IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1689

	BETWEEN	TRAVIS TRUST Appellant
	AND	CHARITIES COMMISSION Respondent

Hearing: 12 November 2008

Counsel: A J Ryan for Appellant
K Muller for Respondent

Judgment: 3 December 2008

RESERVED JUDGMENT OF JOSEPH WILLIAMS J

This judgment was delivered by the Hon. Justice Joseph Williams
on 3 December 2008 at 2.30 p.m.
pursuant to r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

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Crown Law Officer, PO Box 2858, Wellington

[1] This is an appeal by the Travis Trust (the Trust) against a decision of the Charities Commission (the Commission) refusing to register the Trust as a charitable entity under the Charities Act 2005 (the Act).

The Charities Commission

[2] The Commission is established under s 8 of the Act. It has seven members and a staff of 55. The Commission has a wide range of social, educative and facilitative functions in accordance with s 10 but its primary functions are as registrar and supervisor of charitable entities in New Zealand.[1]

[3] Since 1 February 2007, the Commission has received 24,215 applications for registration and determined 14,361 of them. Although, I was advised, a number of applications had been withdrawn by applicants, only 17 have actually been declined. The appellant Trust is one of the 17.

[4] The Commission must follow a statutory process in making its registration decision. This includes a requirement that the applicant must be given an opportunity to make submissions if necessary.[2] That process was indeed followed in this instance, and the appellant does not challenge any part of the decision making process. The appeal is focused only on the substantive outcome.

[5] Registration as a charitable entity under the Act is important to the Trust because by the terms of ss CW41 and CW42 of the Income Tax Act 2007 "tax charities" are exempt from income tax in relation to both donations and business income. In order to qualify as a "tax charity", the Trust must be registered as a charitable entity under the Charities Act.[3]

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[1] See s 10(1)(e) to (k).
[2] See generally s 18(3)(c).
[3] But note s CW41(5)(b) in respect of entities that have started the registration process before 1 July 2008; and (c) as to non-resident charities. Neither category is relevant in this appeal.

The Travis Trust

[6] The Trust was established in 1997 by Mrs Mildred Travis Grubbs. Mrs Travis Grubbs was a woman of means who loved horsing racing. She settled the Trust, as the Deed says:

> … for the purpose of providing funds to support the New Zealand racing industry by the anonymous sponsorship of a Group race known as the Travis Stakes and to otherwise provide for the settlor and her family.

[7] According to clause 3 of the deed, the beneficiaries of the Trust comprised the Cambridge Jockey Club Incorporated or its successor, the settlor herself, Thomas W Travis (the settlor's nephew), any other beneficiary advised in writing by the settlor during her lifetime, and the Cambridge Harness Racing Club in the event that the Cambridge Jockey Club Incorporated is wound up with no successor.

[8] As I will shortly explain, the potential private beneficiaries of the Trust may be set aside for the purpose of considering the merits of this appeal and need not be further referred to here. The detailed instructions as to how the trust deed should carry into effect the Trust's primary purpose are provided for in clause 4:

> … without limiting the generality of this clause any payment to the Cambridge Jockey Club Incorporated … may be for or towards the establishment and continuation of a thoroughbred horse race to be known as the "Travis Stakes" and by way of sponsorship for such race and that in accordance with intentions of the settlor (sic) the contribution to such race may include:
>
> (a) A minimum payment of $20,000 each year;
>
> (b) That such sponsored race shall continue from season to season at such venue as the Trustees shall consider complies with the requirements for the running of the race as may be stipulated by the Settlor in any memorandum of wishes;
>
> (c) That the Trustees may diminish the capital of the Trust to enable the race to continue from year to year until the eventual exhaustion of the trust fund and the Trustees shall be under no liability to any beneficiary for the ultimate extinction of the trust fund by way of such purpose;
>
> (d) Such other terms and conditions as the Settlor or the trustees may nominate for the conditions on which the race shall be run;

(e) Any failure to meet the Group status conditions for two consecutive seasons shall require the Trustees to remove the sponsorship from the racing club then in receipt of the same.

[9] Mrs Travis Grubbs passed away on 29 December 2003. She left her entire estate to the Trust to continue its work.

[10] Counsel advised that Trust assets now exceed NZ$1 million. The Trust's gross income for the year ending 31 March 2008 was $42,135.44, and its after tax income was $28,230.96. Counsel advised that the three trustees of the Trust (including himself) have refused to accept any fee for their work as trustees, and that he appeared on this appeal on a pro bono basis.

[11] In accordance with the spirit of the Trust instrument, the entire income of the Trust has in fact been utilised as prize money for a Group 2 race for fillies and mares called the Travis Stakes. Group 2 races are the second most prestigious category on the New Zealand racing calender. Since 2005, the Trust has contributed $40,000 in each year to the stake in the race. I understand that with the assistance of other contributors, the overall stake money for the Travis Stakes is approximately $120,000 putting it at the upper end of the prize quantum generally associated with Group 2 races. It is hoped that the Trust's contribution to the Travis Stakes can be increased in the new year so that the event can become a Group 1 race.

The parameters of the appeal

[12] Counsel for the Trust submitted that the Trust operated only to fund the Travis Stakes and that the private (as he called them) objects of the Trust were not operative. That is to say no Trust income or capital had been expended, or would be expended, for the benefit of the private individuals listed in clause 3 of the Trust Deed.

[13] For the purposes of the appeal, the Commission was prepared to proceed on the basis that the Trust operated only for the purpose of funding the prize money in the Travis Stakes, and not otherwise. This was an appropriate concession since private beneficiaries or purposes can, where appropriate, be severed from an

otherwise charitable trust instrument.[4] I was advised from the Bar that for practicable purposes the Commission registers mixed trusts on the condition, as I understand it, that any private objects of a charitable entity will not be given any effect by the trustees or governance body of the entity.

[14] The single issue before me therefore is whether the provision of prize money for an annual and significant race on the New Zealand horse racing calender is a charitable purpose.

[15] The appeal right is contained in s 59 of the Act, and s 61 gives this Court on appeal wide powers to make such orders as may be necessary to justly dispose of the appeal. By the terms of rule 718 of the High Court Rules, the appeal is to be by way of rehearing. The principles applicable to appeals of this nature are well set out in the Supreme Court decision in *Austin, Nichols and Co Inc v Stichting Lodestar*.[5] While the burden of making out the appeal belongs to the appellant, there is no inherent deference to be paid to the first instance decider except for the "customary caution" to be accorded that decider where it has a particular advantage including (as in this case) specialist expertise.

[16] I have organised my reasons for this judgment around the following headings:

(a) **Charitable purpose and the common law:** In which I explain the relationship between the statutory definition of charitable purpose and the classical English authorities on the subject.

(b) **Arguments for the parties**: In which I summarise the positions taken by the appellant and respondent.

(c) **Defining the scope of the purpose**: In which I delineate the true purpose of the Trust in order to measure that against the relevant test for charitable purpose.

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[4] See for example, s 61B(3) Charitable Trust Act 1957 and ss 5(3) and (4) of the 2005 Act.
[5] [2008] 2 NZLR 141.

(d) **The sport and leisure cases**: In which I consider decisions from throughout the Commonwealth on whether the promotion of sports and leisure is charitable.

(e) **The categories of charitable purpose can evolve**: In which I consider the extent to which the Courts are prepared to extend and adapt the categories of charitable purpose.

(f) **Are the beneficiaries sufficiently public?** In which I consider the law in relation to public benefit.

(g) **The Travis Trust is neither charitable nor public**: In which I reach my conclusions.

Charitable purpose and the common law

[17] Charitable purpose is inclusively defined in s 5(1) of the Act as every charitable purpose whether it relates to:

(a) the relief of poverty;

(b) the advancement of education;

(c) the advancement of religion; or

(d) any other matter beneficial to the community.

[18] Section 5 includes a number of additions and amendments to that broad definition but none of them are relevant to this case. The definition rather unhelpfully repeats the four heads of charity contained in the celebrated House of Lords decision in *Commissioners for Special Purposes of the Income Tax v Pemsel*.[6] They in turn are extracted, it is said, from the preamble to the *Statute of Charitable*

[6] [1891] AC 531.

Uses 1601[7] – generally referred to these days as the Statute of Elizabeth. The preamble provides a list of charitable uses as follows:

> 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.

[19] As Lord Macnaughten said in the *Pemsel* case:

> The object of that statute was merely to provide new machinery for the reaffirmation of abuses in regard to charities. But by a singular construction it was held to authorise certain gifts to charity which otherwise would have been void. And it contained in the preamble a list of charities so varied and comprehensive that it became the practice of the Courts to refer to it as a sort of index or chart.[8]

[20] From this his Lordship extracted the four heads of charity now codified in s 5(1) with the last and most problematic of them being "other purposes beneficial to the community, not falling under any of the preceding heads".[9] But, as Lord Bramwell said in the same case "certainly every benevolent purpose is not charitable".[10] So in a deft circumlocution of legal logic, we are required in considering what is beneficial to the community under the last of the *Pemsel* heads to look back to the "spirit and intendment" of the preamble to the Statute of Elizabeth to assist in dividing between those purposes that are both beneficial and charitable, and those that are beneficial but not charitable. To make the division, regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy. The 117 years since *Pemsel* have seen a steady encrustation of new analogous charitable categories by this means. These developments have been evolutionary rather than revolutionary.

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[7] 43 Elizabeth I c.4.
[8] *supra* at p 581.
[9] *ibid* at 583.
[10] *ibid* at 565.

[21] There are other statutory definitions of charitable purpose about which one should be aware, but they are either applicable to specific circumstances and so not of general relevance[11], or repeat the substance of the definition in s 5(1) of the Act[12] and so offer no real assistance.

[22] It follows that for the purposes of this appeal, s 5(1) of the Act codifies the common law and it is in the common law that the answer in this case is to be found.

Arguments for the parties

[23] For the Trust, Mr Ryan argued that the "beneficial to the community" category in s 5(1) should be generously applied. His argument was that while the direct purpose of the Trust was to provide a stake in a particular race, this had to be seen in the context of the wider benefit to the Cambridge Jockey Club, the district and the racing public arising from the successful staging of the Travis Stakes race.

[24] The evidence of the Chief Executive of the Cambridge Jockey Club was that the club had in excess of 250 members and holds three racing meetings per year at Te Rapa. Attendance can be up to 3,000 for the main day of the April meeting – which day is called the "Travis Stakes Day". There is no entry fee and it is generally seen as a family day for people from the Cambridge and Hamilton districts. The successful staging of this race has the effect of making the club's racing calender a success and that in turn enables 13 further days of trial racing benefiting 205 horses and four trial days for jumping. Even more significantly it was said that 220 trainers resident in Cambridge are able to train 8,350 horses during the year at the Cambridge Jockey Club facility while providing employment for more than 3,000 people in the district. The Chief Executive added:

> In addition the club as part of its community focus sponsors community events such as the annual A&P Show and Waikato Show Jumping; the club's function rooms are provided free of charge to a variety of equine groups to hold meetings and seminars in; and an area of land which the club owns is rented at a nominal rate to the New Zealand Equine Academy. The academy is an educational body which provides training in equine related occupations such as farriers, jockeys, stablehands and stud staff.

[11] See for example ss 2 and 38 of the Charitable Trusts Act 1957.
[12] For example, s YA1 of the Income Tax Act 2007.

[25] More broadly, counsel argued that the New Zealand racing industry provides employment for some 40,000 participants in 18,000 full-time equivalent jobs. The industry, he submitted, also provides a significant leisure opportunity to many New Zealanders as hobby owners, trainers or breeders and as punters attending races or club events.

[26] Counsel argued that the prize money in the Travis Stakes fits into this wider picture. The purpose of the Trust counsel argued is not so much to provide prize money as it is to contribute incrementally to the success of the club and the wider industry and to provide leisure opportunities to a broad section of the general public.

[27] The Commission appeared in its own right on this appeal even though it was the first instance decider. While this is generally frowned upon, in the circumstances of this case, the assistance of counsel for the Commission was both necessary and valued. This arises from two circumstances particular to this appeal. The first was that there was no other party adopting a position contrary to that of the appellant on this appeal. The absence of the usual tension between appellant and respondent can sometimes lead to poor decision-making and that should be avoided. The second and more important reason is that this was the first appeal under the 2005 legislation and it was important that the Court heard submissions properly contextualising the appeal within the 2005 reforms. For this purpose counsel for the Commission acted rather more as counsel assisting than as an adversary to the appellant. I am grateful particularly for that aspect of the contribution of counsel for the Commission.

[28] For the Commission, Ms Muller, argued for a narrower reading of the "general benefit to the community" head in s 5(1). She cautioned the Court against extending the categories of charitable purpose beyond the prescriptions contained in the existing line of cases in respect of sports and leisure. She argued that whether one conceived of the endowment as funding a prize in a particular race or contributing more broadly to the racing industry, it must be seen as supporting a sectional interest and one essentially private in nature.

[29] There was no argument from the appellant that the purpose of the Trust fitted within any of the first three heads of charity so our focus is the fourth general benefit

head. Although leading recent cases diverge as to the way in which the test for general benefit should be applied, all authorities agree that the test has two parts: first, is the purpose charitable in nature, and second, is the benefit public in nature?

Defining the scope of the purpose

[30] It is important to begin by carefully defining the scope of the alleged charitable purpose to which the test must be applied. In this case, is the purpose of the Trust the provision of a prize to owners of the winning horse in the Travis Stakes; support for the Cambridge Jockey Club whose operations are enhanced by the sponsorship of the race; support for the racing industry more generally; or support for the wider community of racing employees and customers in the Hamilton/Cambridge area?

[31] This issue of accurately describing the genuine purpose of the entity in question has been addressed in the Court of Appeal in *New Zealand Society of Accountants v Commissioner of Inland Revenue*[13] and by the Canadian Supreme Court in *Amateur Youth Soccer Association v Canada (Revenue Agency)*[14]. The New Zealand case related to fidelity funds operated by the New Zealand Society of Accountants and the New Zealand Law Society. At issue was whether the purpose of these fidelity funds was to ensure peace of mind in the community in respect of the provision of legal and accounting services or, more restrictively, to underwrite private clients who had been defrauded by their professional advisors. Richardson J took the view that there must be a direct relationship between the alleged public benefit and the expressed purpose of the fund. He saw no point in enlarging the community of benefit – for which I would read the object of the fund – beyond those persons entitled to claim from it. He found therefore that the purpose of the fund was to assist private clients rather than provide community peace of mind. The latter he regarded as far too nebulous and remote to be considered a genuine purpose of the Trust.

[13] [1986] 1 NZLR 147.
[14] (2007) 287 DLR (4th) 4.

[32] Similarly in the *Amateur Youth Soccer Association* (AYSA) case, the Canadian Supreme Court had to decide whether a trust for the promotion of youth soccer fitted within the accepted charitable category of promotion of community health and wellbeing. The Court expressed a great deal of scepticism about the appropriateness of defining the purpose of a trust by reference to alleged downstream benefits where those benefits are not themselves the Trust's express purpose. Rothstein J for the Court said:

> The fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable. If every organisation that might have beneficial by-products, regardless of its purposes, were found to be charitable, the definition of charity would be much broader than what has hereto for been recognised in the common law.[15]

[33] In this case the relevant purpose is provided in the Trust Deed under the heading "Background".

> The Settlor wishes to establish a trust for the purpose of providing funds to support the New Zealand racing industry by the anonymous sponsorship of a Group race known as the Travis Stakes …

[34] Applying the analogy in the *Society of Accountants*[16] case, the purpose is the support of a single Group race to be run by the Cambridge Jockey Club once a year. While it may be possible to say the indirect purpose is to support the Cambridge Jockey Club's annual calender of three meetings through sponsorship of one of the club's headline races, any wider benefits that may accrue to the racing industry or indeed the racing public are too remote to be considered within the scope of the Trust's purpose. Any downstream benefits to the racing industry and those who are employed by it, or attend its race meetings are, in my view, mere by-products of the Trust's purpose rather than the purpose itself and so, in accordance with the *AYSA* decision, should be set to one side.

[35] I proceed therefore on the basis that the purpose of the Trust is either the support of the Travis Stakes or of the Cambridge Jockey Club's annual program of race meetings.

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[15] At p 22.
[16] *supra*.

The sports and leisure cases

[36] The English, Canadian, Australian and New Zealand courts have dealt with the question of whether trusts for the promotion of sport and leisure are charitable under the "general benefits" heading on a number of occasions.

[37] The leading historical decision is contained in the English Court of Appeal consideration of a testamentary gift in 1894 to the Yacht Racing Association of Great Britain. The gift was made to fund annually the purchase of a cup to be given to the most successful yacht each year in a particular yachting class. At first instance Kekewich J held:

> The racing of yachts when built employs a large number of men, who are educated in the management of vessels which may become useful for the defence of the realm. But this testator had not these objects in view when he made this gift. He has told us that his object was to encourage the sport of yacht racing. I cannot bring myself to hold that the sport of yacht racing is beneficial to the community in the sense in which that phrase is used by Lord Mcnaughten in the case in the House of Lords [i.e. *Pemsel*] and by other learned judges. I cannot see that the benefit of the community is the natural direct and necessary result of this gift; and though I am far from saying that the result of the gift is not beneficial, I must hold that it is not beneficial to the community so as to constitute this a charitable gift. The consequence is that the gift fails.[17]

[38] On appeal, the Court of Appeal upheld that decision unanimously. Lindley LJ held:

> I deal with the present case on the broad ground that I am not aware of any authority pointing to the conclusion that a gift for the encouragement of a mere sport can be supported as charitable.[18]

[39] Lopes LJ put the principle this way:

> I am of opinion that a gift, the object of which is the encouragement of a mere sport or game primarily calculated to amuse individuals apart from the community at large, cannot upon the authorities be held to be charitable, though such sport or game is to some extent beneficial to the public. If we were to hold the gift before us to be charitable we should open a very wide door, for it would then be difficult to say that gifts for promoting bicycling,

[17] *In re Nottage* [1895] 2 Ch 649 at 654.
[18] *ibid* at 655-6.

> cricket, football, lawn-tennis, or any outdoor game, were not charitable, for they promote the health and bodily wellbeing of a community.[19]

[40] For the same reason gifts made or trusts established to promote rowing, swimming, athletics, foxhound breeding and showing, breeding and racing homing pigeons, the improvement of angling and the teaching or coaching of young cricketers were all found to be non-uncharitable.[20] It must though be noted that all of these cases arose prior to 1950 and the significant social changes that occurred in the Commonwealth as with the rest of the western world in the 1960s and later.

[41] There is a more recent line of cases dealing specifically with the sport of horse racing. In the Queensland Supreme Court decision *In Re Hoey*[21], the Court had to consider the status of a trust for the establishment of a racecourse. Demack J applied the Queensland equivalent of our s 61A of the Charitable Trusts Act 1957. This is a specific provision overriding the four *Pemsel* heads in the case of physical facilities provided "in the interests of social welfare".

[42] The case is accordingly not on all fours with the present facts where the gift is not for land or physical plant, but the learned Judge was nonetheless of the view that the purpose lacked the requisite character and the benefit was not public:

> I am not satisfied that registered horse racing is conducted with the object of improving the conditions of life for the persons for whom the facilities are primarily intended …
>
> Here the relevant Act is the *Racing and Betting Act 1980*. From the various provisions of that Act it appears that registered horse racing is conducted for a variety of purposes but these can be summed up in the phrases in s 12(2)(b), "the welfare of the racing industry and the protection of the public interest". In my opinion the first of these phrases suggest a sectional or class interest, something which has always been regarded as negating a charitable trust, and the second does not suggest the improvement and the conditions of life of the persons involved but rather desire to see that the existing conditions are not eroded.[22]

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[19] At 656.
[20] The cases for these propositions are set out in Dal Pont and Chalmers, *Equity and Trust in Australia and New Zealand* (2nd ed LBC Information Services, Sydney, 2000) 550-551 and footnotes 223-225.
[21] [1994] 2 Qd. R 510.
[22] At 513-14.

[43] In the New Zealand High Court decision *In Re Beckbessinger*[23], the Court dealt in part with a gift to the Addington Trotting Club for a purpose similar to that in the present case. Tipping J (then in the High Court) rejected in an *obiter* statement, any suggestion of charitable purpose in these terms:

> The suggestion that a sum of money should be given to the trotting club at Addington to provide a stake, preferably for 4 year olds, is beyond doubt non-charitable. It cannot be and was not suggested that the Metropolitan Trotting Club is or remotely resembles a charitable organisation.[24]

[44] It is clear therefore that the weight of authorities runs powerfully against a finding that a gift toward the prize in the Travis Stakes is charitable.

The categories of charitable purpose can evolve

[45] While the cases tend to suggest that mere sport is not a charitable purpose and that horse racing is even less so, there is no New Zealand case directly deciding the point. More recent New Zealand cases tend to support the idea that the concept of charitable purpose is evolving in response to changing social circumstances and the steady development of a more unique New Zealand legal culture. As the authors of *Garrow & Kelly's Law of Trusts and Trustees* suggest in relatively conservative terms:[25]

> It is possible that an object held to be charitable in one age may in another age be regarded differently. By reason of change and social ideas, habits, or needs of the community, or by change of law, or by the advancement of knowledge, a purpose once thought to be beneficial and therefore charitable, may become superfluous, detrimental to the community, or even illegal. Conversely, with the passing of time, an object or purpose formerly held not to be charitable may come to be regarded as charitable. It would need a radical change of circumstances, established by sufficient evidence to compel the Court to accept a new view of the matter.[26]

[46] Thus in *Commissioner of Inland Revenue v Medical Council of New Zealand*[27] the Court of Appeal held that the promotion of community health was a valid charitable purpose relying on and further developing a line of English

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[23] [1993] 2 NZLR 362.
[24] At p 376.
[25] *Garrow & Kelly's Law of Trusts and Trustees* (6th ed LexisNexis NZ Limited, Wellington 2005).
[26] At pp 238-239.
[27] [1997] 2 NZLR 297.

cases to that effect. But in *Latimer v Commissioner of Inland Revenue*[28] the Court developed an entirely new category of charitable benefit:

> We have no doubt that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character. The assistance purpose of providing the Waitangi Tribunal with additional material which will help it to produce more informed recommendations, leading in turn to the settlement of longstanding disputes between Mäori and the Crown, is of that character. It is directed towards racial harmony in New Zealand for the general benefit of the community.[29]

[47] The Court noted in addition that there were educational and relief of poverty effects of settling Treaty claims but there is no doubting that the Court established the pursuit of racial harmony and social cohesion as a new charitable category in New Zealand. Thus there is room for growth and development in appropriate cases.

[48] In the same way and contrary to the line of cases suggesting that trusts or gifts for the promotion of sport and leisure are not charitable, it cannot be said that such purposes are *never* charitable. In the House of Lords decision in *Inland Revenue Commissioner v McMullen*[30], their Lordships upheld a trust established by the English Football Association to organise or provide:

> Facilities which enable and encourage pupils at schools and universities in any part of the United Kingdom to play association football or other games or sports and thereby to assist in ensuring that due attention is given to the physical education and development and occupation of their minds.

[49] Meanwhile in the much earlier case of *Re Gray*[31], the Court upheld a gift to a regiment "for the promotion of sport".

[50] In the *AYSA* decision to which I have already made reference, the Canadian Supreme Court rejected an argument that the promotion of amateur soccer was charitable in itself. But it is clear from the reasoning of Rothstein J that the Court would have found in favour of the Association if its purposes and activities had been

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[28] [2002] 3 NZLR 195.
[29] *supra* per Blanchard J at para 40. The Privy Council reversed the Court of Appeal in *Latimer* but the Court of Appeal's findings as to charitable purpose remained intact.
[30] [1981] AC 1.
[31] [1925] 1 Ch 362.

more focused on health, fitness, education, and physical wellbeing *through* the sport of soccer rather than soccer simpliciter.[32]

[51] Returning to New Zealand, there is also an unreported High Court case in *Nelson College v Attorney General*[33] in which a bequest was made to provide "a coach for improving back play and place kicking in the game of rugby football among the scholars" of Nelson College. Heron J found the gift to be charitable on the ground that "the overriding consideration is one of education".[34]

[52] The cases then seem to establish some workable first principles. The first, the class of charitable purposes does indeed evolve over time and the Courts (including those in New Zealand) have shown a willingness to develop new categories of charitable purpose and to develop or extend established ones. In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original *Pemsel* heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth.

[53] In the area of sport, the deeper purpose is usually health or education. The *Nelson College* decision focused on the latter, the *McMullen* and *AYSA* decisions confirmed the former. These are not the only two categories however as the gift in *Gray* shows. There the deeper purpose related to defence of the realm.[35]

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[32] See for example Rothstein J at paras 40 and 41. I note in passing the decision of the Ontario High Court in *Laidlaw Foundation* (1984) 13 DLR (4th) 491 in which that Court accepted that the promotion of amateur athletic sport was inherently charitable. This decision appears contrary to the run of cases already mentioned. The Canadian Supreme Court in *AYSA* described it as "anomalous" and restricted it to its facts (see para 38).

[33] (1986) (HC Nelson MN. 40/86, Heron J).

[34] At p 5.

[35] There is a line of cases which draws from the express reference in the preamble to the 1601 Statute to support for soldiers. These cases have held that gifts or trusts for the support of the military and constabulary are generally seen to be charitable. Sport and leisure gifts for this deeper purpose will therefore be charitable.

Are the beneficiaries sufficiently public?

[54] Once it is established that the purpose of a trust is charitable in character, it must also be established that the benefits of the trust will accrue to the public. According to Richardson J in *New Zealand Society of Accountants*[36] this requires the application of a two-fold test: first, are the purposes of the trust such as to confer a benefit on the public or a section of the public; and second, do the class of persons eligible to benefit constitute the public or a sufficient section of it?

[55] The distinction here is to be drawn between trusts or gifts whose primary beneficiaries are private individuals or a private class and those for which the beneficiaries might properly be considered to be the wider community or a section of it. Drawing the line can be exceedingly difficult and there is clearly a degree of interplay between purpose and class. An excellent exposition on the nature of community or public benefit can, with respect, be found in the decision of Bleby J in the South Australian Supreme Court case of *Strathalbyn Show Jumping Club Inc. v Mayes*[37]. In that case, the question was whether the members of two separate polo clubs and a polo grounds association were a sufficient section of the public. Bleby J acknowledged that the issue is often difficult to resolve. He said after referring to most of the leading English cases[38], he suggested:

> Courts have tended not to recognise public benefit where benefits were conferred upon a group related to or employed by one or a group of persons, perhaps as representing a privileged and closed group to which one is admitted either by birth, employment or some other privilege. On the other hand, there is an acknowledged public benefit where the beneficiaries consist of a relatively small group suffering a disability of some kind over which they have no control and which might equally be brought about by an accident at birth.
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> Public benefit is an elusive quality. It is not always open to sound reason, but it is a quality often plainly recognised when it exists.[39]

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[36] *supra*.
[37] (2001) SASC 73.
[38] *Oppenheimer v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Verge and Somerville* [1924] AC 496; *Dingle v Turner* [1972] AC 601.
[39] Pp 74 and 75, but note in New Zealand s 5(2)(a) and (b) Charities Act 2005 in which relationship by blood and support for marae are excluded from the general principle in the English cases forbidding the derivation of benefit through relationship to an individual.

[56] He relied on a decision of the High Court of Australia in *Thompson v Commissioner of Taxation (Commonwealth)*[40] in which the funding of schools for the children of the members of the Masonic Order was found to be insufficiently public because Masonic members were themselves admitted only by election. In the same way in the *Strathalbyn* case, Bleby J found that the rules of admission in each of the three polo clubs rendered them essentially private. He said:

> Although the membership rule of each of the three clubs are quite different, they have a common feature, namely, that admission to membership and exclusion from membership is vested in the relatively small Board of Directors or committee of management. It is not open to any member of the public who wishes to join. Such provisions are not surprising. They are common to great many sporting and other associations of persons who have a common interest. … It indicates, however, that those who may benefit from the provisions of the first limb of Trust Deed constitute a highly restricted class … It is not a class which is open to members of the public or any significant section of it. The class of persons on whom the benefit is conferred is a group or groups of individuals who have a common interest in the playing of polo and who have been admitted to membership by the controlling body of the organisation. Even if there were less stringent restrictions on or qualifications for membership, I doubt whether the class or beneficiaries would meet the necessary public interest test.[41]

[57] Having concluded that it is inappropriate in the present case to expand the beneficial class to those who might derive some benefit as a by-product of the Trust's purposes, I consider that the widest valid category of beneficiaries of this Trust would be the members of the Cambridge Jockey Club. It is the club that draws the widest relatively direct benefit in terms of being able to sustain a successful racing calender on an annual basis in part through the funding of a high profile race offering a relatively valuable purse.

The Travis Trust is neither charitable nor public

[58] Drawing these principles together, the result in this case seems clear. The purpose of the Trust is to fund a Group 2 race for the benefit of the Cambridge Jockey Club's race program. The jockey club has 350 members. Membership is not open to the public generally upon payment of a subscription or similar. Instead members must be elected after being proposed and seconded in writing by two

[40] (1959) 102 CLR 315.
[41] At p 78.

members of the club.[42] It is very much a private club similar in format to those considered in the *Strathalbyn* case. I hold that the Cambridge Jockey Club is not the community or a sufficient section of it to amount to "the public" in accordance with that requirement.

[59] Even if I am wrong in that, it is clear both on the basis of first principle and on consideration of the authorities that the promotion of a horse race is not a charitable purpose in and of itself. Nor is the promotion of horse racing generally – even if the Cambridge Jockey Club did in fact constitute the community or an appreciable section of it which, in my view, it does not. A trust to promote racing could only be charitable in nature if its deeper purpose was the pursuit of some other objective, either in principle or, in accordance with charities jurisprudence, a charitable purpose in its own right within the spirit and intendment of the Statute of Elizabeth. Thus, if it could have been established that the true intention of the support for this race was the promotion of health, education or perhaps even animal welfare[43], it might have satisfied the test. But it is clear that none of these purposes is the deep reason for this Trust, and counsel for the appellant quite rightly did not pitch his case on that basis.

[60] It follows that the decision of the Commission is to be upheld and the appeal is dismissed.

[61] As this is the first appeal under the Charities Act 2005, it does not seem to me to be the sort of case in which costs should follow the event. On the contrary, counsel for the appellant has sought an award of costs in favour of his client whatever the outcome in this case. Before I rule on that application I will need the assistance of submissions from counsel for the parties. I would appreciate written memoranda on that particular question within 14 days of this judgment.

"Joseph Williams J"

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[42] See Rule 5, *Cambridge Jockey Club Rules and Regulations*, September 1979.

[43] Whether the promotion of animal welfare is a charitable purpose in New Zealand within the spirit and intendment of the Statute of Elizabeth remains to be seen, but counsel referred me to s 2(2)(k) of UK Charities Act 2006 in which in that country the question is put beyond doubt.