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Mr Russell Ness
The Wilson Home Trust
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Dear Sir

Power of WDHB as trustee of the Wilson Home Trust

1. We have been asked to review the trust deed and advise on the power that the WDHB has, as the sole trustee of the Wilson Home Trust (the Trust). In particular, we have reviewed the powers the trustee has in relation to its:
 - a. control over the assets of the Trust;
 - b. ability to change the Deed of Trust;
 - c. powers of appointment;
 - d. ability to change the purposes of the Trust; and
 - e. ability to change the objects (beneficiaries) of the Trust.
2. We have reviewed the following documents:
 - a. Deed of Variation of the Trust dated 30 July 1999;
 - b. Order of the High Court modifying the trust dated 21 December 1999;
 - c. Trustee Act 1956; and
 - d. Charitable Trusts Act 1957.

Deed of Trust

3. The original Deed of Trust was between Mr William Robert Wilson, Ernest Hyam Davis and the Auckland Hospital Board dated 20 July 1937. The Trust was set up as a charitable trust under which:
 - a. Mr Wilson set aside his home and grounds in Lake Road and St Leonards Road, Takapuna as a home for crippled children (the Wilson Home for Crippled Children); and
 - b. An endowment fund was established for running the home and the maintenance and upkeep of the grounds.

High Court Variation

4. In 1999 the Deed of Trust was varied by the High Court. This variation now records and defines the entire provisions of the Trust; as such it is now the Trust Deed.
5. The application to the High Court included a variation of the definition of a beneficiary of the Trust.

The Trustee

6. The Trust Deed appoints Waitemata Health Limited (now Waitemata District Health Board by Act of Parliament) (WDHB) as the sole trustee of the Trust.
7. WDHB is to remain the sole trustee while it is 'owned' by the New Zealand Government and continues to offer medical and hospital services from its location on the corner of Shakespeare and Taharoto Roads, North Shore. If WDHB ceases to comply with these requirements then the Deed states that in the absence of any statutory direction as to its continuing trusteeship then WDHB shall within 2 years nominate a body to replace it and to act as trustee. Such a body must have a major role or connection with the provision of health services on the North Shore.
8. Therefore the Deed contemplates that WDHB will continue to be the sole trustee and if it ceases then another 'body' will act as sole trustee.

Power of Appointment

9. Trust Deeds often provide a clause which states how trustees are appointed and removed and who has the power to do so. However this Trust Deed is silent on this matter (other than that WDHB is to nominate a body to replace it as in paragraph 7 above).
10. When Trust Deeds do not provide for the appointment of trustees then the provisions of the Trustee Act 1956 (Trustee Act) apply. Section 43(1) of the Trustee Act provides for the appointment and discharge of trustees. Effectively the Trustee Act provides that where a trustee is unable to act as a trustee (because the trustee is dead, outside NZ, is incapable of acting etc) and the Deed does not nominate someone to appoint a replacement trustee, then the surviving or continuing trustees may appoint someone else to be a replacement trustee. However these provisions are more generally applicable to trustees who are individuals rather than corporate trustees.
11. But section 43(1)(g) of the Trustee Act provides that (paraphrased):

Where a trustee, being a corporation, has ceased to carry on business, is in liquidation, or is dissolved, then the surviving trustee or continuing trustees may appoint someone to be a trustee.
12. This section appears to apply only when a corporate trustee finds itself in the above circumstances and will not apply if a corporate trustee simply decides to relinquish its role as a trustee.

13. In view of the above it appears that WDHB is to be the sole trustee. If it ceases to be eligible to act as the trustee then another body is to take its place as the sole trustee. In these circumstances WDHB can nominate the replacement body who upon acceptance in accordance with the Trust Deed will become the (sole) replacement trustee. In the situation where the existing trustee cannot find a suitable body to replace it as trustee (i.e. one who meets the criteria in the Deed) then an application to the High Court will likely be required to appoint a replacement trustee.

Trustees powers in relation to land

14. When the Trust was settled it took ownership of real property being 3 lots of land on the North Shore as described in the plan marked B attached to the Trust Deed.

Lot 2

15. Main Homestead – Lot 2 fronts onto Lake Road and contains the main Wilson Home building (the homestead) and other buildings. The Trust Deed places restrictions on the trustee in relation to this Lot and dictates how it can deal with it.
16. The trustee has no power to sell Lot 2 but it may grant easements over it. The trustee is obliged to maintain the homestead and/or, where continuing repair becomes uneconomic, it must replace the building with a replacement one in like character. The trustee has the power to make this decision.
17. Other buildings - the trustee has a discretion to decide what to do with the other buildings on Lot 2. It can demolish them, rebuild them, sell them or deal with them as it wishes in its absolute discretion.
18. However, in dealing with the assets on Lot 2 the trustee must respect the wishes of the settlor and only use the Lot 2 for the purposes of the Trust and must maintain the grounds and homestead in the character and state and to the standard the settlor would have wished them to be kept in.

Lots 1 and 3

19. Lot 1 fronts onto Lake Road and Lot 3 fronts onto St Leonards Street. The trustee is free to subdivide, sell, lease, develop etc Lots 1 and 3. The trustee has no legal obligation to consult with the descendants of the settlor but may do so.

Gardens

20. The trustee is obligated to maintain the grounds and gardens and to hold \$20,400 as part of the endowment fund and apply the income for the maintenance and upkeep of the gardens and grounds. This is the minimum and the trustee may apply other assets toward maintaining the grounds and gardens as it sees fit.

Providing other services

21. In addition to the Lake Road site, the trustee may use the Trust assets to provide services (permitted by the Deed) from other locations within the qualifying area. The trustee may purchase, lease or acquire premises and facilities to do this and may utilise any of the Trust's assets in doing so. Therefore the trustee may set up a site elsewhere in the upper North Island to provide services and use the Trust's assets to do so.

Schedule C - Trustees authorised powers

22. Schedule C of the Trust Deed provides specific powers, authorities and discretions for the trustee.
23. Management of the Trust – WDHB is the sole trustee but the day to day management of the Trust is to be performed by a management committee (the Committee). This Committee is to have an odd number of members (3, 5 or 7) with the majority being appointed by the trustee and the minority appointed by New Zealand CCS (Auckland) Incorporated. It is envisaged that if the trustee is replaced then the incoming trustee will also form a management committee that complies with the Deed to perform the day to day management of the Trust.
24. The trustee and the management committee have an overriding duty to act and make decisions in the best interests of the Trust.
25. Standard of Care – in exercising its powers the trustee (and the Committee) must meet the standards of care provided in sections 13A to 13Q of the Trustee Act 1956.

Miscellaneous Power

26. Schedule C provides the trustee with a very broad discretion in dealing with the Trust's assets. Subject to the restrictions placed on Lot 2, the trustee may invest, subdivide, purchase, sell, lease any property (real or personal), incorporate companies, lease or deal with assets in its absolute discretion.
27. In effect the trustee has a very broad power to deal with any Trust asset. But in doing so it must exercise its power for the objects (i.e. those set out in clause 3 of the Trust Deed) and the benefit of the beneficiaries of the Trust and only act in what it concludes is in their best interests.

Power of Vary the Trust Deed

28. The Trust Deed does not make provision for varying the Trust Deed. Therefore if the trustee wants to vary the Deed it must do so by application to the High Court. This was done in 1999 in order to change the definition of a beneficiary (among other things).
29. The High Court has the power under section 53 of the Charitable Trusts Act 1957 to vary the 'scheme' of a charitable trust. When such an application is made the Court may decide what persons it will hear in support or opposition to the proposed change and has the jurisdiction and authority to hear all matters relating to the proposed change.
30. The Court may then approve the change as is, or it may make modifications to the proposed change as it sees fit.

Summary

31. The Trust Deed envisions that WDHB or some other corporate entity that provides health services on the North Shore will always be the trustee of The Wilson Home Trust. The day to day management of the Trust will be performed by a management committee.
32. Should the situation arise that the trustee needs to be replaced other than as specified in the Trust Deed (see paragraphs 12 and 13 above) then an application to the High Court will likely be required.
33. While the Trust Deed places restrictions and obligations on the trustee in relation to Lot 2, the trustee has very broad powers and discretion in relation to Lots 1 and 3 and the other Trust assets.
34. If the trustee wishes to vary the Trust Deed (the beneficiaries, the objects (purposes) of the Trust etc) then an application to the High Court will be required.
35. Despite the trustee's broad powers and discretion, it must at all times act in accordance with the Trust's objects (i.e. those set out in clause 3 of the Trusts Deed) and in the best interests of the beneficiaries otherwise it may be held to be acting outside its powers and such actions can be challenged in the High Court.

If you have any questions in regard to this letter please contact the writer.

Yours faithfully
Schnauer and Co Limited



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