IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-2851
[2012] NZHC 1469

BETWEEN	PERPETUAL TRUST LTD Plaintiff
AND	FINANCIAL MARKETS AUTHORITY Defendant
AND	TRUSTEES EXECUTORS LTD Intervener

Hearing: 26 June 2012

Counsel: M R Heron and J Edwards for Plaintiff
B J Moffat and L F G Connell for Defendant
C M Stevens and F M Russell for Trustees Executors Ltd

Judgment: 26 June 2012

(ORAL) JUDGMENT OF HEATH J

Solicitors:
Russell McVeagh, PO Box 8, Auckland
Financial Markets Authority, PO Box 1179, Wellington
DLA Phillips Fox, PO Box 2791, Wellington
Counsel:
H Rennie QC, PO Box 10242, Wellington

The application

[1] This proceeding has been brought by Perpetual Trust Ltd (Perpetual) against the Financial Markets Authority (the Authority). In the substantive proceeding, judicial review is sought of various actions taken by the Authority, in circumstances to which I shall refer.

[2] At the commencement of the proceeding, a confidentiality order was made. The Authority now applies to revoke that order. Its application is opposed by Perpetual.

[3] Trustees Executors Ltd is the statutory supervisor of the funds over which Perpetual is trustee. Those funds[1] are the subject of the Authority's inquiries. Trustees Executors supports the stance taken by the Authority on the present application. It was given leave to intervene in this proceeding, for that purpose.

Background

[4] Perpetual is a wholly owned subsidiary of Pyne Gould Corporation Ltd (PGC). PGC is also the "ultimate holding company" of Torchlight (GP) 1 Ltd. Mr George Kerr is a director of PGC. He is also the beneficial owner of approximately 76.5% of its share capital. Mr Kerr is Chairman of Torchlight and actively involved in its management.

[5] Perpetual is the trustee of two group investment funds: Perpetual Cash Management Fund (Cash Fund) and Perpetual Mortgage Fund (Mortgage Fund). Each of those Funds was constituted under a deed of trust dated 14 October 1991 and, in February 2012, was soliciting money from members of the public under a prospectus issued by Perpetual on 23 September 2011, as amended on 10 February 2012.

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1 See paras [5] and [6] below.

[6] Both the Cash Fund and the Mortgage Fund are participatory securities, as defined by the Securities Act 1978. They are also group investment funds, for tax purposes. In addition to Perpetual having responsibility as trustee for the Funds, an associated entity, Perpetual Asset Management Ltd (PAM) (also a wholly owned subsidiary of PGC) acts as Administration and Investment Management of each.

[7] At material times, Messrs Duncan, Mogridge and Middelton were directors of Perpetual and PAM. Mr Duncan and Mr Mogridge were also directors of PGC.

[8] Trustees Executors is the statutory supervisor of each Fund. It receives regular reports and financial statements through PAM. It does not guarantee indebtedness of either Fund to its unit holders.

[9] The Cash Fund and the Mortgage Fund are operated independently. The common feature is Perpetual's trusteeship and PAM's management of each. Unit holders in the Cash Fund are allowed to claim credits for resident withholding tax on income distributed to them, meaning that those credits can be used to off-set income tax. The primary purpose of investing in the Cash Fund is to secure that tax advantage. On the other hand, the Mortgage Fund is operated as a portfolio investment agency.

[10] The Cash Fund is authorised to invest in trustee investments,[2] investments permitted by the Superannuation Schemes Regulations 1983[3] and any securities authorised for the investment of money subject to a trust by any Act. Permitted trustee investments are those prescribed by the more conservative regime that applied before the Trustee Amendment Act 1988 was enacted. Relevant regulations in the Superannuation Schemes Regulations are to be interpreted as those in force immediately before the Trustee Amendment Act 1988 was passed. Within the constraints of those authorised investments, each investment must fall within credit policy guidelines adopted from time to time by the trustee, on the recommendation of the Administration and Investment Manager.

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2 Trustee Act 1956, s 4(1)(a)–(j).

3 Superannuation Schemes Regulations 1983, reg 10(3)(b).

[11] The objective of the Mortgage Fund is to provide a consistent and competitive income return, combined with capital stability. Authorised investments are the same as those applying to the Cash Fund.[4] As with the Cash Fund, each investment must fall within credit policy guidelines adopted by the trustee on the recommendation of the Administration and Investment Manager.

[12] In general terms, unit holders can withdraw part or all of their units, not less than seven days after the date on which the funds representing their units were subscribed. Generally, that is done in writing to the trustee but some redemptions can be auctioned by telephone instruction.

[13] The trustee has wide powers to conduct the Funds' business. Normal indemnities are given in respect of costs, expenses and fees incurred by it. The trustee and the Administration and Investment Manager, or its delegates, are permitted to hold units in a Fund. The trustee is entitled to use funding facilities to provide liquidity cover for the Cash Fund. If, at any time in the opinion of the trustee, it is likely that payment is unable to be made on due date in respect of any redemption of a unit, the trustee has power to declare a moratorium on payment for such period as it thinks fit.

[14] As at 31 March 2012, the value of the Cash Fund was $56.13 million. The Mortgage Fund was, at the same date, worth $66.7 million. Both had been operating profitably in the five years to 31 March 2012, despite the impact of the global financial crisis.

The Torchlight loan

[15] By email dated Sunday 19 February 2012 (timed at 7.22pm), Mr Kerr (as chairman of Torchlight) requested a financial facility from the Cash Fund, as from Monday 20 February 2012. No formal application for finance was made. Nor was any information provided about Torchlight's creditworthiness or financial position.

[16] In concluding his email, Mr Kerr said:

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4 See para [10] above.

FOR 100% CLARITY

As the Chairman of Torchlight i am requesting that the following is put in place for tomorrow – Monday 20th.

1. cash fund facility to Torchlight LP – 7.5m (ideally 15m)

2. if cash fund is then capped at 7.5m then for perpetual alts to accelerate cash by an agreed methodology (interfund preferred) and make sure perpetual alts can send aud5.5m to Sydney tomorrow.

Please email me tonight and make a time [to] call and agree execution

George

[17] A meeting of the Board of PGC was convened at 3.50pm on 20 February 2012 to discuss a "request" from PAM, as manager of each Fund, for the board to approve an "interfund funding line" of $18 million to Torchlight Fund No 1 LP.[5] The PGC's board's approval was sought because a loan of that magnitude to a single borrower would have exceeded the existing investment and credit criteria. The PGC board had authority to authorise departure from those criteria. The Minutes of the PGC board record:

BACKGROUND:

1. *The meeting was called at short notice to discuss a request from Perpetual Asset Management Limited ("PAM") as manager of the Perpetual Cash Management Fund ("Cash Fund") and the Perpetual Mortgage Fund ("Mortgage Fund") for the board to approve an interfund funding line ("interfund Facility") to be made available by the Cash Fund of $18 million to Torchlight Fund No. 1 LP ("Torchlight").*

2. *The approval of the board was being sought by PAM as the size of the Interfund Facility meant that the facility had exceeded the 5% threshold for funding to any one party set out in the investment and credit criteria ("Credit Criteria") set for the Cash Fund. The Credit Criteria provided that the threshold is able to be exceeded with the approval of the board of PGC as the ultimate parent company of the Cash Fund's manager.*

3. The second item of business was for the board to consider and approve the appointment of Michael Owen Tinkler as a director of Torchlight Investment Group Limited ("TIG").

4. It was noted that George Kerr and John Duncan had declared themselves as being interested under section 139(1)(c) of the

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5 The evidence suggests that Torchlight (GP) 1 Ltd was the general partner. I refer to the Torchlight entities collectively as Torchlight.

Companies Act 1993 in the Interfund Facility by George Kerr disclosing that he is a director of the general partner ("GP") as well as an investor in Torchlight, and John Duncan disclosing his interest as a director of the GP.

5. Because of these disclosures of interest in the Interfund Facility George Kerr and John Duncan would not be included in the quorum for the purposes of the resolution on the approval of the Interfund Facility, although following that resolution being considered they would both rejoin the board to be included in the quorum for the consideration of the second resolution being the appointment of Michael Tinkler as a director of TIG.

NOTED:

1. Interested directors: it was noted that:

   (a) George Kerr and John Duncan disclosed their respective interests in the Interfund Facility as described in paragraphs 1 and 2 of the background section above.

   (b) Having discussed the above, the directors concluded that Bryan Mogridge, Michael Tinkler and Russell Naylor were not "interested" in the Interfund Facility under section 139 of the Companies Act 1993.

RESOLVED:

1. The board comprising a quorum of the disinterested directors resolved to approve the request by PAM for approval to the Interfund Facility and specifically the approval to the threshold for loans to any one party being exceeded.

2. The board comprising a quorum of all directors resolved to appoint Michael Tinkler as a director of TIG and that John Duncan be authorised by the board to provide the [requisite] notice of this to TIG.

(my emphasis)

[18] *After* the board's resolutions, a "loan application" form dated 21 February 2012 was prepared and set out the basis on which the loan was to be made. Security was to be given over five properties in the Queenstown/Wanaka region, owned by Henley Downs Village Investments Ltd and Real Estate Southern Holdings Ltd. A first general security agreement was to be taken over the Torchlight LP No 1 Ltd. The conditions of the loan are set out as being:

Conditions Conditions prior to drawdown of funds:

1. Application is to have been approved by the PGC Board and discussed with [Perpetual].

2. Loan offer is to be executed by the borrower.

3. All security documentation is to be executed and certified to be in registerable form by [Perpetual] solicitors who will prepare the documents.

Additional conditions:

4. *Advance will be on the understanding that registered valuations by a valuer instructed by [Perpetual] of the security will be required within three months.* If the valuation results in our LVR ratios exceeding [Perpetual's] standard criteria the borrowers will repay the appropriate principal required to return the LVR ratios to acceptable levels, or will provide additional security to bring the loan within the acceptable parameters.

5. Security to be a registered 1st Mortgage over the titles described under "Security heading and encompassing items 1 & 2 –A registered 1st GSA over assets and undertakings of Torchlight LP No 1 Limited.

6. Priority sum to be $21.6m plus two years interest plus costs.

7. Establishment fee $5,000.

8. Penalty rate 5%.

9. Interest rate and term as stipulated above.

10. All other standard terms and conditions are to apply.

(my emphasis)

[19] A letter was sent by Perpetual to Torchlight, dated 21 February 2012, reflecting those terms. The priority sum for the securities was stated as being $21.6 million, plus two years interest and costs. A loan agreement, also dated 21 February 2012, was prepared.

[20] On 23 February 2012, Mr Lancaster (a member of the Perpetual Corporate Trust Board) wrote to PAM raising concerns that the loan was to a "related party".[6] No response appears to have been forthcoming. At a meeting of that Board, held on

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6 In this letter, Mr Lancaster expressed the view that "the proposed loan is not permissible" and asked for confirmation that it had not proceeded. He also suggested that it was likely that Torchlight would be regarded as a "related entity".

7 March 2012, the issue was discussed. The Minutes of the Perpetual Corporate Trust Board's meeting record:

> 1. Wellington Office
>
> 1.1 Perpetual Cash Fund ("Cash Fund")
>
> A memorandum dated 6 March 2012 in relation to the Torchlight loan transaction ("the loan") was received and discussed.
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> It was noted that it is understood that the loan has been made and that the Perpetual Trust Limited Board has provided its consent.
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> The Corporate Trust Board has considered the matter and notes the following that:
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> - it is inappropriate for the Corporate Trust Board to act in this instance, given the Perpetual Trust Limited Board's decision to approve the loan;
> - it is not clear that the Corporate Trust Board has the delegated authority to act;
> - even if it does have the delegated authority to act when the decision by the Perpetual Trust Limited Board to proceed with the loan has superseded any such delegation; and
> - therefore any related issues of compliance and reporting to the Statutory Supervisor are to be managed by the Perpetual Trust Limited Board and executives.
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> In addition the Corporate Trust Board considers that the Perpetual Trust Limited Board should be advised to reconsider the offer documentation pertaining to the Fund and any required disclosures.
>
> It is also recommended that the delegations to the Corporate Trust Board be clarified. The current view of the Corporate Trust Board is that the delegated monitoring of these internal funds (being Cash, Mortgage and Streat) is unworkable and the responsibility for those funds needs to be handled by the Perpetual Trust Limited Board and its executives.

[21] Notwithstanding those concerns, further advances were made to Torchlight on 21 March 2012 ($4,500,000), 22 March 2012 ($950,000), 26 March 2012 ($920,000), 30 March 2012 ($2,300,000) and 30 March 2012 ($1,412,000). During this period two repayments were made by Torchlight; one of $85,808.22 on 21 March 2012 and the other of $60,000 on 22 March 2012.

[22] By 4 April 2012 the initial advance of $18 million had grown to $28.22 million. There is no evidence before me that the additional amounts

advanced, over and above the original $18 million, were approved in the same way as the initial advance.

[23] Between 5 and 23 April 2012, a sum of $3,963,600.22 was paid by Torchlight to the Mortgage Fund.

[24] On 27 April 2012, the manager of the Cash Fund certified that its assets had been invested only in authorised investments and that all provisions of its trust deed had been complied with.

[25] On 10 April 2012, Trustees Executors had received a copy of a report from PAM for February 2012. The report contained a certificate that the Trust Deed and Investment and Administration Agreement had been complied with that month. On 23 April 2012, an analyst at Trustee Executors raised a concern, having read the report. Those concerns were reported to the Authority on 26 April 2012, under s 46 of the Securities Trustees and Statutory Supervisors Act 2011.

[26] Subsequently, Trustees Executors has had access to documents filed in this proceeding. It now expresses a concern that "the Torchlight Advances are a significant risk to the Unitholders or investors in the Cash Fund and because of the dependence of the Mortgage Fund for liquidity on the Cash Fund ... unitholders or investors in that Fund are also materially prejudiced".

[27] On 1 May 2012, PGC announced KPMG's resignation as auditor of the PGC Group. The issue raised by KPMG was whether certain transactions should be disclosed in the financial statements as related party transactions. General concerns about the adequacy of governance and management of financial reporting were also raised. On the same day, PGC responded to a statement made by the Authority about the related party transactions, indicating that it was co-operating in the Authority's inquiries. While there is no specific evidence to this effect, I infer from the proximity and nature of the transactions in this case that they are the ones with which KPMG had expressed concern.

[28] On 24 May 2012, the present proceeding was issued. In it, Perpetual sought judicial review of a number of decisions made by and actions of the Authority, since it became aware of the problems identified by Trustees Executors. At Perpetual's request, and without hearing from the Authority, Ellis J made an order that "the information relating to [an interim relief application] and all materials relating to it are confidential and are not to be published or publicised without further order of the Court". Notwithstanding submissions of Perpetual to the contrary, it is clear that the Judge saw her order as temporary in nature and subject to review should circumstances dictate.

[29] The interim relief application and the proceeding generally were listed before me, as Duty Judge, on 28 May 2012. I made directions enabling the interim relief application to be heard on 31 May 2012. However, on that day counsel informed me that arrangements had been made that were designed to facilitate repayment of the amounts outstanding and that it was unnecessary for the application to proceed at that time.

[30] During the course of a further conference on 11 June 2012, I was referred to an informal application made to the Registrar by solicitors representing some unit holders to inspect an "interim order" made in the proceeding. I directed that the Registrar advise the applicant that no interim order had been made and that any application to search the Court file must be made on notice to the parties. I also directed that the information they then held about the decision could not be further disseminated without permission of a Judge.

[31] Further conferences were held to monitor progress on 15 June, 18 June and 20 June 2012. On 20 June it became clear that an application was imminent from the statutory supervisor[7] and that the Authority wished to seek that the existing confidentiality orders be lifted. Applications were duly filed and have been heard by me today. An urgent decision is required.

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[7] A separate proceeding has been filed by Trustees Executors, seeking orders under s 49 of the Securities Act 1978.

[32] Mr Middleton, the Chief Executive of Perpetual, has deposed that, as at 23 June 2012, about $13 million remains outstanding from Torchlight to Perpetual. The Authority now has little confidence in the ability of Perpetual to achieve repayment of the loan in a timely fashion and seeks to revoke the confidentiality orders so that there is transparency in the market about what has occurred. Revocation of the order would enable market participants to make informed decisions about their investments, with knowledge of the behaviour of those responsible for making decisions that allowed the Torchlight loans to be made.

[33] There have been some articles in media which are linked to the circumstances of this case. None have revealed the detail that has been provided to me. I make that observation simply to demonstrate that, together with statements that have been made to the New Zealand Stock Exchange, there is some information in the public domain about the issues in this case.

Competing contentions

[34] I thank counsel for their detailed submissions in support of and in opposition to the application. In the time available tonight it will not be possible to do full justice to the arguments. I endeavour to summarise them briefly.

[35] The Authority contends that while confidentiality orders were appropriate when the proceeding was first commenced, the failure of Perpetual to procure repayment of the loans in full, at agreed times, means that circumstances have changed. It contends that the pleadings and evidence should be available for public inspection to promote the purposes of the Financial Markets Authority Act 2011. In particular, Ms Moffat, for the Authority, relied on s 9 of that Act in which the Authority's functions are stated to include the promotion of a "confident and informed participation of business, investors and consumers in the financial markets" and "to monitor compliance with, investigate conduct that constitutes or may constitute a contravention of and enforce" statutes to which the s 9 refers.[8]

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[8] Financial Markets Authority Act 2011, s 9(1)(a) and (c).

[36] Mr Heron, for Perpetual, submitted that disclosure ought not to be made until such time as the loans had been repaid or such earlier period as Perpetual might choose. In his submission, Perpetual should be allowed to make the relevant disclosure, rather than the Authority or the Court. He also advanced submissions based on the need to protect the position taken by Perpetual in its substantive judicial review proceeding. I do not need to outline those concerns at this stage.

[37] Mr Stevens, for Trustees Executors, supported the stance taken by the Authority and submitted that the time was ripe for disclosure to the markets to be made.

Analysis

[38] I agree with the Authority and Trustee 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.

[41] Nevertheless, I do accept the force of Mr Heron's submission about potential prejudice to Perpetual's extant proceeding. It is important that the Court not allow information to be put into the public domain that might ultimately prejudice Perpetual's ability to prosecute its substantive action. I take the view that I should limit disclosure to what is said in this judgment but maintain the existing order that the Court file not be searched, copied or inspected without leave of the Court. The summary of facts set out in this judgment provides a transparent basis on which investors (or potential investors) may make decisions. There is no distortion of the real position in the summary I provide.

[42] It is necessary to deal with one further aspect of Mr Heron's submission. It relates to the extent to which the Authority may allow disclosure beyond what I have set out in this decision.

[43] There are a number of powers available to the Authority to make or remove confidentiality restrictions in respect of information gathered and generated during the course of an investigation. With one qualification, the Authority must be entitled to exercise those powers as it sees fit.

[44] The orders I will make are designed not to interfere with the Authority's statutory powers in that regard, so that changing circumstances can be met. In the circumstances of this case, it would be impossible to prophesy what may happen in the future and it is undesirable that I tie the Authority's hands in any way. Otherwise, its public interest functions would be inappropriately circumscribed.

[45] My qualification arises from the fact of a confidentiality order having been made in this Court, to which the Authority is subject. In my view, any disclosure of information during the currency of such an order must not infringe the order by which the Authority is bound. Rather, its remedy in such circumstances is either to seek variation or revocation. In this case, revocation of the order was sought so that this problem would be avoided. I see no basis on which it can be suggested that this qualification has any impact on continuing decisions in respect of this case.

[46] I give some illustrations of the powers of the Authority that may be relevant to these circumstances. The general information-gathering powers of the Authority are set out in Subpart 1 of Part 3 of the Financial Markets Authority Act. Subpart 4 sets out other powers and includes the power to make confidentiality orders. Section 44 provides:

> **44 Power to make confidentiality orders**
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> (1) The FMA may, on its own initiative or on the application of any person, make an order prohibiting the publication or communication of any information, document, or evidence that is provided or obtained in connection with any inquiry, investigation, or other proceeding of the FMA under this Act or any other enactment.
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> (2) The FMA may make an order under subsection (1) on the terms and conditions (if any) that it thinks fit.
>
> (3) An order under subsection (1) may be expressed to have effect—
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> (a) from the commencement of any inquiry, investigation, or other proceeding of the FMA to the end of that inquiry, investigation, or proceeding; or
>
> (b) for any shorter period.
>
> (4) At the end of the inquiry, investigation, or proceeding, the Official Information Act 1982 and the Privacy Act 1993 apply to any information or document or evidence that was the subject of the order under subsection (1).

[47] Section 45 provides that an order under s 44 does not prohibit the publication or disclosure of any information, document, or evidence by a person with the Authority's consent; s 45(2) provides that the consent must not be unreasonably withheld. Without limiting the circumstances in which it may be reasonable for the Authority to withhold consent, s 44(3) provides that it is reasonable for consent to be withheld if it considers that the publication or disclosure of any information, document or evidence would be likely to prejudice the maintenance of law; including the prevention, investigation and detection of contraventions of financial markets legislation.

[48] Sections 59 and 60 set out the confidentiality that applies to information and documents disclosed to, or obtained by the Authority under the Financial Markets Authority Act 2012 or any other financial markets legislation. There are also

provisions in the Corporations (Investigation and Management) Act 1989 which may or may not be relevant in this case.

[49] I make it clear that although the Authority did not object to the continuation of the confidentiality orders when the interim relief application came before me on 28 May 2012, I had given consideration to the issue myself.

[50] At the initial stage of an investigation, particularly when the Authority is endeavouring to avoid or minimise losses that investors may suffer, it will often be necessary for confidentiality to exist in order to provide a better atmosphere in which to achieve that goal. That course may avoid panic in the markets, when panic is unnecessary. It remains open for other actions to be taken later against any person alleged to have breached requirements of relevant financial markets legislation.

[51] As time progresses, the need for transparency becomes greater. In my view, the Authority has exercised good judgment in balancing those two competing interests in this case. The responsible way in which it has dealt with the issues raised should engender confidence in the markets that it is fulfilling its statutory functions and protecting the interests of investors.

Orders

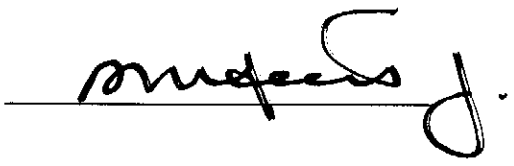
[52] For those reasons, the confidentiality order made by Ellis J on 24 May 2012 is discharged. The order I made on 14 June 2012, that the Court file not be searched, copied or inspected without leave of a Judge of this Court, remains intact. This judgment may be publicised in its entirety.

Costs

[53] Questions of costs are reserved.

Stay

[54] Mr Heron has advised that Perpetual intends to appeal against this decision. I stay publication of this judgment and the orders I have made until 4pm tomorrow. Unless the Court of Appeal extends the stay before that time, the orders will come into force then.



P R Heath J