

IN THE COURT OF APPEAL OF NEW ZEALAND

CA371/2012  
[2012] NZCA 308

BETWEEN	PERPETUAL TRUST LIMITED Appellant
AND	FINANCIAL MARKETS AUTHORITY Respondent
AND	TRUSTEES EXECUTORS LIMITED Intervenor

Hearing: 4 July 2012

Court: Glazebrook, Ellen France and Stevens JJ

Counsel: J R Billington QC and S E Fitzgerald for Appellant  
H B Rennie QC and B J Moffat for Respondent  
C M Stevens and F M Russell for Intervenor

Judgment: 4 July 2012 at 4.45 pm

Reasons: 16 July 2012 at 11.00 am

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**JUDGMENT OF THE COURT**

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- A** By consent, we grant the appellant's application to adduce further evidence.
- B** We dismiss the appeal, subject to the following.
- C** The confidentiality order made by Ellis J on 24 May 2012 is discharged as from midday, Thursday 5 July 2012.
- D** In the meantime, the confidentiality order made by Ellis J is varied to allow the appellant to release a statement to unit holders immediately if it wishes to do so. The respondent and the intervenor may comment on that statement publicly, again if they wish to do so.

- E** The order made by Heath J on 14 June 2012 that the High Court file not be searched, copied or inspected without leave of a Judge of the High Court, remains intact. The order is extended to this Court’s file on this appeal.
- F** Heath J’s judgment of 26 June 2012 may be published in its entirety on or after midday, Thursday 5 July 2012.
- G** This Court’s judgment may also be published in its entirety on or after midday, Thursday 5 July 2012.
- H** The appellant (personally and not in its capacity as trustee) must pay the respondent and the intervenor costs for a complex appeal on a Band B basis plus usual disbursements. We certify for:
- (a) an uplift of 50% in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005; and
- (b) two counsel.

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## REASONS OF THE COURT

(Given by Glazebrook J)

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## **Introduction**

[1] Perpetual Trust Ltd (Perpetual) is the trustee of two group investment funds: Perpetual Cash Management Fund (the Cash Fund) and Perpetual Mortgage Fund (the Mortgage Fund). As at February 2012 they were each soliciting money from members of the public under a prospectus issued by Perpetual on 23 September 2011, as amended on 10 February 2012.

[2] Heath J, in a judgment of 26 June 2012,<sup>1</sup> partially lifted confidentiality orders made on an interim basis on 24 May 2012 by Ellis J, in respect of judicial review proceedings filed by Perpetual, challenging certain actions of the Financial Markets Authority (FMA) with regard to the Cash Fund.

[3] Perpetual appealed against Heath J's decision and, on 4 July 2012, this Court dismissed that appeal and made the orders set out above.<sup>2</sup> These are the reasons for judgment.

## **Background**

[4] In brief, the proceeding in the High Court relates to the actions of the FMA with regard to a loan made by the Cash Fund to a limited partnership, Torchlight Fund No 1 LP, of which Torchlight (GP) 1 Ltd is the general partner (collectively referred to as Torchlight in this and Heath J's judgment).

[5] Perpetual is a wholly owned subsidiary of Pyne Gould Corporation Ltd, which is also the "ultimate holding company" of Torchlight (GP) 1 Ltd. The background to the loan is set out in full in Heath J's judgment.

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<sup>1</sup> *Perpetual Trust Ltd v Financial Markets Authority* [2012] NZHC 1469.

<sup>2</sup> *Perpetual Trust Ltd v Financial Markets Authority* [2012] NZCA 298.

## **Perpetual's position on appeal**

[6] While the position of Perpetual before Heath J was that no information should be provided to unit holders or the public about the circumstances of the Torchlight loan, it modified that position before this Court.

[7] Before this Court, Perpetual accepted that it had an obligation to provide investors with the following information that:

- (a) Torchlight has an outstanding loan to the Cash Fund;
- (b) the total currently outstanding on that loan is \$13 m; and
- (c) the total value of the Cash Fund is \$56 m, which means that the Torchlight loan at its current level is approximately 25 per cent of the total fund.

[8] Perpetual also accepted that investors should be provided with information on the history of the Torchlight loan transaction and the context in which it was made, as well as a summary of the concerns of the FMA with regard to the loan.

[9] Perpetual's position was, however, that the above information is relevant only to the unit holders of the Cash Fund and not to investors in the Mortgage Fund or to the wider public. In Perpetual's submission, Heath J confused the principle of open justice with the statutory obligations of the FMA and of Perpetual to inform investors about the Torchlight loan.

[10] Perpetual's primary submission was that Heath J's judgment should remain confidential but that Perpetual (not the statutory supervisor, Trustees Executors Ltd, which was given leave to intervene in this proceeding) should communicate with unit holders. It accepted that the FMA should also be able to comment on any such communication in line with its statutory obligations and constraints.

[11] If Heath J's judgment is not to remain confidential then Perpetual submitted that it should be released in an anonymised fashion with Perpetual not being identified. Further, the judgment should be redacted, if published.

[12] Perpetual submitted that, while Heath J's bare recitation of the facts was accurate, some of the quotations from the documents should be excised because the documents were obtained under notices issued pursuant to s 25 of the Financial Markets Authority Act 2011, which were under challenge in the judicial review proceedings. In addition, it submitted that later information might arise that may put those documents in a different light.

[13] Perpetual submitted also that some of the inferences drawn by Heath J were unavailable to him and that certain of the conclusions drawn by him were made in the context of what was an interlocutory application and so not properly tested. It was submitted that those conclusions and inferences should be removed from the judgment because, if published, they might have an unfairly adverse effect on the market.

[14] Perpetual submitted that Trustees Executors should not have been involved in this proceeding which should properly only be between the FMA and Perpetual.

### **The FMA's position**

[15] The FMA supported Heath J's judgment.<sup>3</sup> It also sought indemnity or increased costs on the basis that Perpetual's appeal was wholly without merit.

[16] The FMA also submitted that the involvement of Trustees Executors was entirely appropriate. Further, Perpetual consented to the intervenor status of Trustees Executors.

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<sup>3</sup> This was also the position of Trustees Executors.

## **Issues on appeal**

[17] The issues on appeal are:

- (a) Should the judgment remain confidential?
- (b) Should the judgment be released publicly?
- (c) Should Perpetual's name be published?
- (d) Should the quotations from documents be redacted?
- (e) Were the conclusions and inferences drawn by Heath J available?
- (f) What costs award should be made?

*Should the judgment remain confidential?*

[18] We do not accept the submission that Heath J confused the principle of open justice with the statutory obligations of the FMA and Perpetual. The judgment relates to a court proceeding, thus clearly engaging the principle of open justice.

[19] We accept the FMA's submission that Heath J carefully balanced the various interests involved and that his decision to lift the confidentiality order of Ellis J was inevitable.

[20] We also accept the FMA's submission that Heath J struck the correct balance between commercial confidentiality of some of the information disclosed in the affidavits and the rights of unit holders and the FMA by maintaining the order that the Court file not be searched, copied or inspected without the leave of the High Court.

[21] We did, however, consider it appropriate to allow Perpetual a short period before Heath J's judgment was released to communicate with the investors in the Cash Fund.<sup>4</sup>

*Should the judgment be released publicly?*

[22] We do not accept the submission that the Torchlight loan is only of relevance to investors in the Cash Fund. It is also of relevance to investors in the Mortgage Fund, given the dependence of the Mortgage Fund on the Cash Fund for liquidity.

[23] In addition, investors and potential investors in other funds managed by Perpetual should have an opportunity to assess the actions of Perpetual with regard to the Cash Fund and Torchlight loan. There may also be lenders to investors in the various funds with a legitimate interest in Perpetual's actions.

[24] Finally, as the FMA submitted, there is a general public interest in the promotion and facilitation of fair, efficient and transparent financial markets.

*Should Perpetual's name be published?*

[25] We can deal in short order with the submission that any publication of Heath J's judgment should be anonymised. This would not serve to inform investors or the public and could lead to unwarranted speculation as to the position of other trustee companies. There are only three operational trustee companies currently in New Zealand.

*Should the quotations from documents be redacted?*

[26] Given that Perpetual accepted that Heath J's recitation of the primary facts was accurate and that his summary of those facts was based on the documents he referred to, it is difficult to see why the documents themselves should be concealed.

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<sup>4</sup> Order D of the Judgment of the Court.

Further, the documents in question are in the main business records relating to the Torchlight loan.

*Were the conclusions and inferences drawn by Heath J available?*

[27] Perpetual took issue in particular with the following passages in Heath J's judgment, which it said drew either incorrect or premature inferences and conclusions:

[38] I agree with the Authority and Trustee [sic] Executors that disclosure of what has occurred should be made to the markets promptly. The lack of judgment and understanding of the role of a trustee of funds of this nature, evidenced by the circumstances in which the loans came to be made, is striking. The failure of Perpetual to procure repayment of the loans by Torchlight in accordance with its own suggested timetables add to my concerns.

[39] Those concerns are exacerbated further by the realisation that the securities on which the loans are made may not be as robust as Perpetual suggests. If they were, it is likely that Torchlight could have refinanced to pay back the Perpetual loans. In turn, that leads to an inference that the money was sought from Perpetual, at short notice, because moneys at a competitive interest rate could not be sourced from a third party dealing with Torchlight at arm's length.

[40] Taken together with the disclosure issues raised by KPMG in relation to the related party lending (which I infer is referable to the Torchlight loans) and lending that was not made in accordance with established criteria, or in accordance with statements in the current prospectus, those concerns lead me to have no confidence in Perpetual's ability to procure repayment of the moneys advanced or to disclose adequately what has occurred, if the confidentiality order were to remain in place.

[28] As we commented in the results judgment of 4 July 2012,<sup>5</sup> we accept that Heath J's conclusion and inferences were made in the context of an interlocutory decision focused on the issue of confidentiality. We also accept that further information may arise in the substantive proceeding and/or in other proceedings that may be relevant to the broader matters discussed in Heath J's judgment.

[29] However, on the basis of the information available to Heath J at the time of his judgment, coupled with the fact that no further information was placed before

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<sup>5</sup> See the reference at fn 2 above.

this Court by Perpetual, we consider the conclusions and inferences drawn by Heath J were available to him.

[30] As such, we see no reason effectively to censor his judgment by removing those inferences and conclusions.

*What costs award should be made?*

[31] The position of Perpetual in the High Court was that there should be no lifting of the confidentiality order and that the timing of any disclosure to unit holders was a matter for Perpetual alone.

[32] If that position had been maintained on appeal, then we would have accepted the FMA's submission that the appeal was wholly without merit. However, we do not consider that Perpetual's modified arguments, although ultimately rejected by us, were entirely hopeless. We thus do not consider indemnity costs should be awarded.

[33] Perpetual's modified position, however, was not heralded until the morning of the hearing. This meant, as Mr Billington QC responsibly accepted,<sup>6</sup> that there had been an element of wasted costs in meeting Perpetual's more extensive submissions on confidentiality. We considered it appropriate to recognise those wasted costs with an order for increased costs and that these be paid by Perpetual personally and not in its capacity as trustee.<sup>7</sup>

[34] The costs award was made in favour of both the FMA and Trustees Executors. As statutory supervisor, we accept that Trustees Executors' involvement in this proceeding was entirely appropriate and in any event was consented to by Perpetual.

## **Result**

[35] The following orders were made in our judgment of 4 July 2012:

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<sup>6</sup> At least as far as the FMA was concerned.

<sup>7</sup> Order H of the Judgment of the Court.

- (a) By consent, we grant the appellant's application to adduce further evidence.
- (b) We dismiss the appeal, subject to the following.
- (c) The confidentiality order made by Ellis J on 24 May 2012 is discharged as from midday, Thursday 5 July 2012.
- (d) In the meantime, the confidentiality order made by Ellis J is varied to allow the appellant to release a statement to unit holders immediately if it wishes to do so. The respondent and the intervenor may comment on that statement publicly, again if they wish to do so.
- (e) The order made by Heath J on 14 June 2012 that the High Court file not be searched, copied or inspected without leave of a Judge of the High Court, remains intact. The order is extended to this Court's file on this appeal.
- (f) Heath J's judgment of 26 June 2012 may be published in its entirety on or after midday, Thursday 5 July 2012.
- (g) This Court's judgment may also be published in its entirety on or after midday, Thursday 5 July 2012.
- (h) The appellant (personally and not in its capacity as trustee) must pay the respondent and the intervenor costs for a complex appeal on a Band B basis plus usual disbursements. We certify for:
  - (i) an uplift of 50% in terms of r 53C(1)(b) of the Court of Appeal (Civil) Rules 2005; and
  - (ii) two counsel.

Solicitors:  
Russell McVeagh, Auckland for Appellant  
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