IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-003992
[2013] NZHC 2320

UNDER	Part 18 of the High Court Rules
IN THE MATTER OF	an application under s 46 of the Trustee Act 1956
BETWEEN	PERPETUAL TRUST LIMITED Plaintiff
AND	CAPITAL + MERCHANT FINANCE LIMITED (in receivership and in liquidation) First Defendant
	PUBLIC TRUST Second Defendant
	BRENDON JAMES GIBSON AND GRANT ROBERT GRAHAM Third Defendants

Hearing:	6 June 2013
Appearances:	MC Smith for Plaintiff No appearance for First Defendant KP McDonald QC and M Hodge for Second Defendant VL Heine for Third Defendants
Judgment:	6 September 2013

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 6 September 2013 at 3.00 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Introduction

[1] Capital + Merchant Finance Limited (CMF) is a failed finance company. Prior to its failure, it raised money from the public by way of debt securities and lent that money to borrowers, principally property developers. As an issuer of debt securities, it was required by the Securities Act 1978 to appoint a trustee to look after investors' interests. It appointed Perpetual Trustee Limited (Perpetual) as trustee in terms of a Debenture Trust Deed dated 5 April 2002.

[2] Initially, Perpetual was the first-ranking secured creditor. However, it subordinated its first-ranking interest in favour of Fortress Credit Corporation (Australia) II Pty Limited (Fortress) by Deed of Subordination dated 5 October 2006.

[3] On 23 November 2007, Fortress placed CMF into receivership and appointed Richard Simpson and Timothy Downs as receivers (first receivers). Six days later, on 29 November 2007, Perpetual appointed Brendon Gibson and Grant Graham as receivers (second receivers). As a condition of the second receivers' appointment, Perpetual agreed to indemnify them in relation to reasonable fees and expenses incurred in the conduct of the receivership (if not able to be met from the assets of CMF). The second receivers were, however, unable to act in the management of CMF while the first receivers remained in office.

[4] On 21 March 2012, having realised most of CMF's assets, the first receivers retired, even though Fortress was still owed $1.14 million in interest by CMF. The second receivers then took over management of CMF and responsibility for taking any further steps in relation to any outstanding monies and potential claims.

[5] After reviewing CMF's affairs, the second receivers formed the view that the only remaining avenues of recoverability for investors were claims against CMF's auditor and/or Perpetual. On 8 August 2012, the second receivers filed a proceeding in the High Court at Auckland against Perpetual alleging breach of contract and negligence. Perpetual has filed a defence in the second receivers' proceeding. Perpetual is, however, duty bound under the Debenture Trust Deed to give directions to the second receivers. Perpetual therefore resolved that it had an irreconcilable conflict of interest and that it would be appropriate for it to retire as trustee.

Perpetual wrote to the second receivers giving notice of its intention to retire as trustee and terminating the indemnity it gave them on their appointment to meet their reasonable fees and expenses.

[6] At Perpetual's suggestion, the second receivers contacted Public Trust requesting that it accept trusteeship of CMF. It appears that no other potential trustees were identified and/or approached regarding appointment as trustee. Public Trust initially declined the request. It had, and still has, a number of concerns regarding the request. In particular, Public Trust has never previously assumed trusteeship of a failed finance company with the associated risks to its brand and its relationship with the general public. Further, Public Trust anticipates that the trusteeship will cost it a considerable amount of time and money and that it will not be reimbursed for its services because CMF has no assets. These concerns have now been recognised and addressed by Parliament, which has recently passed the Trustee (Public Trust) Amendment Act 2013 (the Amendment Act), which specifically provides for Public Trust to be indemnified by an outgoing trustee. However, the Amendment Act is not retrospective and therefore does not apply to these proceedings.

[7] On 12 July 2012, Perpetual filed proceedings in the High Court at Auckland seeking an order under s 46 of the Trustee Act 1956 (the Act) that Public Trust replaces it as trustee of CMF. On 23 August 2012, Public Trust filed a statement of defence opposing the order sought, but in the alternative, seeking an order by way of counterclaim under s 71 of the Act, that Perpetual pay for Public Trust's ongoing costs and expenses in relation to the appointment. On 6 September 2012, Perpetual filed a reply to Public Trust's counterclaim opposing the making of an order under s 71 of the Act.

[8] There were a number of subsequent developments. In particular, Perpetual provided Public Trust with informal discovery. After reviewing the informal discovery provided, Public Trust reconsidered its position in light of information supplied by Perpetual. It resolved not to oppose Perpetual's application but instead abide the decision of the High Court. It does, however, maintain its counterclaim against Perpetual. The hearing before me therefore focused on the order sought by

Public Trust pursuant to s 71 of the Act, that Perpetual pay to Public Trust the costs of Public Trust acting as trustee for CMF, should an order be made appointing Public Trust as trustee of CMF.

Trustee Act 1956

[9] Perpetual seeks an order under s 46 of the Act that Public Trust replaces it as trustee of CMF. At the time that the proceedings were filed, s 46 provided:

> **46 Discharge of trustee with assistance of Court or Registrar**
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> (1) Where any trustee is desirous of being discharged from his trust he shall be entitled to retire therefrom on passing his accounts before the Registrar, and giving notice of his retirement to his co-trustees (if any), and to such other person (if any) as is empowered to appoint new trustees.
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> (2) If such co-trustees, or such other person, as aforesaid empowered to appoint new trustees, or any of them, refuse or neglect to appoint a new trustee or to consent to such appointment in place of the trustee so retiring, or if the retiring trustee is the sole trustee having power to appoint a new trustee, but the exercise of that power is impracticable or difficult without the assistance of the Court, it shall be lawful for the retiring trustee to apply to the Court for the appointment of a new trustee in his place.
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> (3) The Court may, upon any such application, make an order appointing some proper person as trustee in place of the trustee so desirous of being discharged from his trust, and direct any accounts and inquiries to be made, and make an order discharging the trustee from the trust and from all liability in respect thereof, and may make such order as to costs or otherwise as it thinks fit, and may exercise any of the powers contained in Part 5 of this Act; and the person who upon the making of the order becomes trustee shall have the same rights and powers as he would have had if appointed by judgment in an action duly instituted.
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> (4) If on any such application the Court thinks proper to appoint Public Trust to be trustee instead of the retiring trustee, it shall be the duty of Public Trust to undertake the trust.

[10] The effect of s 46(4) is to make Public Trust a trustee of last resort who must accept appointment if the Court so directs.

[11] Public Trust counterclaims under s 71 of the Act, seeking an order that Perpetual pay for Public Trust's ongoing costs and expenses if appointed as replacement trustee. Section 71 provides:

> **71 Power of Court to charge costs on trust estate**
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> The Court may order the costs and expenses of and incidental to any application for any order under this Act, or of and incidental to any such order, or any conveyance or assignment in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

[12] The explanatory note to the Trustee Bill 1956 explains the purpose of the Act as follows:[1]

> The law of trusts and trustees in New Zealand has always been founded in the main on that of the United Kingdom. This branch of law developed originally in the English Courts of Equity, and the principles so developed and set out in the case law form the basis of this branch of the present New Zealand law. Only part of the field is covered by legislation. Most of the New Zealand statutory provisions have their origin in earlier enactments of the United Kingdom. Their provisions were however reviewed and re-enacted in 1925 in connection with the general changes then made in the law of property. Some of the new United Kingdom provisions have already been enacted in New Zealand; and, in view of the extent to which our case law on this subject follows that of the United Kingdom and countries having a similar system, it is desirable to keep our Trustee legislation in line with theirs as far as possible.

[13] In keeping with Parliament's avowed intention to keep New Zealand's trustee legislation in line with that of the United Kingdom, s 71 of the Act is taken from s 60 of the Trustee Act 1925 (UK) (the UK Act). Section 60 provides:

> **Power to charge costs on Trust Estate.**
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> The Court may order the costs and expenses of an incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be raised and paid out of the property in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.

[14] Help in interpreting s 71 of the Act can therefore be obtained from the commentary on s 60 of the UK Act. Section 60 of the UK Act is explained by the authors of *Lewin on Trusts* as follows:[2]

> In view of the terms of the section, it is clear that the trustees have no entitlement to indemnity as a matter of right, though the Court as a matter of practice might be expected to order the costs of any trustees who are parties

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1 Trustee Bill 1956 (52-1) (explanatory note) at 1.

2 J Mowbray and others *Lewin on Trusts* (17th ed, Sweet & Maxwell, London, 2000) at 575.

> to the application, as well as beneficiaries, to be paid out of the trust fund, in those cases where the application is for the benefit of the estate, by analogy to *Buckton* Categories (1) or (2). Accordingly, in general the costs of applications for the appointment of new trustees by the Court under s 41 of the Trustee Act 1925, being for the benefit of the whole estate, come out of the trust fund. Of course, where a trustee is in effect removed for misconduct under s 41 of the Trustee Act 1925, the trustee is usually ordered to pay costs, as is permitted by the closing words of s 60. Similarly, trustees will normally be ordered to pay costs of a successful application for a vesting order under s 44(vi) or s 51(1)(ii)(e) of the Trustee Act 1925 made on the ground of their refusal or neglect to transfer land or stock to the beneficiaries entitled within a specified period where there is no justification for the failure to transfer. Where new trustees of two funds were appointed in the same proceedings, the costs were borne by the two funds rateably according to the respective values. On appointing new trustees of real estate, the Court has directed the amount of the costs to be raised by mortgage.

[15] The New Zealand cases which apply s 71 of the Act (taken from s 60 of the UK Act) are few in number and are all cases where the Court has ordered the litigation costs of the trustees who have made applications for orders in Court, to be paid for by the trust property.[3] There have been no cases in which a Court has ordered the costs of a replacement trustee to be paid by a retiring trustee.

Trustee (Public Trust) Amendment Act 2013

[16] The Trustee (Public Trust) Amendment Act 2013 (the Amendment Act) amended s 46 of the Act with effect from 14 May 2013, to specifically allow an order to be made that a retiring trustee indemnify Public Trust for its reasonable fees and expenses if appointed as replacement trustee. It has replaced s 46(4) with the following:

> (4) If the court, on an application under subsection (2) by a trustee other than a securities trustee, appoints Public Trust as the replacement trustee, Public Trust must accept the appointment.
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> (5) On an application under subsection (2) by a securities trustee for the appointment of Public Trust as the replacement trustee, the court may appoint Public Trust, and Public Trust must accept the appointment, only if—

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[3] See *New Zealand Maori Council v Crown Forest Rental Trust* [2013] NZHC 663, *Time v Fagalilo* [2011] NZCA 605, *Wellington Audio Visual Limited v Euro Boston Group Limited (No 2)* HC Auckland CIV-2007-404-1089, 31 March 2010, *Finlayson v Young* HC Wellington CIV-2009-485-717, 10 July 2009, *Vincent v Lewis* HC Auckland CIV-2002-404-2440, 26 April 2006, *Kain v Hutton* HC Christchurch M198/00, 11 May 2001, *NZ Guardian Trust Co Ltd v Hewitt* HC Hamilton M314/96, 19 May 1998.

(a) the retiring trustee has failed to obtain a replacement trustee after making reasonable endeavours to do so; and

(b) it is impracticable or difficult to obtain a replacement trustee without an order under this section; and

(c) the retiring trustee indemnifies Public Trust for its reasonable fees and expenses incurred in undertaking the appointment; and

(d) the retiring trustee has provided security to the satisfaction of the court for its indemnity under paragraph (c).

(6) For the purposes of subsection (5)(a), and without limiting the meaning of reasonable endeavours, a retiring trustee has not made reasonable endeavours to obtain a replacement trustee if it has not both—

(a) undertaken to indemnify the proposed replacement trustee for its reasonable fees and expenses in undertaking the appointment; and

(b) offered adequate security for its indemnity.

(7) In subsections (4) and (5), *securities trustee* means a person appointed as a trustee in respect of a security (and, for this purpose, *security* and *trustee* have the same meanings as in section 4(1) of the Securities Trustees and Statutory Supervisors Act 2011).

[17] The regulatory impact statement to the Amendment Act suggests that the Act in its form prior to the amendment does not allow for the indemnification of Public Trust by a retiring trustee. Page three of the regulatory impact statement reads:

Status Quo

1. Trustees may retire from their role, and a replacement trustee can be appointed under s 46 of the Trustee Act 1956 ("the Act"). The retiring trustee may seek assistance from the High Court if it is impracticable or difficult to appoint a replacement trustee without the Court's assistance under s 46(2). The Court can appoint "a proper person" as replacement trustee under s 46(3) of the Act.

2. A retiring trustee can apply to the Court under s 46(4) of the Act to have Public Trust appointed as replacement trustee. Public Trust has a duty to undertake the trust if so appointed. This makes the Public Trust the "trustee of last resort".

3. As an unintended and novel consequence, this "trustee of last resort" mechanism has been recently applied to the securities regime and carries the risk of Public Trust being appointed as trustee for failed finance companies.

4. Under trust law, a trustee is indemnified for its expenses by the trust. If the entity which Public Trust is required to supervise as replacement trustee is insolvent, the Public Trust will be required to bear the costs of acting as a replacement trustee.

Discussion

Appointment of replacement trustee

[18] Perpetual's application for an order that Public Trust be appointed as a replacement trustee for CMF is not opposed by the Official Assignee as liquidator of CMF or by the second receivers. Public Trust also accepts that Perpetual cannot continue as trustee of CMF and that there is no alternative replacement trustee. Public Trust therefore abides the decision of the Court and accepts that it is likely the Court will grant the application.

[19] After careful consideration, I am of the view that I should exercise my discretion to discharge Perpetual and to appoint Public Trust as replacement trustee. Perpetual has an irresolvable conflict of interest. Perpetual is obliged to give directions to the receivers it appointed who have filed a proceeding against it claiming a breach of contract and negligence. Self interest would suggest Perpetual should direct the receivers not to continue with the proceeding, while the interests of the investors, which Perpetual is supposed to protect, would suggest otherwise.

[20] There is also no alternative trustee available because of the lack of assets out of which an alternative trustee could be remunerated. It is also accepted that one of the functions of the Public Trust is to be a trustee of last resort. Trusts of whatever description are not to be left without trustees to administer them. Public Trust is therefore duty bound to accept appointment by the Court. The prejudicial effect of such an order in future cases has been met by the passage of the Amendment Act, although it is not retrospective and does not apply to these proceedings.

Payment of costs and expenses

[21] The crucial issue in this case is the proper interpretation of s 71 of the Act and, in particular, the meaning of the words "incidental to" an order. Does s 71 allow the Court to order the retiring trustee, Perpetual, to pay the ongoing costs of

the replacement trustee, Public Trust, notwithstanding the position taken in the regulatory impact statement to the Amendment Act, that if the entity which Public Trust is required to supervise as replacement trustee is insolvent, Public Trust will be required to bear the costs of acting as replacement trustee?

[22] The starting point of any statutory interpretation exercise is s 5(1) of the Interpretation Act 1991, which requires that "the meaning of an enactment must be ascertained from its text and in the light of its purpose". Canvassing the authorities surrounding s 5(1), Clifford J summarised the principles involved in the resolution of statutory ambiguities in *Transpower New Zealand Ltd v Commerce Commission.* He stated:[4]

> [17] In the course of argument I was referred to various authorities in which Courts had interpreted statutes to resolve an ambiguity, to fill an obvious gap in a statutory scheme and to correct an obvious drafting error to allow purpose to prevail over strict grammatical, or apparent, meaning.[9] The principles I take from those cases, and from the various authorities they rely on, may be summarised as follows:
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> (a) The starting point is s 5(1) of the Interpretation Act 1999:
>
> > The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (b) The relationship between text and purpose, and the significance of what may appear to be plain meaning, were commented on by Tipping J in *Fonterra:*
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> (i) Even an apparently plain meaning is to be "cross-checked" against purpose:
>
> > It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

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4 *Transpower New Zealand Ltd v Commerce Commission* HC Wellington CIV-2011-485-1032, 4 November 2011.

(ii) The concept of a plain and ordinary meaning does not involve the Court having regard to external sources such as expert meaning and textbooks — but reference to recognised dictionaries is of course appropriate.

(iii) Where meaning is not plain "the Court will regard context and purpose as essential guides".

(c) As Cooke P observed in *Northland Milk Vendors*, the Courts will also try to make enactments work by filling gaps in a statutory scheme in a manner consistent with statutory purpose, and in doing so will have to have regard to legislative statements of purpose. But the Courts must not usurp Parliament's policy-making function. The Courts must therefore be satisfied as to Parliament's intention before acting in that way.

(d) The situations where the apparent meaning of plain and unambiguous language, or strict grammatical meaning, will yield to a meaning to be found in purpose and context (as is argued for here by the Commission) can be categorised either as the application of the general, s 5(1) principle, or of a more particular rule for correcting obvious drafting errors. Thus:

(i) The Court of Appeal, in passing, recognised the former approach in *McKenzie v Attorney-General*, observing:

> This illustrates the general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose.

[23] Using these principles, it is therefore necessary for me to first ascertain the plain meaning of words "incidental to" and then cross-check their meaning against the purpose of the Act. The Shorter Oxford English Dictionary defines "incidental" as:[5]

2. Occurring as something casual or of secondary importance; not directly relevant to; following upon as a subordinate circumstance:

b Of an expense or charge; incurred apart from the main sum disbursed.

[24] There are two potential meanings of the words "incidental to" that could be taken from s 71 of the Act. The first is that "incidental to" refers to subsidiary expenses solely relating to the costs and expenses incurred in applying for and making the order appointing Public Trustee as replacement trustee. The second interpretation is that the words "incidental to" refer not just to the subsidiary costs

[5] Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, New York, 2002) at 1343.

and expenses incurred in applying for and making the order but also refers to all costs and expenses incurred in substantive enforcement and application of the order itself. I am of the view that the dictionary definition clearly points to the former, with references to "secondary importance" "not directly relevant to" and "a subordinate circumstance". It seems that the ongoing administration costs of the trust will far exceed the costs of a Court application. The costs of a Court application are therefore not "the main sum disbursed" in terms of the definition of "incidental".

[25] I am also of the view that it is of significance that s 71 expressly refers to the costs and expenses of and incidental to any conveyance or assignment in pursuance of an order. This is obviously intended to include transferring trust property into the name of a replacement trustee. There would be no reason to expressly provide for conveyances and assignments in the section if the section had the broad meaning contended for by Public Trust.

[26] Further, I am also of the view that it is not consistent with the words "incidental to" that the retiring trustee be responsible for the costs and expenses of administration of the trust for the duration of its life. This could span decades during which the retiring trustee would be required to pay for the trust's ongoing maintenance. This would be an enduring financial obligation upon the retiring trustee rather than a simple order for costs. This would also be a substantive obligation to impose upon a retiring trustee with no ongoing duties to the trust. Such an enduring and substantive obligation is not in keeping with the Oxford English Dictionary's definition of an expense which is "incidental to" an order as being of "secondary importance".

[27] This interpretation of the words "incidental to" then needs to be cross-checked with the purpose of the Act. As Tipping J stated in *Commerce Commission v Fonterra Co-operative Group Ltd:*[6]

> Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe

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6 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[28] As noted above, the Act is a consolidation of existing common law trust principles that had been codified by the UK Act. One of the most fundamental principles of trust law is that trustees are entitled to be reimbursed out of trust property for expenses incurred in carrying out the trust. This principle is set out in s 38(2) of the Act, which provides:

> A trustee may reimburse himself or pay or discharge out of the trust property all expenses reasonably incurred in or about the execution of the trusts or powers; but, except as provided in this Act or any other Act or as agreed by the persons beneficially interested under the trust, no trustee shall be allowed the costs of any professional services performed by him in the execution of the trusts or powers unless the contrary is expressly declared by the instrument creating the trust:
> provided that the Court may on the application of the trustee allow such costs as in the circumstances seem just.

[29] In *Stott v Milne*[7] the English Court of Appeal held that a trustee's right to indemnity is a first charge on trust income and capital. *In Re Leslie*[8] confirms that the indemnity allows the trustee to be reimbursed where the trustee has met such a liability wholly or in part from his or her own funds. The *Lewin on Trusts* commentary to s 60 of the UK Act, which is noted above, states that the costs of an application for the appointment of new trustees, being for the benefit of the whole estate, comes out of the trust fund.

[30] Considering that the purpose of the Act is to consolidate existing principles of English trust law, an interpretation of s 71, which allowed the Court to make an order requiring a retiring trustee to indemnify a replacement trustee for the ongoing maintenance and administration of the trust, is inconsistent with this purpose. Such an interpretation is inconsistent with the principle that trustees are to be indemnified out of trust property and not by retiring trustees. It is also inconsistent with the principle that a trustee's liability to the trust ends upon discharge.[9] Furthermore, under trust law principles, beneficiaries are expected to bear both the benefit and

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7 *Stott v Milne* (1884) 25 Ch D 710 (CA).
8 *In Re Leslie* (1883) 23 Ch D 552.
9 Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at 121.

burden of equitable trust property. In trust law, where a trust fund is insufficient to indemnify a trustee, it is the beneficiaries that are required to indemnify trustees personally.[10] Having regard to the general legislative context of the time, it is difficult to conceive of Parliament intending s 71 to apply in circumstances such as the present case, which would be inconsistent with established trust law principles, that trustees are to be indemnified out of trust property and that their duties and liabilities end upon being discharged as trustees.

[31] To interpret s 71 as allowing an order that a retiring trustee pay the ongoing costs of administration and maintenance of the trust on behalf of the replacement trustee, is not consistent with any trustee's duties as conceived when the Act was drafted in 1956. *Lewin on Trusts* gives examples of where the costs of applications under the UK Act were shared rateably by trusts, or raised by mortgage, or formed a charge on the inheritance, but certainly no cases where retiring trustees were required to indemnify replacement trustees.[11]

[32] Public Trust point to the concluding words of s 71 in support of its submission that an order under s 71 should be made directing Perpetual to pay the ongoing administration costs of the trust. The concluding words of s 71 state:

> or to be borne and paid in such manner and by such persons as to the Court may seem just.

[33] Public Trust is certainly correct that these words do literally include Perpetual. However, just because they can be read literally to include Perpetual does not mean that it is consistent with the purpose of the Act to do so. It does not seem likely that Parliament ever conceived of s 71 allowing an order requiring retiring trustees to be liable for the ongoing administration of the trust for the remainder of the trust's duration. Parliament did not, in my view, intend s 71 to be a loophole which would allow an order requiring individuals or entities upon which there are no longer duties of trusteeship to be liable for the long term costs of administering a trust, costs that would endure many years after Court proceedings had finished.

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10 *Hardoon v Belilios* [1901] AC 118 (PC).

11 *Lewin on Trusts*, above n2, at 575.

[34] Counsel referred me to two relevant cases – *Re Brackenbury's Trusts*[12] and *Foord v Brock & Ors.*[13] However, I do not consider that *Re Brackenbury's Trusts* is particularly helpful to the Public Trust. It is an application of a principle that beneficiaries will at times bear both the benefit and the burden of being a beneficiary to a trust. In *Re Brackenbury's Trusts*, the beneficiaries were required to pay the costs of their application to the Court. This is consistent with an interpretation of s 71 that the Court can order such persons that it thinks just, to bear the costs of an order.

[35] In *Foord v Brock & Ors* the section at issue was s 76(2) of the Supreme Court Act 1970 (NSW). It reads:

> (2) In sub-section 1 the expression "costs" includes:
>
> (a) Costs of or incidental to the proceedings in the Court, including the administration of estates and trusts.

[36] The Court stated that s 76(2)(a) does not refer to all administrations of estates and trusts in its ordinary and natural meaning. The Court said that there are many administrations of estates and trusts which are in some way connected with orders of the Court but do not fall within s 2(a). The Court gives as examples the granting of letters of administration or appointing a new trustee by order of the Court.[14] This illustrates that the Court viewed the appointment of a new trustee and the associated costs as an entirely separate substantive procedure which could not be considered incidental to the administration of an estate or trust. At [56] the Court concluded that whether or not the trust function may be incidental is a question of fact. The decision recognised that the Court can order remuneration for costs inherently bound up with Court proceedings, not necessarily for all costs related to the administration of a trust.

[37] A final factor I take into account is the passage of the Amendment Act. The fact that Parliament enacted the Amendment Act indicates that Parliament did not consider that the Act in its original unamended form enabled the Court to make an order requiring a retiring trustee to indemnify a replacement trustee. Furthermore,

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12 *Re Brackenbury's Trusts* (1870) LR 10 EQ 45.
13 *Foord v Brock & Ors* [2005] NSWLR 156 (NSW CA).
14 *Foord v Brook & Ors*, above n12, at [49].

Parliament amended s 46 of the Act rather than s 71, which further indicates that s 71 is not a section designed or contemplated to address the ongoing administration costs of a trust after the appointment of a replacement trustee.

[38] Although the regulatory impact statement, as cited above, does not discuss whether s 71 makes provision for the indemnification of replacement trustees, presumably Parliament would have looked at the Act in its entirety and not just s 46 before it considered that the Act in its unamended form made no provision for the indemnification of Public Trust. While the regulatory impact statement is not determinative, it does indicate that Parliament did not believe the Act in its unamended form allowed for the order requested by Public Trust.

Conclusion

[39] As a result of my findings, I therefore allow Perpetual's application and make an order, without opposition, under s 46(3) of the Act that Perpetual be discharged as security trustee of CMF. I also make an order under s 46(4) that Public Trust is duly appointed as security trustee for CMF. However, I am of the view that an order that Perpetual indemnify Public Trust for all the costs associated with being security trustee of CMF cannot be supported on a reading of s 71, in light of its object and purpose. I therefore dismiss Public Trust's counter-claim.

Costs

[40] If parties are unable to agree on costs, they are to file memoranda by 30 September 2013. I will then make a costs decision on the papers.

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Woolford J