

Registration decision: Jacks Point Community Housing Trust

The facts

1. Jacks Point Community Housing Trust (the Applicant) was created by a declaration of trust dated 10 August 2009. The trust was incorporated as a board under the Charitable Trusts Act 1957 on 18 August 2009.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 20 August 2009.
3. The Applicant's purposes are set out in clause 4 of the Trust Deed:

"4.1 The primary objects and purposes for which the Trust is established are:

- a) Either alone or with or through any other entity or entities to promote and/or provide housing within Jacks Point (whether freehold, leasehold, licence, option or some other form of ownership or rental) for Households that contribute or will contribute to the economic and environmental, cultural and social wellbeing of those living within the District at a cost within their means.*
- b) To develop and maintain consultation with the Council, the Queenstown business community and the greater community on the requirement for housing to be provided pursuant to clause 4.1a and as to how those requirements may be met.*
- c) To establish and facilitate systems for the purposes of raising, administering and investing funds for the purpose of the Trust generally whether by the Trust directly or through trusts, companies or other entities controlled, owned, or contracted by the Trust.*
- d) To carry on any other charitable objects which may in their discretion is capable of being appropriately carried on in connection with the objects stated above, or calculated directly or indirectly to advance the other objects of the Trust or any of them.*

4.2 The objects in clause 4.1 will be the primary objects of the Trust. The objects stated in any clause of this Deed will not, except where the context expressly requires, be restricted to the terms of any other clauses. None of the objects specified in this Deed will be deemed subsidiary or ancillary to any other object. The Trust may carry out the objects in this Deed independently of any other objects. None of the powers conferred upon the Trustees under clause 12 will be subsidiary or ancillary to any other power or authority. The Trustees are entitled to exercise the powers or authorities independently of any other such powers or authorities. However, the powers or authorities are exercised in pursuance of the exclusively charitable objects and purposes for which the Trust is established."

4. The Commission analysed the application for registration and on 31 August 2009, sent the Applicant a notice advising that its application for registration may be declined on the basis that its purposes did not meet the definition of charitable purpose in the Act.
5. The Applicant's solicitor responded in a letter dated 7 September 2009, making the following submissions:
 - *"Queenstown has suffered a long standing lack of affordable residential accommodation. ... The Trust will provide District families and the working community on low to moderate household incomes with subsidised access to residential properties in the Jacks Point development at Queenstown ("Jacks Point")."*
 - *"Assisting District families and members of the working community on low to moderate household incomes into affordable residential accommodation in the 21st century is the modern day equivalent of the supportation, aid and help of young tradesmen and handicraftsmen in 1601. Due to the very expensive nature of the District, to be on a low or moderate income or be of modest means in the District equates to being disadvantaged."*

The issues

6. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act.

The law on charitable purpose

7. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
8. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefitting the public or a sufficient section of the public.
9. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.

¹ See *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195.

10. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the entity's activities at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

Charities Commission's analysis

11. Despite the reference in clause 4.2 of the Applicant's Trust Deed that none of the objects "will be deemed subsidiary or ancillary to any other object", the Commission considers that clauses 4.1(b) and 4.1(d) are ancillary and that clause 4.1(c) is a power. The Applicant's purpose in clause 4.1(a) does not indicate an intention to advance education or religion; this has therefore been considered in relation to the relief of poverty and "any other matter beneficial to the community".

Relief of poverty

12. In order to be charitable under this head, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief.²
13. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor".³ People who are in need, aged,⁴ or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take for granted.⁵ To provide "relief", the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.⁶
14. The Applicant's solicitor, in his letter of 7 September 2009, indicated that the Applicant will provide assistance for "District families and the working community on low to moderate incomes". The purpose stated in clause 4.1(a), however, is to provide housing for "households that will contribute to the economic and environmental, cultural and social wellbeing of those living within the district".
15. The Commission considers that the wording of clause 4.1(a) does not indicate an intention to provide benefits for people who have an

² *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

³ *Re Bethel* (1971) 17 DLR (3d) 652 (Ont: CA); affirmed sub nom *Jones v Executive Officers of T Eaton & Co Ltd* (1973) 35 DLR (3d) 97 (SCC) referred to in *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342. See also *re Pettit* [1988] 2 NZLR 513.

⁴ *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

⁵ *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepoint Community Growth Trust* [2000] 2 NZLR 325.

⁶ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

identifiable need, rather the beneficiaries are limited to those who are able to improve the wellbeing of people already living in the area. The purpose in clause 4.1(a) does not therefore amount to the relief poverty.

Other purposes beneficial to the community

16. In order for a purpose to qualify as “any other matter beneficial to the community”, the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).⁷ The purposes set out in the Preamble are as follows:
- relief of aged, impotent, and poor people
 - maintenance of sick and maimed soldiers and mariners
 - schools of learning
 - free schools and scholars in universities
 - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
 - education and preferment of orphans
 - relief, stock or maintenance of houses of correction
 - marriage of poor maids
 - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
 - relief or redemption of prisoners or captives and
 - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.⁸
17. The Applicant’s solicitor has stated that the Applicant’s purposes are the modern day equivalent of the supportation, aid and help of young tradesmen and handicraftsmen in 1601.
18. When considering whether the Applicant’s purposes are within the spirit and intendment of the Preamble to the Statute of Elizabeth, and in particular, the “supportation, aid and help of young tradesmen and handicraftsmen”, it is necessary to consider the decision of the High Court of Justice in *Commissioners of Inland Revenue v White*.⁹
19. In that case, the court considered that in a contemporary context the “supportation, aid and help of young tradesmen and handicraftsmen”

⁷ *Re Jones* [1907] SALR 190, 201; *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447, 455; *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138, 146-48; *Incorporated Council of Law Reporting (QLD) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 667, 669; *Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304, 305; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147, 157; *Re Tennant* [1996] 2 NZLR 633, 638.

⁸ (43 Eliz I c 4).

⁹ (1982) 55 TC 651.

would mean assistance for those people who perform an art, trade or profession requiring special skill or knowledge.

20. In addition, the Commission considers that the specific words used in the Statute of Elizabeth, "**young** tradesmen and handicraftsmen and persons **decayed**", indicate that these people had particular disadvantages and assistance would be required to overcome these disadvantages.
21. The Commission notes that the purpose in clause 4.1(a) does not identify an intention to benefit people by reason of their age, employment in a particular trade, or particular disadvantage. The Commission considers that this purpose does not appear to be within the spirit and intendment of the Preamble to the Statute of Elizabeth and therefore concludes that clause 4.1(a) is not a charitable purpose under "other matters beneficial to the community."

Public benefit

22. The public benefit criterion necessarily requires that any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.¹⁰ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.¹¹
23. In *Hadaway v Hadaway* the court held that the granting of loans to agricultural planters was not a charitable purpose because there were no restrictions in place to ensure the funds would be used for a charitable purpose. He stated:

"It appears . . . to be impossible to regard as charitable a trust for the granting of loans at a low rate of interest to a class of persons carrying on a particular trade or business or profession, unless at least there is a condition that loans so made should be employed for a purpose which could itself be regarded as charitable.

*... between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative and remote to justify the attribution to it of a charitable purpose. It would be equally easy and equally wrong to regard as charitable a trust for the granting of loans on generous terms to any member of any other class which performs a useful function in the social or economic life of the country."*¹²

24. On the basis of the Privy Council's decision in *Hadaway v Hadaway* the Commission considers that the purpose in clause 4.1(a) will provide

¹⁰ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

¹¹ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

¹² [1955] 1 WLR 16, 19-20.

private benefits for the householders who are able to receive assistance from the Applicant and any benefits conferred on the remainder of the community will be too remote.

Conclusion

25. The Commission concludes that the purpose in clause 4.1(a) is a non-charitable purpose that will not provide sufficient public benefit.

Applicant's submission

26. The Applicant's solicitor, in his letter of 7 September 2009, noted that the Commission has registered another housing trust.
27. The Commission takes a case-by-case approach to each application for registration as a charitable entity. The Commission considers the specific wording of each Applicant's rules document, and has regard to the current and future activities of each applicant as required by section 18(3)(a) of the Act. The fact that the Commission has registered another housing trust does not affect the Applicant's eligibility for registration.

Section 61B of the Charitable Trusts Act

28. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the Charitable Trusts Act 1957 however, can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes.
29. The first is where the entity's **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).¹³
30. The Commission considers that the purpose stated in clause 4.1(a) is the primary purpose of the entity and this is non-charitable for the reasons set out above. If the purpose in clause 4.1(a) were "blue-pencilled out", the Applicant would be left with no specific purposes. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.
31. In *Re Beckbessinger*, Tipping J held:

"In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say ... that because a gift might have been applied for charitable purposes,

¹³ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

*s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.*¹⁴

32. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18(3)(a) of the Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.
33. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Charities Commission's determination

34. The Commission determines that the Applicant has failed to meet an essential requirement for registration as a charitable entity in that the Applicant is not a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act.

For the above reasons, the Commission declines the Applicant's application for registration as a charitable entity.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

26/11/09
Date

¹⁴ *Re Beckbessinger* [1993] 2 NZLR 362, 376.