which persuaded him that the earlier law should govern the construction of the present.

(It will be appreciated that the references to s 37(1)(c) and to s 39 are to the United Kingdom equivalents of s 43 and s 45 respectively) The authors note that the finding

in the *Hatt* case was accepted in *Adam & Company International Trustees Limited v Theodore Goddard* (above).

[53] The authors of Underhill and Hayton (again paragraph 72.10) also note that s 37 (New Zealand's s 43) relates to the position "on the appointment of a trustee", where the power being exercised is to remove a trustee (so reducing the number of remaining trustees to one) pursuant to an express rather than statutory power, there is no question as to the effectiveness of the action. The authors refer to the English Court of Appeal decision in *Chamberlain v Inland Revenue Commissioners* [1945] 2 All ER 351. In that case it was argued that s 37(1)(c) Trustee Act 1925 (UK) precluded Chamberlain from removing a trustee and becoming sole trustee pursuant to powers within the trust instrument as to removal. Uthwatt J, for the Court, at p 355, dismissed the argument thus:

> There is no substance in this argument. The general validity of a power to remove a trustee contained in a trust instrument cannot be doubted…

[54] The Court went on to note that s 37 (our s 43) has no application where what is involved is a removal.

[55] The authors of Underhill and Hayton, at paragraph 72.13, p 920, then state this in relation to the situation where it is a trustee who is seeking his/her own discharge (rather than a person with power of removal removing the trustee):

> It would seem that the power to obtain his discharge without appointment of a successor is one of the powers conferred on trustees which under s 69(2) [Trustee Act 1925] yield to the express terms of the settlement,…

[56] Brief mention of the position in Canada is warranted. The provisions of trust legislation as to number of trustees in Commonwealth common law jurisdictions, including the Canadian provinces, having many similarities. In *Waters' Law of Trusts in Canada* 3rd ed. (2005) Waters and others, the authors deal with issues relating to the number of trustees in chapter 15. In referring to s 6(c) Ontario Trustee Act (which is the counterpart of New Zealand's s 43(2)(c) and to the United Kingdom s 37), the authors refer at p 826 to the sensible nature of the equivalent to s 43(2)(c) and comment that it is a provision found in most recent trust legislation. They state:

> It reflects the fact that a trust corporation as an institutional trustee is not subject to human demise or incapacity, and it is not only capable of carrying on the trust alone, but is adequately secured.

[57] Having made these comments, the authors note at footnote 108 that in *Chamberlain v Inland Revenue Commissioner* above [53] the English Court of Appeal held that the English equivalent to section 6(c) of the Ontario Act applies only when an appointment is being made by the surviving or continuing trustee. They note that if that trustee has not made any move to replace the former trustee, the subsection does not apply and appointment of a substitute is not mandatory.

[58] In his submissions for the plaintiff, Mr Davies relied upon the provisions of s 2(4) Trustee Act 1956, in relation to powers given by the instrument creating the trust. Mr Davies addressed the matter in terms of the instrument "clearly authorising the appointment of only one trustee". That terminology is not strictly apposite – the present case was not a case of the appointment of a trustee. Rather it was a matter of one trustee retiring and leaving the other in office. But in relation to a retirement under s 45 Trustee Act 1956 I adopt as correct the conceptual approach in Underhill and Hayton (above [53]) that the deed in this case by referring expressly to the minimum number of trustees as "1" can be said to have conferred a power on the trustee – to obtain his/her discharge without appointment of a successor – contrary to the limitation which s 45(3) would otherwise provide.

[59] I turn then to the decision of this Court in *Sanson v Gray* (HC, Invercargill CIV 14/99, 16 June 1999, Young J). In that case Gray had become the sole surviving trustee of the family trust and had entered into an agreement for sale and purchase of a trust property.

[60] By reference to the provisions of the Trust Deed Young J found that it was clear that the Trust Deed had been drafted on a basis which contemplated the possibility of there being a sole trustee. His Honour then concluded:

> Accordingly, on the authority of *Peacock v Colling* (1885) 54 LJ Ch 743, Mr Gray is not required to appoint a further trustee; this despite the provisions of s 43(2)(c).

[61] I have arrived at the same conclusion as was reached in *Sanson v Gray*, albeit by a longer route. I agree with the conclusion reached in *Sanson v Gray.*

[62] The above conclusions also appear to accord with the law as stated in New Zealand texts. Dr Richardson, as author of Nevill's *Law of Trusts, Will and Administration* 9th ed., 2004 7.1.4 (New Trustees) pages 173 – 174 under "Number of trustees", summarises the law thus:

> **(d) Number of trustees**
>
> As always, the trust instrument controls the number of trustees, where that instrument deals with the matter. The position is then as follows:
>
> (1) If the instrument specifies a particular number of trustees this must be adhered to. Thus, when two trustees transferred the trust property to a single new trustee they were held liable for the resulting loss since they had not been properly discharged. Unless expressly forbidden, however, a trustee corporation may be appointed sole trustee notwithstanding that the instrument provides for or directs the appointment of two or more trustees.
>
> (2) If the instrument appoints only one trustee, the beneficiaries have no right to the appointment of a co-trustee. Only one trustee need be appointed in his or her place, although the Court will not usually agree to a sole appointment if it has control over the making of the appointment.
>
> (3) If the instrument appoints more than one trustee, but does not specify a number, then the statute controls the position: that is, the number may be diminished as long as at least two remain, unless the sole trustee is a trustee corporation or the Public Trustee is appointed.
>
> (4) If the wording of the instrument indicates that the settlor contemplated only one trustee acting, then one trustee will suffice.

[63] To similar effect, the authors of *Law of Trusts* Lexis Nexis (loose leaf), under a heading "Resignation of Trustees" at 36,109 paragraph 4.39, deal with s 45(3) in particular:

> By virtue of section 45(3) a trustee shall not be discharged unless there are two remaining trustees except where:
>
> - Only one trustee was originally appointed; or
> - The remaining trustee is a trustee corporation i.e., one of the statutorily recognised trustee corporations.

> However, by virtue of s 2(4) and 2(5) of the Trustee Act 1956 if the terms of the Trust Deed provide that only one trustee is required (even though two or more trustees were initially appointed) then that express provision in the Trust Deed takes precedent (sic) over s 45(3).

[64] As additional support for the concept of a sole remaining trustee continuing to act, Nevill's *Law of Trusts, Wills and Administration* at p 174, refers to s 23(1) Trustee Act which provides:

> Where a power or a trust is given to or imposed on two or more trustees jointly, the same may be exercised or performed by the survivors or survivor of them for the time being.

[65] Young J in *Sanson v Gray*, at p 14, also invoked s 23(1) as providing additional authority for Gray, as the sole surviving trustee in that case, to continue exercising trust powers. There was obvious application for s 23(1) in *Sanson v Gray* because Mr Gray was literally the sole surviving trustee. However, I do not read s 23(1) Trustee Act 1956 as support for the proposition that one of two trustees may retire and be discharged – for that to occur it must be on jurisdiction other than s 23(1) of the Act.

Other New Zealand decisions

[66] For completeness, I will deal briefly with three other decisions.

[67] First, I refer to *Karaka v Nga Tai Ki Tamaki Tribal Trust* (HC, Auckland CIV 2203-404-6164 9 March 2004) and *Heenan v Official Assignee* (HC, Christchurch CIV 2005-425-76 12 May 2009) both judgments of Heath J. His Honour reached the conclusion in the former case that the Court in the appointment of an interim trustee need not restrict itself to the original number of trustees. His Honour viewed the minimum number approach as being a rule of practice which might be varied in an appropriate situation. His Honour adopted a similar position in the latter case. In a situation where the trust instrument provides expressly for the minimum number of trustees, I prefer to adopt the analysis which I have set out above.

[68] The third decision to which I have been referred is a decision of the District Court (*Thames-Coromandel District Council v Fawcett* District Court, Hamilton, CIV-2008-19-655 16 December 2008, Harland DCJ). In that case the Trust Deed expressly required a minimum of two trustees. There had been two trustees, namely a Mr Granville and Mr Fawcett. Mr Granville purported to retire as trustee. Mr Fawcett then purported to retire and appoint in his place a company. The company intended to be appointed could not be a sole trustee because it was not a corporation authorised by statute to administer trust estates. The Court, having regard to the provisions of the Deed of Trust, held that Messrs Granville and Fawcett were both required to remain as trustees. Thus the case involved a straight forward application of the provisions of the Trust Deed.

The trust deed in this case – the express stipulation of 1

[69] In the absence of any relevant provision within the trust instrument, s 45(3) Trustee Act 1956 would apply to the present case so as to preclude Mr Turner's being discharged as a trustee. By reason of s 2(4) of the Act, however, s 45(3) of the Act does not apply so as to preclude Mr Turner's discharge – the settlor's express stipulation of "1" as the minimum number of trustees provides to the trustees (when there is more than one in office) the power to obtain a discharge from trusteeship. A trustee accepting appointment pursuant to the terms of the deed would understand from the deed that he/she could achieve discharge by retirement so long as at least one trustee remained.

Conclusions

[70] For the above reasons, my conclusions are:

(a) Contrary to the defendants' submissions, Mr Turner's retirement as a trustee of the Donovan Trust is effective and Mr Donovan has since 9 April 2009 been the sole trustee with the capacity to conduct the business of the trust.

(b) The "New Parties Order" sought by the plaintiffs is not an appropriate order – it is inappropriate not because of the sole trusteeship issue but because there has been no change of interest or liability of the nature required by r 4.52.

(c) Had Mr Turner simply discontinued his claim as a trustee the Court would have recognised such discontinuance as effective and would have then recognised the right of the defendants to be addressed on the issues of security for costs and costs generally.

Disposition

[71] The plaintiffs' application is dismissed.

Costs and security for costs

[72] Although I am not dealing as such with a costs application following a discontinuance, it is appropriate having heard argument that I record the following conclusions. These flow from a consideration of the detailed submissions with which counsel provided me in relation to the prejudice which the defendants submit they will suffer should Mr Turner cease to be a plaintiff.

[73] I record the following conclusions not as a binding judgment but so as to provide counsel with the assistance of the Court's present view on costs and security for costs should a discontinuance now take place.

[74] Costs upon a discontinuance are dealt with by r 15.23 which provides:

> **15.23 Costs**
>
> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[75] Subject to what might be termed this presumption as to costs, the Court retains its discretion as to costs under r 14.1 – see *Oggi Advertising Limited v McKenzie* (1998) 12 PRNZ 535.

[76] Relevant to the Court's exercise of discretion in this particular case are the following:

(a) The second plaintiffs' claim was being brought on behalf of a trust and, after discontinuance by the second named second plaintiff, continues to be;

(b) The second plaintiffs' claim will in due course be determined when costs will be able to be dealt with in the light of the substantive outcome;

(c) Security has previously been provided by or on behalf of the plaintiffs, by arrangement with the defendants, in a sum of $400,000.00 (which had become with interest a little over $427,000.00 at the time of hearing before me).

[77] If a discontinuance were filed in these circumstances, it would not be just to impose upon Mr Turner an order that costs be paid now in any event. Costs against Mr Turner should be reserved. His liability for costs will then be preserved. The usual rule if applied would be that the liability would extend to the time at which the discontinuance was filed. The defendants will in the meantime have a degree of assurance in that the security held is substantial. Submissions were made to me by Mr Radich relating to the fact that the security sum negotiated between the parties was negotiated partly to provide security for costs and partly as a sum in the nature of a pre-judgment charged sum. The correspondence exhibited before me also indicated that there had been something in the nature of a trade off between the parties on the precise sum to be provided by way of security. Mr Radich submitted, correctly in my view, that this proceeding has attracted a greater number of interlocutory attendances than might have been anticipated when the agreement sum was placed on stakeholding. To that extent the security figure reached by

compromise between the parties will not be providing the same level of adequacy of security as at the time it was agreed.

[78] In these circumstances, the orders which I envisage the Court would make in the event of a discontinuance would be as follows:

(a) Costs against the second named second plaintiff would be reserved;

(b) If the defendants sought an increase in the level of security, such an application would be likely to succeed upon the basis that security be increased by a reasonable sum on account of party/party costs (2B scale) having regard to the interlocutory applications which occurred from January 2008 (when the security had been agreed) until April 2009 (when Mr Turner executed his Deed of Retirement).

[79] The above conclusions at [78] do not constitute a judgment of this Court. Rather, having regard to the fact that counsel provided the Court with detailed submissions in relation to costs and security for costs, it is appropriate that the Court's tentative conclusions be recorded in the light of those submissions so that the parties have the opportunity to resolve those matters by agreement without further application or hearing.

Costs of this application

[80] The primary application made by the applicants (for an order substituting Patrick Donovan as the sole second plaintiff) has failed. In essence, the defendants have succeeded in their opposition based upon the argument that it is for a plaintiff to discontinue in the present circumstances. The plaintiffs' application did apply for "such other order that the Court sees fit to achieve the above outcome". However, the filing of a notice of discontinuance is not a matter for Court order and accordingly the application is strictly speaking wholly unsuccessful.

[81] There remains a path forward for the plaintiffs, namely through the filing of a notice of discontinuance. That option is available to the plaintiffs. In that regard the ground of opposition extensively pursued by the defendants – the proposition that there always had to be at least two personal trustees for the Donovan Trust – has been unsuccessful. However, that proposition was of secondary importance in the defendants' opposition. The defendants' primary position was that the wrong procedure had been adopted, and their position in that regard has been upheld.

[82] Against that background, I reserve costs but my preliminary view for the reasons stated is that the plaintiffs should pay the defendants the costs of this application in any event. If agreement is not reached between the parties as to that, and the defendants wish to pursue an application for costs, then the defendants are to file a memorandum and the plaintiffs are to reply to that memorandum within 5 working days.

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