

## Memorandum

13 March 2020

**To** Kevin Murphy  
General Manager  
Greytown Trust Lands

**From** Doran Wyatt/Graeme Smail

**Reference** 1908834-1

### **Investment of accumulated funds**

- 1 This memorandum responds to the request that you made in your email of 25 February 2020 for our opinion in relation to the following two questions:
  - whether or not, on interpreting the wording and intention of the Trust's act, the placing of accumulated funds in independently-managed funds is a legitimate and valid activity for the Trustees to engage in as part of a more diversified investment strategy?

and

  - whether or not the present placing of accumulated funds with the Wairarapa Building Society (*WBS*) which by current financial market definition is not a "bank", is consistent with the wording and intention of the Trust's act?

### **General conclusions**

- 2 In our view, for the reasons set out more fully below, the wording of the Greytown District Trust Lands Act 1979 (*Act*) is very clear in giving the Trustees (being the Trust Board constituted under the Act) the power to invest in independently-managed funds and/or the Wairarapa Building Society.
- 3 Generally, in exercising their powers, the Board of Trustees are required to invest "prudently".
- 4 Also, clearly the Act imposes primary duties on the Board to advance the purposes set out, in particular, in sections 13 and 14. Accordingly, any investment of accumulated funds should ultimately be part of the planning for the Board to advance those purposes.
- 5 However, on the basis that the accumulated funds in question are, presumably, being invested pending use in due course for advancing the purposes set out in the Act, it appears to us consistent with the Act for the Board to seek to have a diversified investment strategy and to take into account, in the case of WBS, the advantages to be achieved through earning a higher rate of interest than being able to be obtained from a clearing bank and keeping a line of credit open with the WBS.

### **Analysis**

- 6 Turning then to the specific wording in the Act that applies to the Board's investment powers, section 26 states that "all money representing income of the Trust Board from time to time remaining unapplied pending the application of it in accordance with the trusts and purposes of this Act" may be invested, amongst other things, "on any other form of investment for the time being authorised by law for the investment of trust funds".
- 7 Since 1988, the Trustee Act 1956 states, in section 13A, that "a trustee may invest any trust funds, whether at the time in a state of investment or not, in any property". There is, therefore, clear New Zealand law that authorises a trustee (such the Board) to invest in any property.
- 8 The Trustee Act continues to state, in section 13B, that, unless the trust deed or another governing instrument states otherwise, a trustee exercising a power of investment must "exercise the care, diligence, and skill that a prudent person of business would exercise in managing the affairs of others".
- 9 Therefore, the Board is also under a general statutory duty to act prudently when investing funds and the power to invest in any property remains subject to that overarching requirement of prudence.
- 10 There is no single test to be applied when determining "prudence". It is clear is that prudence is to be contrasted with recklessness but, subject to that, what is prudent will necessarily have to be considered having regard to the particular facts that the trustees in question face.
- 11 In addition, section 13E of the Trustee Act 1956 states that, while not limiting the matters that trustees can take into account, trustees exercising a power of investment can consider various things including such things as the desirability of diversification, the need to maintain the real value of the capital or income of the trust, the risk of loss and the likely income return.
- 12 For completeness, if any Trustee is themselves a professional trustee or professional investment adviser, or manager, that Trustee is, under section 13C of the Trustee Act 1956, subject to a higher standard. They must show the level of care, diligence and skill that a person in that profession would exhibit. That section may or may not be relevant.
- 13 The memorandum attached to your email indicated that the Board consider that putting funds into independently-managed funds would have the potential to deliver a higher rate of return and achieve diversification aimed at securing the Trust's long-term stability. It appears to us that taking those matters into account would be part of an approach to investment that should be regarded objectively as being prudent.
- 14 Similarly, in relation to the WBS, the potential advantage of achieving interest rates higher than those offered by clearing banks and the potential advantage of assisting with the objective of keeping a line of credit open also would appear to be factors that should be regarded positively from a viewpoint of considering whether the Board are acting prudently.

- 15 The Trustee Act 1956 is due to be replaced in 2021 by the Trusts Act 2019. However, the provisions relating to trustees' investment powers are not materially different.
- 16 We hope that these comments are helpful. We would be happy to elaborate on any points if you wished.



Graeme Smail  
Consultant