

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

CIV-2010-485-924

UNDER the Charities Act 2005

IN THE MATTER OF an appeal against a decision of the Charities
Commission concerning the New Zealand
Computer Society Inc

BETWEEN NEW ZEALAND COMPUTER SOCIETY
INC
Appellant

Hearing: 22 November 2010

Counsel: J K Scragg and A L Robinson for Appellant
D K Baltakmens for Charities Commission

Judgment: 28 February 2011

I direct the Registrar to endorse this judgment with a delivery time of 3.00pm on the 28th day of February 2011.

RESERVED JUDGMENT OF MACKENZIE J

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1. Introduction

[1] The appellant, New Zealand Computer Society Inc (the Society), appeals against a decision of the Charities Commission (Commission) to remove the appellant from the register of charitable entities (the Register). The Commission found, following a review of the Society's status, that the Society did not qualify as a charitable entity under the Charities Act 2005, because it was not established and maintained for exclusively charitable purposes.

[2] The principal ground of the appeal is that any non-charitable purpose that the Society may have is merely ancillary to its main, charitable purpose.

[3] Also before the Court is an application by the Society for leave to adduce further evidence in support of the appeal.

2. Background

[4] The Society is a non-profit incorporated society, which works to advance computer-related education and professional development in New Zealand. It was registered as a charitable entity on 9 January 2009. The Society's objects are set out in cl 3 of its Constitution:

3 Objects

The Objects of the Society are to

- 3.1 develop the discipline of information technology in New Zealand.
- 3.2 foster the training, education and qualification of persons practising or intending to practise within the discipline in New Zealand.
- 3.3 promote proper conduct within its membership and to set ethical standards for the discipline.
- 3.4 grant qualifications and classes of membership to members in recognition of their proficiency within the discipline.
- 3.5 develop or provide lectures, meetings, conferences and publications and to promote research within the discipline of information technology.
- 3.6 take a public position on matters of concern to the Society and make submissions or advise government as appropriate.
- 3.7 promote any other related activities that are in the interests of the Society.

[5] On 6 July 2009, the Society received a notice from the Commission advising that the Commission intended to remove the Society from the Register. The Commission said that it believed that the Society did not have exclusively charitable purposes. In particular, the Commission was of the view that the Society's objects provided non-ancillary benefits to its members. The Society notified the Commission that it intended to object to the removal. On 1 August 2009, it sent a response to the Commission outlining its charitable activities and addressing the Commission's concerns. It provided a non-exhaustive list of its educational activities and offered to provide further submissions in support of its charitable status should the Commission still have concerns.

[6] On 31 August 2009, the Commission again notified the Society of its intention to remove it from the Register and requested that any objections to the removal be submitted by 30 September 2009. The Society responded on 20 September and provided further details concerning its charitable activities. It also requested a meeting with the Commission if the letter was not considered sufficient to address the Commission's concerns, and asked to be given a further opportunity to address any outstanding matters before a final decision was made.

[7] The Commission met with the Society's Chief Executive and legal adviser on 3 November 2009. Although the Commission had previously taken the position that discussions at the meeting would have to be limited to the removal process, the Society's charitable status was in fact addressed informally. It was agreed that the Society would provide further written submissions, which it did on 27 November 2009.

[8] On 14 December 2009, the Commission informed the Society that the issue of its registration would be put to the Board during its meeting in the second week of February 2010. On 19 February 2010, the Society provided further submissions. These submissions were provided to the Board prior to its meeting on 18-19 March 2010, at which it adopted the Committee's recommendations. The Commission sent the Society notice of its decision to proceed with the Society's removal from the Register by letter dated 18 March 2010. However, it appears that the Society did not receive the letter. The Society finally became aware that it had been removed from the Register on 25 April 2010. It subsequently filed an application for leave to appeal out of time, which was not opposed, in order to bring this appeal against the Commission's decision.

3. The Law

[9] In order to be registered as a charity under s 13(1)(b) of the Charities Act, a society must satisfy the following three conditions: the purpose of the organisation must have a charitable character; the organisation must exist for the benefit of the public; and it must be exclusively charitable. Section 13(1)(b) provides as follows:

13 Essential requirements

(1) An entity qualifies for registration as a charitable entity if,—

...

(b) in the case of a society or an institution, the society or institution—

(i) is established and maintained exclusively for charitable purposes; and

- (ii) is not carried on for the private pecuniary profit of any individual; ...

[10] Section 5 defines “charitable purpose” in the following terms:

5 Meaning of charitable purpose and effect of ancillary non-charitable purpose

- (1) In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

...

- (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

[11] The definition in subs (1) follows the established common law classification of charitable purposes.¹ The four heads of charity are relief of poverty, advancement of education or religion, and any other purposes beneficial to the community.

[12] In the present case, only the second and the fourth heads of charity are relevant. Advancement of education is the primary purpose relied on by the Society. Courts have generally taken a broad approach in determining what qualifies as an educational purpose, with the effect that any meaningful connection with the provision of education is likely to be sufficient.² The “other purposes” ground must be defined in accordance with the “spirit and intendment” of the Statute of Elizabeth

¹ *Re Education NZ Trust* HC Wellington CIV-2009-485-2301, 29 June 2010 at [13].

² At [16], [22].

and existing case law.³ The preamble to the Statute provides the following list of charitable uses:

The relief of the aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids; the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid and ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

[13] As well as being required to have a charitable purpose, the entity must be carrying out its purposes for the benefit of the public. For the first three heads of charity, public benefit is assumed to arise unless the contrary is shown.⁴ This does not mean, however, that existence of public benefit is a foregone conclusion. Rather, “the question whether a gift is or may be operative for the public benefit is a question to be answered by the Court by forming an opinion upon the evidence before it”.⁵ Where the claimed purpose is “any other matter beneficial to the community”, public benefit must be expressly shown.⁶

[14] Two questions are asked to determine whether there is a public benefit:⁷ First, do the purposes confer a benefit on the public or a section of the public? And second, does the class of persons eligible to benefit constitute the public or a sufficient section of it? Accordingly, in order for a society for the advancement of education to be charitable, the education intended to be provided must be beneficial, that is, of educational value, to the community, and the benefits must be available to the public or to a sufficiently important section of the community.⁸

[15] The third requirement, that the society is established and maintained “exclusively” for charitable purposes, does not mean that the entity cannot also have some objects that are not charitable. Section 5(3) makes it clear that the presence of

³ Statute of Charitable Uses (43 Eliz I c 4); see *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at [20].

⁴ *In Re Education NZ Trust* at [24].

⁵ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 at 695, citing Russell J in *Re Hummeltenberg* [1923] 1 Ch 237 at 242.

⁶ *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 at [45].

⁷ *Travis Trust v Charities Commission* at [54]-[55].

⁸ Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at [2-019].

a non-charitable purpose that is merely ancillary to a charitable purpose does not prevent the society from qualifying for registration as a charitable entity. As stated in subs (4), a non-charitable purpose is ancillary to a charitable purpose if the non-charitable purpose is “ancillary, secondary, subordinate, or incidental to a charitable purpose” and “not an independent purpose”.

[16] Simon France J in *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* considered that the question of whether a purpose was ancillary required both a quantitative and qualitative assessment.⁹ As noted by Dobson J in *Re Education NZ Trust*, the assessment is a “situation-specific analysis of the relative relationship between public and private benefits.”¹⁰

[17] When considering an application for registration, the Commission must have regard to the activities of the organisation at the time the application was made; the proposed activities of the organisation; and any other information that it considers relevant.¹¹ The Commission may remove an entity from the Register if the entity is not, or is no longer, qualified for registration as a charitable entity.¹² In making a decision whether to remove an entity from the Register, the Commission must observe the rules of natural justice, which include giving the entity a reasonable opportunity to make submissions on the matter.¹³

[18] The appeal is brought under s 59(1) of the Act and proceeds by way of rehearing.¹⁴ The Commission has in this case adopted an active role on the appeal, in support of its decision. Because there would otherwise have been no argument against the Society’s submission, this has been entirely proper, and very helpful.

⁹ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* HC Wellington CIV-2009-485-2633, 23 September 2010 at [49]-[52].

¹⁰ At [44].

¹¹ Section 18.

¹² Section 32(1)(a).

¹³ Section 36.

¹⁴ Section 61.

4. The Commission's Decision

[19] The Commission noted that the key issue for consideration was whether the Society was established and maintained exclusively for charitable purposes, as required by s 13(1)(b)(i). In determining that issue, it needed to consider whether all of the Society's purposes fell within the definition of charitable purpose and, if there were any non-charitable purposes, whether these were ancillary to a charitable purpose.

[20] The Commission considered that the objects contained in cls 3.1, 3.2 and 3.5 could be considered, at least in part, as advancing education. However, it did not accept that this was the case of cls 3.3, 3.4, 3.6 and 3.7, and also considered that cl 3.2 and 3.5 might allow activities of benefit to the members of the Society, the IT profession and the IT industry. It found that, read as a whole, these purposes were directed towards the promotion and protection of the Society, the IT profession and the IT industry, through the development of professional standards, educational standards, professional development and networking. The Commission did not accept that cls 3.3, 3.4, 3.6 and 3.7 could qualify as "any other matter beneficial to the community", as they did not indicate an intention to provide a benefit to the community.

[21] The Commission then turned to the Society's activities. It described the range of educational activities undertaken by the Society, and concluded that the Society's educational events programme, its mentoring activities and its accreditation programme provided benefits to members, the profession and the industry. The Commission accordingly considered that these activities were not charitable.

[22] Balancing the Society's charitable and non-charitable purposes and activities, the Commission found that the non-charitable purposes were separate and independent purposes which could not be considered ancillary to any charitable purposes of the Society.

5. Application for Leave to Adduce Further Evidence

(a) *The Principles to be Applied*

[23] The appellant seeks leave to adduce further evidence in support of the appeal. The evidence that the Society seeks to file on appeal falls into two categories. The first is evidence that could have been obtained prior to the Commission making its decision, and the second is evidence that the Society says has arisen subsequent to the Commission's decision.

[24] Rule 20.16 of the High Court Rules sets out the requirements for further evidence to be adduced on appeal. It provides that the Court may grant leave only if there are special reasons for hearing the evidence. An example of such a special reason is if the evidence relates to (potentially) relevant matters that have arisen after the date of the decision appealed against.

[25] In *Canterbury Development Corporation v Charities Commission*, Ronald Young J discussed the filing of further evidence in the context of appeals from the Commission:

[105] This is an appeal from a decision of the Commission. As such the relevant factual material before the Commission, when it made its decision, would typically be brought before this Court by an agreed bundle of documents. If either party wished to provide further factual material to the Court then this would ordinarily be by way of an application for leave to bring the evidence with the necessary justification (r 20.16(2)–(3) of the High Court Rules).

[106] It is clear from the material in the affidavits filed by the appellant that significant relevant factual material, which was provided to this Court, was not provided to the Commission. Although in this case with the agreement of the respondent I accepted this material, this approach should not become habitual in appeals pursuant to s 59.

[107] The applicant for registration as a charity must ensure all relevant factual material is placed before the Commission prior to the Commission making its determination. On an appeal this material should form part of the bundle of documents provided to the High Court. Then leave would be required for any further evidence to be available for the appeal. The ordinary rules governing such evidence on appeals would then apply.

[26] In *Re Education New Zealand Trust*, Dobson J confirmed that r 20.16 is applicable to appeals from the Commission, in response to a submission from the appellant that a general exemption from the rule's requirements was warranted. The appellant was concerned at the limited evidential procedures prescribed by the Act. In particular, the appellant noted as relevant factors that the Commission is not required to convene hearings; that it is not bound by the rules of evidence; and that modestly resourced and small charities may not appreciate the consequences of not putting all possible material to the Commission. Dobson J considered that these "sort of circumstances" could always be considered on an application for leave to adduce additional evidence.¹⁵

(b) *The Parties' Submissions*

[27] Referring to *Re Education New Zealand Trust*, the Society submits that it is relevant that it did not have a formal opportunity to present submissions and evidence to the Commission, as no formal hearing was convened. It also expresses concern that the Commission was not bound by the rules of evidence and that it may have placed undue weight on some of the evidence.

[28] In respect of the first category of evidence noted above, the application is brought on the basis that the Commission did not provide the appellant with a final deadline for submitting information, and that the Commission failed to take up the Society's offers to produce further evidence. The Society argues that the evidence is cogent evidence in support of its charitable status. It consists of a letter from the Society's accountant in relation to the Society's financial accounts and four testimonials relating to educational activities undertaken by the Society. The Society submits that it believed that the Commission would have requested this information if it was not convinced of the Society's charitable status, and says that it simply did not appreciate the consequences of not submitting the evidence.

[29] The Commission submits that there are no special reasons that justify the admission of further evidence. It says that it notified the Society on two separate

¹⁵ At [63].

occasions of its intention to remove the Society from the Register and of the date by which any objection to removal was to be received; that it acted in accordance with the procedure set out in ss 31 to 36 of the Act, which does not require it to convene a hearing; that the Society had a reasonable opportunity to make submissions prior to the Commission's final decision; and that it was the Society's responsibility to ensure that all relevant factual material was placed before the Commission prior to the Commission making its determination.

[30] The Commission also argues that the proposed evidence does not meet the test of being cogent, likely to be material, and unable to have been produced at an earlier stage. It submits that the letters seek to improve or revise material that had been put before the Commission in submissions, and that they are not relevant to the grounds on which the Commission found that the Society was not exclusively charitable.

[31] The second category of evidence relates to an amended version of the Society's Constitution. The Society submits that it has amended its objects to clarify its educational focus. It says that the amendments were already in progress prior to the date of removal, but that they were only formally updated after it was removed from the Register. It submits that the updated Constitution is cogent evidence of the Society's purposes. The Commission, on the other hand, submits that the proper course would be to make a new application to the Commission for registration, given that the amendments were made after its decision to deregister the Society and thus cannot be relevant.

(c) *Decision*

[32] I do not accept the Society's submission that it should be granted leave because it was not provided with a final deadline. It provided submissions on four different occasions. The third submission followed its meeting with the Commission on 3 November. After it had received the submissions, the Commission informed the Society that it would review the material and notify the Society of the result. The Commission also advised the Society that the matter would be put to the Board in the second week of February. It must have been apparent that the Commission was

going to proceed with its decision-making process and that the opportunity to make submissions was not open-ended.

[33] As to the Commission's failure to take up the Society's offer to provide further evidence, I accept the Commission's submission that it was the Society's responsibility to place all relevant material before the Commission to enable it to make a decision. It must have been clear to the Society throughout its correspondence with the Commission that the Commission was not satisfied that the Society was a charitable entity, and that it was necessary to provide all relevant information.

[34] In respect of the second category of evidence, it seems that the amendments to the Constitution may have had the effect of giving more emphasis to the public benefit of the Society's purposes. I do not consider that those amendments, which were effected after the Commission had made its decision, should now be considered on appeal. For the reasons I later give, this is more properly the subject of a new application for registration.

[35] For these reasons, the Society's application to adduce further evidence is declined.

5. The Substantive Appeal

(a) Summary of the Parties' Submissions

[36] The appellant submits that the Commission erred in finding that certain of its purposes are non-charitable. It argues that its objects as a whole are aimed at the advancement of education or, alternatively, that they are aimed at the advancement of education and "other matters beneficial to the community". In respect of this latter head of charity, it relies on its role in "keeping New Zealand up to date with technological advances" and ensuring that "[IT professionals] conduct themselves ethically". It submits that the primary purpose of membership is to encourage IT professionals to further their own education and conduct themselves ethically in

order to provide protection to the public. This, in turn, is said to ensure that services are provided professionally, leading to “significant public benefit”.

[37] Alternatively, the Society submits that any non-charitable purpose that it may have is merely ancillary and incidental to its main purpose of advancing education. It submits that the benefits of membership are an “unsought consequence” of advancing the education of the New Zealand public, and that membership is designed to generate funding for charitable purposes.

[38] The Commission submits that the Society’s objects contain a mix of charitable and non-charitable purposes, and that this is confirmed by a consideration of the Society’s functions and activities. While some purposes are advancement of education for the benefit of the public, other purposes primarily or exclusively confer benefits on members of the Society and the profession, and therefore are not charitable. The Commission’s position is that these non-charitable professional society purposes are not ancillary to the charitable education purposes, with the effect that the Society is not exclusively charitable.

(b) Professional Societies

[39] There are a number of cases considering the charitable status of professional societies or organisations. These establish a general proposition that societies that are formed for the purpose of benefiting their own members are not charitable, unless they also hold purposes benefiting the public and the private benefits are merely incidental to those purposes.

[40] In *Re Mason*, the Court held that the objects of the Law Society, which included promoting proper conduct amongst the legal profession and providing for the diffusion of legal knowledge, were not charitable although they were likely to lead to the ultimate benefit of the public.¹⁶ The Court stated that:¹⁷

... there is an established line of authority which draws a distinction between two kinds of institutions – the one which regulates a profession for the

¹⁶ *Re Mason* [1971] NZLR 714 at 725.

¹⁷ At 723.

advantage of those practising it and the other whose interests include the advancing of some branch of science in a wide sense. The first class of institution has been held to be not charitable; the second class has been held to be charitable.

[41] In *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, the Court in its review of the authorities noted that a society will not be charitable if it is founded for the advantage and in the interests of those practising in a particular profession.¹⁸ This extends to continuing education for the advancement of a particular profession, and activities intended to increase the status of a particular profession and the esteem in which it is held.¹⁹ In *Commissioner of Inland Revenue v Medical Council of New Zealand*, the Court noted that this was so “even though effectuation of the main object has as a consequence the benefiting of the community”.²⁰

[42] In *IPENZ v CIR* Tipping J drew a distinction between, “learned society” functions and professional or “protective society” functions.²¹ The latter are intended to confer private benefits on members of the society, and thus are not charitable, while the former are aimed at developing or advancing the body of learning that is central to the organisation’s profession, making them charitable. In that case the learned society functions included advancement of the science of engineering, facilitating and disseminating publications, making awards, facilitating the activities of technical groups, and arranging conferences. Professional society functions included promotion of professional proficiency, accrediting and training of professional engineers, maintaining the image of the profession, and providing welfare functions for members. In the end, the question was whether the non-charitable purposes were “significant in themselves or simply inevitable and unsought consequences of the pursuit of the principal public and charitable object”.²² Tipping J concluded that the “private benefits [could not] be disregarded as incidental”.

¹⁸ *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 at 578; see also *Re Mason* [1971] NZLR 714 at 722.

¹⁹ At 580, citing *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663.

²⁰ *Commissioner of Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 at 313.

²¹ *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*.

²² At 583.

[43] In *Commissioner of Inland Revenue v Medical Council of New Zealand*, the Court of Appeal decided that, although the Medical Council's main purpose was the registration of medical practitioners, this purpose was charitable because it provided protection of the public in the delivery of medical services. There was a clear and obvious public interest in ensuring high standards in the practice of medicine, and any benefit to medical practitioners was merely incidental.

[44] The Society also refers to *Royal College of Nursing v St Marylebone Corporation*, where the English Court of Appeal found that the promotion of nursing as a profession was directed to advancing nursing for the benefit of the sick, and that this was a charitable purpose even though the members of the profession might benefit.²³ Similarly, in *Inland Revenue Commissioners v Yorkshire Agricultural Society*, the Court held that an agricultural society, whose purpose it was to promote agriculture, carried on a charitable purpose because agriculture was an industry vital to the welfare of the community.²⁴ The mere fact that the members benefited in the course of promoting the charitable purpose was immaterial, because the benefits were only given to them with a view of obtaining contributions, giving encouragement and carrying out the main purpose.

[45] Another case that is referred to by the Society is *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, where the Court determined that the Council's object of promoting the development of industry, commerce and enterprise was not charitable because it resulted in private benefit.²⁵ The Court stated that, in order to be charitable, an object had to promote a purpose beneficial to the community, but that an object could still be charitable as beneficial to the community although its fulfilment incidentally benefited the interests of individual members of the community.

[46] I consider that these cases provide helpful examples of the overall principle that in order to be considered charitable, an entity must be carrying out its charitable purposes for the benefit of the public as opposed to individuals; and the presence of

²³ *Royal College of Nursing v St Marylebone Corporation* [1959] 3 All ER 663 (CA).

²⁴ *Inland Revenue Commissioners v Yorkshire Agricultural Society* [1928] 1 KB 611.

²⁵ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* [1996] STC 1218.

a non-charitable purpose that is merely ancillary to a charitable purpose does not prevent an organisation from qualifying for registration as a charitable entity.

[47] Hence, if the main purpose of a professional organisation is charitable, the fact that the organisation also carries out objects that incidentally benefit its members should not affect its charitable status.

(c) *Discussion*

[48] There is no dispute that the Society's purposes include the advancement of education, and that it carries out activities that are designed to achieve that purpose. The real issues are the extent to which the Society adopts and engages in non-charitable purposes, and whether the Society's purposes are exclusively charitable.

(i) *The Society's Objects*

[49] The Commission considers that, out of the seven objects listed in the Society's Constitution, objects 3.1, 3.2 and 3.5 can be regarded, at least in part, as being for the advancement of education, but that cls 3.2 and 3.5 would also allow for private benefits. These purposes are:

- developing the discipline of information technology in New Zealand (3.1);
- fostering the training, education and qualification of persons practising or intending to practise within the discipline in New Zealand (3.2); and
- developing or providing lectures, meetings, conferences and publications and promoting research within the discipline of information technology (3.5).

[50] The Society submits that the term "discipline" in cls 3.2 and 3.5 refers to the subject area itself, and that these objects are not limited to members of the society or the profession. The Commission, on the other hand, argues that cl 3.2 in particular includes a substantial non-charitable purpose, as it is aimed at "education in a particular aptitude ... primarily designed for the acquisition of some professional

advantage”.²⁶ Referring to *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, the Commission argues that advancement of professional proficiency is not a charitable purpose, and that any public benefit that flows from having an educated professional workforce is too remote to qualify as charitable.

[51] The Commission further considers that objects 3.3, 3.4, 3.6 and 3.7 do not amount to the advancement of education or the provision of any other matter beneficial to the community. These objects are:

- promoting proper conduct within its membership and setting ethical standards for the discipline (3.3);
- granting qualifications and classes of membership to members in recognition of their proficiency within the discipline (3.4);
- taking a public position on matters of concern to the Society and making submissions or advising government as appropriate (3.6); and
- promoting any other related activities that are in the interests of the Society (3.7).

[52] The Society submits that objects 3.3 and 3.4 are matters in the public interest because it is beneficial to the public to be served by IT professionals who adhere to high standards of conduct and ethics. The Commission, however, is of the view that these objects are intended to benefit members of the Society and the profession, and that they are not charitable although they might ultimately be of benefit to the public.

[53] As to objects 3.6 and 3.7, the Society contends that it is in the public interest that it acts as a spokesperson about IT issues. It says that its “advocacy” role is “quite peripheral” and not expressed to be on behalf of members only. The Commission, on the other hand, takes the view that these objects allow the Society to advocate for and promote non-charitable matters such as professional issues, and also submits that political purposes are generally considered to be non-charitable.²⁷

²⁶ *Chartered Insurance Institute v Corporation of London* [1957] 1 WLR 867 at 876.

²⁷ *Bowman v Secular Society* [1917] AC 406 (HL) at 442; *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA); *McGovern v Attorney-General* [1982] 1 Ch 321 at 340.

[54] On my assessment, the Society's objects clearly disclose both "learned society" functions and "professional society" functions. I therefore do not accept the Society's submission that all of its purposes are entirely charitable. In particular, cls 3.3, 3.4 and 3.6 seem to be aimed primarily at advancing the profession. I accept the Society's submission that cl 3.2 seems to be aimed at educating IT professionals rather than members of the public, and would thus lead to limited public benefit. This dual purpose is reinforced by the Society's vision and mission statements, which, at the time that the Commission was considering the Society's charitable status, read as follows:

NZCS Vision Statement

NZCS delivers ever-increasing professional ICT capability for NZ Society and Industry.

NZCS Mission Statement

NZCS exists as the representative body that sets standards, practices and policies for ICT Professionals in NZ.

[55] The statements have since been amended.

[56] It is true, of course, that the public might derive some down-stream, or even direct, benefits from the Society's promotion of further education amongst professionals, its advocacy work, its accreditation system, or its promotion of proper and ethical conduct. However, I think that any such benefits are merely ancillary and cannot constitute independent charitable purposes. The present case is not directly comparable with *CIR v Medical Council*, as submitted by the Society. In that case, registration of medical professionals was held to be of *primary* benefit to the public, by ensuring high standards of practice. Here, the main benefit that is sought to be derived from objects 3.2, 3.3, 3.4 and 3.6 is clearly the advancement of IT professionals and their industry. It is undoubtedly the case that IT is important in modern life. However, I do not consider that its importance is such that the IT profession can be equated with the medical profession or the nursing profession so far as the public interest in the maintenance of high standards in the profession is concerned.

(ii) *The Society's Activities*

[57] The Society engages in a variety of educational and other activities. On its website, under the heading “A rundown of Activities”, the Society provides the following summary:

NZSC has a very extensive **events programme** in place in Auckland, Wellington, Christchurch, Dunedin and Hamilton, as well as events in other regional centres.

The Society also has an extensive **Advocacy** and **Representation** role for the New Zealand ICT Sector, and undertakes extensive **educational activities** both at secondary and tertiary level.

NZCS is also in the process of investigating and implementing several programmes, including internationally recognised **professional certification** in New Zealand, part of an international initiative in partnership with our kindred partners around the world, and tertiary **ICT degree and diploma accreditation** to ensure our degrees maintain the international reputation and recognition they deserve.

The Society also addresses Digital Literacy in New Zealand via the internationally recognised gold standard in computing skill assessment, the **International Computer Drivers Licence (ICDL)** and e-Citizen programme.

NZCS provides a nationwide **ICT Mentoring Programme** to assist in the growth and development of ICT professionals, as well as providing **Scholarships** for those studying towards ICT degrees in New Zealand. (*Note the Mentoring and Scholarship Programmes are currently on hold*).

Each year the NZCS also operates the annual **NZCS Programming Contest** for Secondary and Tertiary Students, as well as ICT Professionals.

NZCS's subsidiary Software Escrow (NZ) Ltd also provides a **Software Escrow Service**, protecting vendors and clients during the provision of software products and services.

[58] The Commission's overall submission is that there is a range of private benefits offered to members of the Society, including professional accreditation and recognition, competitive and marketing advantages, continuing professional education, and networking and mentoring opportunities. The Society, on the other hand, contends that the only tangible benefits provided to members are discounts on events and seminars. It argues that its case is analogous to *Inland Revenue Commissioners v Yorkshire Agricultural Society*, to the extent that the benefits that it

offers to IT professionals through membership are merely a tool for obtaining funding that is then applied to its main charitable purposes.

[59] Accordingly, the Society submits that the majority of its events are focused on educating New Zealanders rather than professionals. The following is a non-exhaustive list of educational activities that the Society says are aimed at benefiting the public:

- Educational Audio Podcasts, which provide general and technical information;
- Involvement in the redesign of the IT curriculum and educational achievement standards used in schools;
- Promotion of tertiary education to improve the intake of students into tertiary education in New Zealand;
- ICT-Connect Engagement Programme, which promotes the value of education and career advancement in schools;
- Digital literacy Programme, which is designed to advance the public's core computing skills;
- Student internship programme, which is designed to provide tertiary students with practical experience while studying;
- Mentoring programme to benefit those wishing to further their career and education through support from IT professionals;
- Programme of IT-related educational presentations throughout New Zealand;
- Provision of grants for educational activities to third party organisations to further the advancement of education in New Zealand; and
- The KiwiSkills Programme, a campaign designed to raise awareness of the benefits of digital based education.

[60] I consider that some of these activities are primarily aimed at providing education for the benefit of the public. In particular, the Commission does not dispute that the digital literacy programme, the KiwiSkills programme, the scholarships programme and the programme to develop an IT curriculum would fall within that category. However, other activities are less clearly exclusively charitable. The Society's "educational events programme", for example, seems to have a strong professional, as opposed to a public benefit, focus. The Society

submits that its educational events programme is charitable because it is available to and attended by the public. However, the following is a description of the events taken from the Society's website:

We select topics, presenters and formats which are suitable from a professional development or educational perspective, but are also entertaining and allow for members to meet and network with other like-minded ICT Professionals in their area.

[61] Examples of such events include "WFIA Breakfast: Creating Market Demand", "Evening with Industry", "Legal Aspects of Cloud Computing", "Richard Stallman on Software Patents", "Benefits Management using Strategic Journey Mapping" or "ICT Top100 Lunch: a Review of the Code of Professional Conduct". Many of these events appear to be designed for professionals rather than the public. Similarly, the Society's mentoring activities for the ICT sector might be considered to be directed more at advancing businesses or the profession, given that their express purpose is to "assist in the growth and development of ICT professionals".

[62] The Commission also submits that the material on the Society's website shows that the Society views and promotes its advocacy role as being significant. The website contains the following statements:

One of the key roles of NZCS is to advocate on behalf of the computing and ICT profession, as well as the ICT sector overall. NZCS takes this role extremely seriously, and the NZCS Executive works tirelessly to ensure the sector, politicians, government and the public at large are aware of the issues that effect (sic) our profession.

...

One of the fundamental purposes of the NZSC is to represent our members, the ICT profession, and by extension, the entire ICT community.

[63] I accept the Commission's assessment that the website portrays advocacy as one of the key functions of the Society.

[64] The Society submits that the Commission has placed too much weight on the material available on its website to support the view that benefits to members, the profession and industry are its main purposes. It argues that one of the objects of the website is to solicit membership, as a means of fundraising, and that this should not

detract from the educational nature of its activities. However, as argued by the Commission, it would seem difficult in the overall circumstances of this case to simply put aside the Society's promotional material and not to treat it as a solid indication of the dual nature of its activities.²⁸

(iii) *Funding*

[65] In terms of allocation of funding, the Society submits that most of its resources are applied to educational activities. It says that any surplus funds are used to fund educational activities, and that the financial statements do not fully disclose the extent of these activities. In particular, the Society says that it granted a substantial number of scholarships during 2007 that did not appear in the financial statements, that most of the Chief Executive's time is spent promoting education and establishing education-based projects, and that it employs one full-time person to promote digital literacy and to run a programme aimed at promoting core computing skills of New Zealanders.

[66] I do not find the financial evidence persuasive on the question of the main focus of the Society's activities. The Society's argument, put at its highest, is that the majority of its resources are applied to educational activities, which might well include educational activities aimed primarily at the profession. In *Re Education NZ Trust*, Dobson J found that a 30 per cent constituency of for-profit institutions could not realistically be characterised as ancillary, secondary, subordinate or incidental.²⁹ I would similarly conclude that, even if the majority of funding was allocated to charitable purposes, this would not necessarily render all non-charitable purposes ancillary.

²⁸ Cf Tipping J's comment in *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* at 575 that "[i]t is difficult to resist the implication from this description, in its own publication, of the aims and objects of IPENZ that this is what it is actually doing or at least endeavouring to do."

²⁹ At [43].

(iv) *Does the Society Have Non-charitable Purposes that are more than Ancillary?*

[67] The Society submits that a notable difference between its own case and other cases about professional bodies is that the Society is focused on growing IT education for the New Zealand public, while the professional bodies in other cases tended to operate with a high degree of regulatory autonomy and were focussed on providing services predominantly or exclusively for members rather than the public. The Society claims that it would continue to provide the majority of its services to the public with or without a membership base, subject to sourcing adequate funding elsewhere. The Society's position is that any benefit to its members is ancillary to its charitable purpose to advance IT education, or to provide any other matter beneficial to the community.

[68] This issue requires a "situation-specific" assessment that is both quantitative and qualitative. Having regard to the Society's objects, its activities and the material on its website, I consider that the Society's non-charitable purposes that are aimed at benefiting the profession, or members of that profession, are purposes that are not ancillary to the purpose of advancing information technology as a discipline. In other words, the professional society functions constitute an independent purpose of the Society, and are not ancillary to the learned society functions.

(d) *Section 61B of the Charitable Trusts Act 1957*

[69] The Society suggests that the Court could "blue-pencil" out aspects of its objects that are non-charitable, contending that this would show that its main purpose is the advancement of education. It relies on s 61B of the Charitable Trusts Act 1957. That section allows the Court to "blue-pencil" out non-charitable parts of a trust's purposes in the following terms:

61B Inclusion of non-charitable and invalid purposes not to invalidate a trust

- (1) In this section the term imperfect trust provision means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be

included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.

- (2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.
- (3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if—
 - (a) The trust property could be used exclusively for charitable purposes; and
 - (b) No holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.
- (4) This section shall apply to every trust under which property is to be held or applied in accordance with an imperfect trust provision, whether the trust is declared before or after the commencement of this section:

...

[70] The Society submits that the section is available to it although it is not a trust. It refers to *Canterbury Development Corporation v Charities Commission*, where Ronald Young J considered that the section was not limited to a “trust” and that “Parliament used ‘trust’ in a general sense of being a charitable entity”.³⁰ He considered that any other interpretation would be irrational, and that the section was therefore equally applicable to societies or institutions.

[71] The Commission, however, submits that s 61B cannot apply to societies and is limited to trusts. It suggests that Ronald Young J may have been under the impression that s 61B was a section of the Charities Act 2005, which is expressed to cover the full spectrum of charitable entities. A reading of his judgment suggests that might be so. It is clear that s 61B is directed to a particular feature of the law of trusts, and has no application to charitable entities which are not trusts. The

³⁰ *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 at [96]-[97].

appropriate mechanism, for an incorporated society, is an amendment to its objects. That is what the Society has done. The issue here is whether the new objects should be considered on this appeal, or on a new application for registration.

[72] I consider that the latter course is the correct one. In *Canterbury Development Corporation v Charities Commission*, Ronald Young J noted that amendment of the appellants' deeds or constitutions pursuant to s 61B of the Charitable Trusts Act 1957:³¹

... would skew the legislative process for approval of charitable entities. The legislation provides that the first body to consider the question is the Commission with the right of appeal de novo to the High Court. This Court would be very reluctant to give away the expertise of the Commission as the first adjudicative body. This would be required if the appellant's suggestion was accepted given it would be for this Court to approve or reject the "new" amended deeds or constitutions.

[73] I consider that those comments apply, with equal force, to an amendment to the objects.

(e) *Is It in the Public Interest to Remove the Appellant from the Register?*

[74] Section 35(1) provides that, if an objection to removal has been lodged, the Commission must not proceed with the removal unless it is satisfied that it is in the public interest to proceed with the removal and one or more grounds of removal have been satisfied. The Commission found that public trust and confidence in registered charitable entities would be diminished if the Society was registered because it did not meet the essential requirements for registration.

[75] The Society submits that its activities confer a benefit on a sufficient section of the public and that it is therefore not in the public interest to remove it from the Register. It argues that the Society has not provided any reasons as to why it is in the public interest to remove it from the Register. It further submits that the Commission's approach to registration fails to promote certainty and is therefore contrary to public interest, noting that the Society's activities have not changed since it was initially registered in January 2009.

³¹ At [19].

[76] These submissions do not add anything of substance to the arguments that the Society has already advanced in support of its contentions. They are in essence a reassertion that the Commission was wrong to conclude that the Society's purposes were not exclusively charitable. I do not consider that any sufficient basis for disturbing the Commission's finding on this issue has been made out.

(f) *Did the Commission Fail to Observe the Principles of Natural Justice?*

[77] The Society submits that the Commission failed to observe the principles of natural justice in breach of s 36 of the Act. Firstly, the Society claims that the Commission failed to provide it with a reasonable opportunity to make submissions. It complains that the Commission did not respond to its further submissions dated 19 February 2010, and that it did not convene a hearing to formally receive oral submissions and evidence (according to the Society, the meeting held on 3 November 2009 was convened expressly on the basis that it was not a hearing as to the merits of the case for registration).

[78] The Commission disputes that the Society did not have a reasonable opportunity to make submissions, referring to the Court's observation in *Douglas v Commissioner of Inland Revenue* that "reasonable opportunity" does not mean limitless or open-ended.³² The Commission says that the Society made submissions to it on four separate occasions and that these were all considered and addressed in its final decision. It also notes that the procedural provisions in the Act do not require the Commission to convene a hearing.

[79] Secondly, the Society submits that the Commission made its decision on the basis of insufficient evidence. It says that the Commission failed to request additional evidence which had been offered to it and which now forms the basis of the application to file further evidence, and that it did not take up invitations to attend the Society's educational events or to contact individuals who could confirm the educational nature of the Society's activities. The Commission responds to that

³² *Douglas v Commissioner of Inland Revenue* (2009) 19 NZTC 15,971 at 15,978.

submission by stating that further information relating to the Society's educational activities would not have affected its decision.

[80] The Society's submissions under this "natural justice" ground are substantially similar to the arguments raised in its application to file further evidence and therefore do not warrant detailed consideration. In my view, the Commission clearly did provide the Society with a reasonable opportunity to make submissions, and could not be said to have made its decision on the basis of insufficient evidence. It seems unlikely to me that any of the evidence that the Society now claims should have formed part of the Commission's decision would have caused the Commission (or this Court) to take a different view of the Society's charitable status.

6. Result

[81] For these reasons, the appeal is dismissed. The parties may submit memoranda on costs.

"A D MacKenzie J"

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Crown Law for Charities Commission