

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

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

**CIV-2017-404-1784
[2018] NZHC 1768**

UNDER	Section 64 of the Trustee Act 1956 and Part 18 of the High Court Rules
IN THE MATTER	of an application to vary the Plaintiff's Trust Deed
BETWEEN	FRIENDS OF THE AUCKLAND ART GALLERY ACQUISITIONS TRUST Plaintiff
AND	FRIENDS OF THE AUCKLAND ART GALLERY INCORPORATED, REGIONAL FACILITIES AUCKLAND and THE AUCKLAND ART GALLERY FOUNDATION Defendants

Hearing: 29 June 2018

Appearances: N Penman-Chambers and RW Belcher for Plaintiff
DJ Perkins and J Herring for Attorney-General

Judgment: 17 July 2018

JUDGMENT OF TOOGOOD J

*This judgment was delivered by me on 17 July 2018 at 3.30 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

Introduction

[1] The trustees of the Friends of the Auckland Art Gallery Acquisitions Trust (the Acquisitions Trust or the Trust) seek an order to vary the Acquisitions Trust deed (the Deed) in accordance with which the Trust was settled. If granted, the variation sought would permit the trustees to:

- (a) use the capital of the Trust to purchase an artwork or artworks for the Auckland Art Gallery; and
- (b) gift any remaining capital to the Auckland Art Gallery Foundation (the Foundation).

Exercising such new powers would render the Acquisitions Trust impotent.

[2] This judgment addresses the Court’s jurisdiction to vary the Deed in such circumstances, and whether it is an appropriate case for the Court to exercise its discretion under s 64 of the Trustee Act 1956 to make the changes sought. Because the ultimate objective is to wind up the Acquisitions Trust, the primary question is whether the Court should decline the application and require the trustees to prepare a scheme under Part 3 of the Charitable Trusts Act 1957 (the CTA) to dispose of the Trust’s property for another charitable purpose.

Background circumstances

[3] In 1954, the Friends of the Auckland Art Gallery (Incorporated) (the Friends) was formed as an incorporated society.¹ Historically, the Friends have raised funds for the Auckland Art Gallery (the Gallery) and run various events supporting the Gallery.

[4] On 20 December 1983, the Auckland Gallery Associates Acquisitions Trust was settled and was registered as a charitable entity in 2008. In 2009, it changed its name to the “Friends of the Auckland Art Gallery Acquisitions Trust”. In 2017, the trustees incorporated as a Board under Part 2 of the CTA. The Acquisitions Trust’s

¹ The entity was originally called Auckland Gallery Associates (Incorporated).

beneficiary is the Auckland City Council (the Council), Regional Facilities Auckland Limited being the Council entity which operates the Gallery.

[5] The purpose of the Acquisitions Trust is to provide “in perpetuity” funds for the purchase of artwork for Auckland Council, to be displayed at the Auckland Art Gallery, and to increase the appreciation of visual arts in the local community, by collecting donations and accumulating funds on behalf of the Friends. The trustees may apply the Acquisitions Trust’s income towards its purposes, but may apply its capital only in limited circumstances.

[6] On 21 February 2005, the Auckland Art Gallery Foundation (the Foundation) was settled as a duly incorporated charitable trust. The Foundation’s beneficiaries are the general public and the Gallery and it has similar purposes to those of the Acquisitions Trust.

[7] In recent years, the Friends’ membership has been dwindling and for all intents and purposes the Friends has wound down. Whereas the Friends now has approximately 500 members only, the Foundation’s membership exceeds 6,700. In 2015, the Gallery proposed to create and operate a new membership programme, replacing that run by the Friends. The Gallery and Friends entered into a Memorandum of Understanding (MOU) to record how the Gallery membership programme would be structured, and how it would encompass the existing Friends programme.

[8] On 5 November 2015, the Friends held a special general meeting. The Friends resolved to accept the MOU, put the Friends into liquidation and appoint a liquidator on a future date. The new membership programme has been running since this time and has been a great success.

[9] On 13 February 2018, at the annual general meeting of the Friends and after consultation between the trustees, the Friends, and the Gallery, consensus was reached that it would be most prudent for the Acquisitions Trust’s capital to be applied to purchase art work for the Gallery, and to wind up the Acquisitions Trust.

Proposed variation to the Deed

[10] It is against that background that the current application is brought.

[11] As the Friends and the Acquisitions Trust have a symbiotic relationship, the Trust's continued operation depends on the Friends' continued existence. This is because:

- (a) the Acquisitions Trust's income is expended at the direction of the Friends;
- (b) the Friends can direct who is to choose artwork in place of the Gallery director;
- (c) the Friends may, following a resolution passed at a general meeting, request a change to the purposes for which the Acquisition's Trust's income may be applied, provided such purpose is conducive to the benefit of the Gallery; and
- (d) the Friends appoints the Acquisitions Trust's trustees.

[12] Furthermore, as it is intended that the Friends will no longer operate, there have been no recent donations to the Acquisitions Trust. The only present and anticipated income is from returns from its current investments. The net resources of the trust at 31 March 2017 totalled \$515,126. There has been little movement since then and the income derived from the Trust's investments is insufficient to achieve its purposes effectively, the acquisitions account being in deficit at the 2017 balance date.

The proposal

[13] There is currently no power in the Deed for the trustees to expend the Trust's capital², wind up the Acquisitions Trust, or vary the Deed to provide the trustees with the above powers. It is proposed that this Court should exercise its supervisory power to vary the Deed by inserting two clauses that would allow the trustees to expend the

² Except in limited circumstances: Deed at cl 7.

Acquisitions Trust's capital on art work for the Gallery, and gift any remaining capital to the Foundation.

[14] The wording of the proposed clauses is as follows:

7A. The Trustees may use the capital of the Trust Fund or any part of it for the purchase of an art work or art works for the Auckland Art Gallery, a business unit of Regional Facilities Auckland. Such art work or art works to be selected in accordance with clause 5 of the Trust Deed, all artworks to be purchased solely by the Acquisitions Trust and to be recorded as gifted by the Friends of the Auckland Art Gallery.

7B. Following the purchase of artworks pursuant to clause 7A, any remaining assets of the Trust Fund that Trustees consider to be too small for the purchase of an artwork may be gifted to the Auckland Art Gallery Foundation (a registered charitable trust: incorporation number 1610446; a registered charitable entity: incorporation number CC26873) ("Foundation") to be held on the trusts set out in the trust deed of the Foundation.

[15] The proposed clauses have been approved by the Friends and the changes also have the support of the Gallery and the Foundation.

Relevant law

[16] Although the Court has jurisdiction to vary a charitable trust, the general rule is that such a trust cannot be terminated.³ There are, however, three exceptions to the rule:⁴

- (a) Where the trust is set up in such a way that the property is applied for charitable purposes for a limited duration and the trustees are given express powers to terminate.
- (b) Where a charity that has the power to expend both income and capital no longer has funds.
- (c) Where the objects of the charity are dependent on the existence of a particular institution or premises.

³ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL).

⁴ William Henderson, Jonathan Fowles and Julian Smith *Tudor on Charities* (10th ed, Thomson Reuters, London, 2015) at [21-024]-[21-025].

[17] Furthermore, a trust may come to an end if the trust deed allows the trustees to wind up the trust without outside intervention; if the trust is a society incorporated as a board;⁵ or if the society and trustees were incorporated on just and equitable grounds.⁶

Section 64(1) of the Trustee Act 1956

[18] In this proceeding, the trustees rely on s 64(1) of the Trustee Act 1956. The section provides:

64 Power of Court to authorise dealings with trust property and variations of trust

- (1) Subject to any contrary intention expressed in the instrument (if any) creating the trust, where in the opinion of the Court any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the same without the assistance of the Court, or the same cannot be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the Court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the Court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income:

Provided that, notwithstanding anything to the contrary in the instrument (if any) creating the trust, the Court, in proceedings in which all trustees and persons who are or may be interested are parties or are represented or consent to the order, may make such an order and may give such directions as it thinks fit to the trustee in respect of the exercise of any power conferred by the order.

[19] The objective of s 64 is to ensure trust property can be managed advantageously in the interests of the beneficiaries and to authorise specific dealings with property which the Court might have felt itself unable to sanction in the exercise of the Court's inherent jurisdiction.⁷ The section permits the Court to authorise certain transactions involving trust property. It confers on the Court a "supervisory function,

⁵ Charitable Trusts Act 1957, s 24.

⁶ Charitable Trusts Act 1957, s 25.

⁷ *Re Gray (deceased)* [1956] NZLR 764 (SC) at 768.

whereby it can enlarge inadequate powers of administration and management”.⁸ In the past, the Court has interpreted the section liberally, and used it to make orders approving a wide variety of transactions.⁹

[20] In the present case, the proviso to s 64(1) may operate to permit the Court to vary the trust in a manner which is arguably contrary to the perpetual nature of the trust. The Friends (by the resolution of a majority of its members voting in the matter), the sole beneficiary and the trustees are all either parties to the proceeding or represented by counsel.

[21] Counsel for the Acquisitions Trust also rely on s 64A of the Trustee Act 1956 as a foundation for the order sought. The Court’s power under s 64A is limited, however, to approving variations “on behalf of those who are legally incapable of giving their consent”. Here, the sole beneficiary of the Acquisitions Trust (Auckland Council) is ascertainable, has capacity and is capable of consenting to a variation in the trustees’ powers of administration and management. I find that s 64A does not apply.

Submissions

Attorney-General’s report and submissions

[22] The duty of ensuring the due administration of charities and the proper use of funds devoted to charitable purposes rests with the Crown in its *parens patriae* (parent of the country) role.¹⁰ As the senior Law Officer, the Attorney-General exercises that responsibility in this proceeding in the public interest. Through delegated authority to a Deputy Solicitor-General, the Attorney-General has filed a report addressing the issues that arise; Crown Counsel presented submissions in support of the report’s conclusions. As may have been expected, the report and counsel’s submissions are objective, principled and balanced. I have found them helpful.

⁸ *Re Lyall (deceased)* [1977] 1 NZLR 713 (SC) at 716.

⁹ *Baker v Waimakuku Whanau Trust Board Inc* [2013] NZHC 2530 at [90].

¹⁰ G E Del Pont *Law of Charity* (2nd ed, LexisNexis Butterworths, Australia, 2017) at [14.24] citing *Construction Industry Training Board v Attorney-General* [1973] 1 Ch 173 at 183; and *Wallis v Solicitor-General for New Zealand* [1903] AC 173 at 181-2.

[23] Mr Perkins, on behalf of the Attorney-General, does not press an argument that there is no jurisdictional bar to the trustees making an application under s 64(1) of the Trustee Act, subject to confirmation that this application has been brought on behalf of all trustees. I am satisfied that that is the case. Mr Perkins submits, however, that although the present application does not by its terms seek to terminate the Acquisitions Trust, it would be unrealistic to ignore the stated intention that it forms part of a larger project, the culmination of which is the Trust's liquidation.

[24] The Acquisitions Trust capital was "dedicated in perpetuity" and Mr Perkins submits that the proposed clauses are contrary to the intention of the original settlor. He submits that this Court should not use its powers under s 64 of the Trustees Act to approve a variation designed to facilitate the termination of a charitable trust that was intended to be perpetual in circumstances that do not come within one of the recognised exceptions to the general rule that a charitable trust cannot be terminated.

[25] Counsel argues that, in these circumstances, the more appropriate and preferable option would be for the trustees to prepare a scheme under Part 3 of the CTA for disposal of the trust capital for other charitable purposes.¹¹ Reliance on the statutory powers found in ss 32 and 33 of the CTA is recommended by the Attorney-General, but the trustees have elected not to resort to them. The procedure under Part 3 of the CTA, informed by the *cy-près* doctrine, is designed to keep the purposes of a charitable trust alive in circumstances where either the administration of the trust could not be facilitated other than by amendment to the subject trust deed, or the original purpose of the trust has become frustrated.

[26] Mr Perkins argues that it is significant that the Part 3 procedure requires:

- (a) submission of the proposed scheme to the Attorney-General, who then may exercise certain statutory powers in relation to the proposal;¹²

¹¹ See Charitable Trusts Act 1957, ss 32 – 37.

¹² Section 35.

- (b) notification to the public by Gazette notice and advertisement in a local newspaper;¹³ and
- (c) the opportunity for objections to be heard by the Court.¹⁴

[27] Mr Perkins notes the *Baptist Union* case¹⁵ as authority for the proposition that, in the case of a charitable trust, it is preferable to proceed by way of an application under Part 3 of the CTA rather than under s 64(1) of the Trustee Act. That is because of the greater degree of transparency in the Part 3 procedure than in the present proceeding, which he contends is important in the present case because the amendment to the Deed is not supported unanimously by the membership of the Friends.¹⁶

[28] Mr Perkins accepts nevertheless that, if the Deed is varied as sought, the trustees of the Acquisitions Trust will not be compelled to expend the capital in such a way that the Trust would become defunct and that there would still be scope for a scheme under Part 3 of the CTA. He submits correctly, however, that that is not their current intention.

Acquisitions Trust

[29] Ms Penman-Chambers, for the plaintiff, argues that the Court's view in *Baptist Union* was not followed in *Greenwood v Greenwood*,¹⁷ a decision later cited with approval by the Court of Appeal in *Pryor v Bully*.¹⁸ She submits that a Part 3 scheme may be avoided where all interested parties are in agreement and says that all parties to this proceeding have come to the view that the proposed way forward is in the best interests of the Gallery.

[30] Ms Penman-Chambers contends that, while principled, the Attorney-General's recommended approach is not a pragmatic response to the current situation. She submits that approaching the matter under s 64 of the Trustees Act is preferable as the

¹³ Section 36.

¹⁴ Section 37.

¹⁵ *Baptist Union of New Zealand v Attorney-General* [1973] NZLR 42.

¹⁶ I note, however, that only a small minority of the total membership – two per cent – voted against the relevant motions.

¹⁷ *Greenwood v Greenwood* HC Christchurch A. No. 48/85 23 July 1987.

¹⁸ *Pryor v Bully* [2013] NZCA 559.

charitable purpose which the Acquisitions Trust serves will be better served by allowing the role of the Friends to be subsumed within the Foundation, which shares a common purpose with the Acquisitions Trust and the Friends.

[31] Ms Penman-Chambers argues that interested members of the Friends or the general public will have an opportunity to oppose the liquidation of the Acquisitions Trust, if that step is taken, as any liquidation application following the procedure under the Companies Act 1993 would be publicly advertised.¹⁹

Discussion

Does the Court have jurisdiction to grant the application?

[32] Mr Perkins suggested that there is conflicting authority about whether s 64(1) may be used to approve textual variations to a deed. He notes that the jurisdiction is confined to authorising any "sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, retention, expenditure, or other transaction" and that it is arguable that amending the terms of the Deed is not an act contemplated by the section. Mr Perkins referred to *Re Lyell (deceased)*²⁰ in which, counsel submitted, Beattie J held that the Court did not have jurisdiction to make textual variations to a deed, relying upon what the Judge described as "strong authority" of the England and Wales Court of Appeal in *Re Downshire Settled Estate*.²¹ In *Lyell*, the Judge referred to what he described as a "practical suggestion" of counsel for certain beneficiaries of a will trust that would amount to varying the beneficial interests provided by the Trust. In support of his view that the Court could not adopt the suggested approach, Beattie J noted that s 64 had been stripped of the specific power that counsel wished the Court to exercise in favour of specific powers being provided by s 64A to deal with such matters.²²

¹⁹ See Charitable Trusts Act 1957, Part 2 and the discussion at [40] below.

²⁰ *Re Lyell (Deceased)* [1977] 1 NZLR 713 (SC) at 716.

²¹ *Re Downshire Settled Estate* [1953] Ch 218; [1953] 1 All ER 103.

²² I have held at [20] that s 64A of the Trustee Act is not available in this case.

[33] As noted above,²³ however, Beattie J observed that:²⁴

... pursuant to s 64 the court has a supervisory function whereby it can enlarge on inadequate powers of administration and management.

[34] I respectfully agree. It seems to me that that is what the trustees have asked the Court to do here. The Court can exercise that function and achieve the desired objective by making the textual variations to the Trust without varying any beneficial interests. As Mr Perkins properly acknowledged, this Court has previously made textual variations to trust deeds under s 64.²⁵

[35] The test for the exercise of the Court's powers under s 64(1) is expediency. Given the state of the Trust's finances; the successful establishment of an alternative vehicle for the provision of support to the Art Gallery formerly provided by the Trust; the transfer of membership support from the Friends to the Foundation; and, most significantly, the decision to wind up the Friends, the proposal meets the test of expediency, for the Trust as a whole, in the management or administration of trust property.

[36] Giving s 64(1) of the Trustee Act a purposive interpretation, I conclude that the jurisdiction of the Court to confer upon the trustees the necessary powers to achieve the purposes for which this application is brought may be exercised by approving the variation of the trust deed as sought.

Should the Court exercise its discretion to grant the application?

[37] The remaining question is whether the Court should exercise its discretion in favour of the trustees being empowered to take a step or steps which will not in themselves result in the termination of the Trust, but which are intended to facilitate that end.

[38] I do not regard the settlor's intention to create a perpetual trust as creating any obstacle to the trustees' intention to facilitate the winding-up of the Trust. The proviso

²³ At [18].

²⁴ *Re Lyell (Deceased)* [1977] 1 NZLR 713 (SC) at 716.

²⁵ *Re Philips New Zealand Limited* [1997] 1 NZLR 93 (HC); *Re Bruce McLaren Trust* HC Auckland M663-IM02, 18 June 2002.

to s 64(1) expressly provides the means to circumvent the barrier. I agree with Mr Perkins that, in determining whether the Court approve the trustees' proposals, it would be unrealistic for the Court to ignore the ultimate objective, which is to terminate a charitable trust. In this proceeding, however, the Court is neither invited nor empowered to sanction that outcome. It has been asked only to vary the powers of the trustees and not to alter the interests of the beneficiaries.

[39] The purpose of the Acquisitions Trust is the provision of funds to acquire art works of any and every description for presentation to the Auckland City Council for display in the Auckland Art Gallery, and to increase the appreciation of the visual arts amongst the citizens of Auckland. It is clear that there is a widely held view among those responsible for the administration of the Auckland Art Gallery and, particularly, among those who have devoted their time and resources to supporting the Gallery and enhancing its collection through the Friends, that the Acquisitions Trust is no longer able to serve its intended purpose and that there is a better arrangement for achieving the common objectives.

[40] The Auckland Art Gallery is a civic, regional and national taonga and I am not persuaded that it would be a proper exercise of the Court's discretion to decline, on what are essentially technical grounds, to exercise the jurisdiction available to the Court to facilitate the achievement of the objectives of those in whose name this proceeding is brought. It is firmly established by the evidence that much thought and discussion has preceded the making of the application. If the application is granted, the trustees will have the power to divest the Trust of its resources in accordance with the wishes of an overwhelming majority of its stakeholders and for a purpose consistent with the Trust's purposes.

[41] It is open to the trustees to ensure that the powers vested in them by the variations will be exercised in such a manner as to ensure that the Trust has sufficient resources to promote a scheme under Part 3 of the CTA, or to otherwise liquidate the Board under the appropriate provisions of Part 2 of the Act, as and when the trustees consider such a course to be appropriate. A voluntary liquidation under Part 2 would be conducted in accordance with the liquidation procedures under Parts 16 and 17 of the Companies Act 1993, modified as may be necessary, including adherence to the

public notice requirements. As mentioned, the Part 3 procedure similarly requires public notification. Both forms of liquidation will require the ultimate sanction of the Court, but that is a matter for the future. For the present, I have no doubt that the Court should approve what is sought in this proceeding, notwithstanding the valued advice of the Attorney-General not to do so.

Order

[42] Accordingly, I order that new clauses 7A and 7B be added to the trust deed of the Friends of the Auckland Art Gallery Acquisitions Trust as follows:

7A. The Trustees may use the capital of the Trust Fund or any part of it for the purchase of an art work or art works for the Auckland Art Gallery, a business unit of Regional Facilities Auckland. Such art work or art works to be selected in accordance with clause 5 of the Trust Deed, all artworks to be purchased solely by the Acquisitions Trust and to be recorded as gifted by the Friends of the Auckland Art Gallery.

7B. Following the purchase of artworks pursuant to clause 7A, any remaining assets of the Trust Fund that Trustees consider to be too small for the purchase of an artwork may be gifted to the Auckland Art Gallery Foundation (a registered charitable trust: incorporation number 1610446; a registered charitable entity: incorporation number CC26873) ("Foundation") to be held on the trusts set out in the trust deed of the Foundation.

[43] I am grateful to counsel for their assistance.

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Toogood J