

Registration decision: Partnership Wellington Trust

The facts

1. Partnership Wellington Trust (the Applicant) was established as a trust on 24 October 1997. The trust was incorporated as a board under the Charitable Trusts Act 1957 on 10 November 1997.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 22 February 2008.
3. The Applicant's purposes are set out in clause 4.0 of its Trust Deed, as amended by clause 1.1.2 of the Deed of Amendment:

"4.0 Objects of the Trust

- 4.1 *The principal object of the Trust shall be to market and add value to Wellington to achieve sustainable economic growth for the benefit of the public of Wellington.*
- 4.2 *In carrying out the principal object the Trust shall also have the following additional objects:*
 - (a) *maximise the City's share of regional consumer spending through strategic campaigns promoting the City throughout New Zealand and overseas as a destination for shopping, leisure, entertainment and events,*
 - (b) *enhance the profile of City businesses, promote strategic alliances and private sector partnerships,*
 - (c) *further enhance the recognition of Wellington and give support to the Wellington Region as a key and desirable visitor destination,*
 - (d) *actively facilitate the co-ordination of marketing initiatives appropriate to the objects of the Trust,*
 - (e) *ensure marketing initiatives are focused on increasing the sustainability of Wellington's commercial sector,*
 - (f) *recognise and promote community focused initiatives,*
 - (g) *enter into funding agreements and other contracts that are necessary or desirable to achieve the objects of the trust,*
 - (h) *generally to do all acts, matters and things that the Trustees consider necessary or conducive to further or attain the principal and additional objects of the Trust set out above.*
- 4.3 *The Trust's objects shall be carried out in or to benefit people in Wellington. The Trustees may carry out activities outside Wellington to promote the Trust or the Trust Assets, but only in they believe that such activities will be for the ultimate benefit of people in Wellington.*

4.4 *For the avoidance of doubt, the Trust will not operate any trading undertaking with the purpose of making a profit.*"

4. The Commission analysed the application for registration and on 19 March 2009 sent the Applicant a notice advising that its application may be declined on the basis that the Applicant's main purposes were to promote tourism and encourage business, which were not charitable purposes.
5. On 15 April 2009, the Applicant responded to the notice submitting that the main purpose was not to promote tourism but "to market and add value to Wellington to achieve sustainable economic growth for the benefit of the public of Wellington".

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, in order to meet the essential requirements for registration, a trust must be 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. 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 Statute of Charitable Uses 1601 (Statute of Elizabeth).² In

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

² *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.

determining what is within the "spirit and intendment" of the Preamble to the Statute of Elizabeth, it is important to be guided by principle rather than by a detailed analysis of decisions in particular cases.

10. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
11. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to:
 - (i) *the activities of the entity at the time at which the application was made; and*
 - (ii) *the proposed activities of the entity; and*
 - (iii) *any other information that it considers is relevant; ..."*

Charities Commission's analysis

12. The Commission considers that the Applicant's purposes in clause 4.0 are not aimed at the relief of poverty or the advancement of religion. The Commission has therefore considered whether the purposes could be held to be charitable under the advancement of education or "other matters beneficial to the community".

Advancement of education

13. In the Applicant's letter of 15 April 2009, the Applicant stated that one of its activities is to:

"Offer information to Wellingtonians and visitors to help them get the most from the city through:

 - o *Visitor Information Services*
 - o *Traditional distribution of collateral (e.g. Events Calendar) to homes throughout Wellington and around New Zealand*
 - o *Online distribution of information through specific channels targeted to individuals in online communities of peoples from both Wellington and the wider world."*
14. The Commission does not consider that this activity will amount to the advancement of education based on the Court's reasoning in *Travel Just v Canada Revenue Agency*.³ In that case, the Canadian Federal Court of Appeal doubted that the dissemination of tourism information would qualify as either publication of research or an educational purpose.

Other matters beneficial to the community

15. As noted above, in order for a purpose to qualify as "any other matter beneficial to the community" (the fourth head), 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 Statute of Elizabeth.

³ 2006 FCA 343, [2007] 1 CTC 294 (Permission to appeal refused by the Supreme Court of Canada in *Travel Just v. Canada Revenue Agency*, 2007 CanLII 15983 (C.S.C.).

16. The Commission is of the view that some of the Applicant's activities may provide a benefit to the community, but its primary purpose does not benefit the community in a way that the law regards as charitable.
17. Courts have held the purposes aimed at the economic development of a community to be charitable under "other matters beneficial to the community", but only where that community has a particular need.⁴ It is difficult to conclude that Wellington is an area that is in need of assistance because:
- the unemployment rate in this area is lower than the rest of New Zealand (7.1%, compared with 7.5% for all of New Zealand);
 - the median income is higher (\$22,400, compared with \$18,500 for all of New Zealand);
 - the total average annual spending for households is higher (\$47,236 compared with \$43,682).⁵
18. The Commission has also considered whether the following cases could assist the Applicant: *Crystal Palace Trustees v Minister of Town and Country Planning*⁶ and *Re Tennant*.⁷
19. In *Crystal Palace Trustees v Minister of Town and Country Planning*, a body of trustees was entrusted with the control and management of Crystal Palace and park as a public place for education and recreation, and for the promotion of industry, commerce and art. Danckwerts J stated:
- "..it seems to me that the intention of the Act in including in the objects the promotion of industry, commerce and art, is the benefit of the public, that is, the community, and is not the furtherance of the interests of individuals engaging in trade or industry or commerce by the trustees."*⁸
20. In that case, the promotion of industry was found to be charitable because it provided education and facilities for the use of the general public. In the case of the Applicant, industry is being promoted through improving tourism and providing benefits to individual businesses in the hope that public benefit will result. Improving tourism is particularly evident through clauses 4.2(a), (c), (d). Promoting benefits to individual business is particularly evident in clause 4.2(a), (b) and (e).
21. The case of *Re Tennant* related to a rural community and the provision of a creamery. In that case, the Court applied other cases which had held

⁴ *Re Tennant* [1996] 2 NZLR 633.

⁵ Wellington Region Community Profile, Statistics New Zealand, <http://www2.stats.govt.nz/domino/external/web/commprofiles.nsf/findinfobyarea/09-rc>, accessed 11 May 2009

⁶ (1950) 1 Ch 132.

⁷ [1996] 2 NZLR 633.

⁸ (1950) 1 Ch 132, 142.

agriculture generally to be charitable such as *Inland Revenue Commissioners v Yorkshire Agricultural Society*. Hammond J stated:

*“Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But here the settlor was attempting to achieve for a **small new rural community** what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery.”*⁹
[Emphasis added]

22. The Applicant is not considered to be promoting a purpose for Wellington that could be considered to be analogous or similar in nature to an agricultural purpose for a small rural community. In addition, the Applicant has not provided any evidence that its purposes are aimed at providing benefits that would meet an established need for the Wellington community.
23. On the contrary, the Applicant has stated that Wellington has turned “from a dull administrative centre into a city that today boasts more restaurants per capita than New York, is home to a national museum associated with cutting-edge excellence across the world and has a stadium that would be the pride of a city of a million inhabitants”. Its purposes can therefore be distinguished from those considered by the Court in *Re Tennant*.
24. As set out earlier, one of the Applicant’s main purposes is to “market” Wellington as a “destination for shopping, leisure, entertainment and events” (clause 4.2(a)) and “further enhance the recognition of Wellington and give support to the Wellington Region as a key and desirable visitor destination” (clause 4.2(c)). Although the Applicant’s letter refutes that its main purpose is tourism, it propounds the merits of marketing Wellington in New Zealand and abroad as a tourist destination. In a recent Canadian case, tourism was held not to be charitable because it primarily promotes the interest of individual tourist operators.¹⁰

Public or private benefit

25. 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.¹¹ In addition, proof that public benefit will necessarily flow

⁹ [1996] 2 NZLR 633, 640.

¹⁰ *Travel Just v. Canada (Revenue Agency)* 2006 FCA 343, [2007] 1 CTC 294 (Permission to appeal refused by the Supreme Court of Canada in *Travel Just v Canada Revenue Agency*, 2007 CanLII 15983 (C.S.C.))

¹¹ *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.

from each of the stated purposes is required, not merely a belief that it will or may occur.¹²

26. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*, the Chancery Division specified the conditions for public benefit to be charitable at law:

*"To fall within the fourth category, it is necessary (but not sufficient) that the object is of general public utility. The public to be benefited for this purpose may be a section of the public and this includes the inhabitants of an area such as Oldham. The object must be to promote a purpose beneficial to the community, and not to the interests of individual members of the community. But an object may nonetheless be charitable as beneficial to the community though its fulfilment either directly or indirectly incidentally may benefit such individuals."*¹³

27. In that case, the Court decided that the public benefit requirement was not met because:

*"..the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote."*¹⁴

28. Similarly, in *Travel Just v Canada (Canada Revenue Agency)*, the Canadian Federal Court of Appeal considered that the entity would not meet the requirement of the public benefit test because it would benefit individuals. The Court stated:

*"In addition, the creation and development of model tourism development projects with the characteristics described above could include the financing and operation of luxury holiday resorts in developing countries. Promoting commercial activity of this kind, with a strong flavor of private benefit, is not a purpose beneficial to the public which would make Travel Just eligible for a subvention from Canadian taxpayers as a charity."*¹⁵

29. The Commission is of the view that clauses 4.2(a) – (e) of the Applicant's Trust Deed indicate that the Applicant's main purpose could provide private benefit to the commercial sector and to tourist operators.

¹² *Gilmour v Coates* (1949) AC 26; see also Dal Pont, *Charity Law in Australia and New Zealand*, Oxford University Press, 2000 at 175 where he wrote:

Whether the relevant criterion is defined as public benefit or beneficial to the community, the court does not assume or presume its existence as in the case of the other head of charity – the benefit in issue must be affirmatively proved or clear to the court. In other words, the word "beneficial" requires independent examination after the purposes and the beneficiaries have been ascertained.

¹³ (1996) 69 Tax Cases 231, 250.

¹⁴ (1996) 69 Tax Cases 231, 251.

¹⁵ 2006 FCA 343, [2007] 1 CTC 294.

Section 61B of the Charitable Trusts Act

30. 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 will operate to "save" a trust that has charitable and "*non-charitable and invalid*" purposes.
31. Section 61B can apply in cases where the entity's stated purposes include non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"); or where the stated purposes are capable of a charitable or a non-charitable interpretation (in which case the purposes would be deemed to apply only in terms of the charitable interpretation).¹⁶
32. In both instances, the trust's purposes would need to be substantially charitable in nature for section 61B to operate to "save" the trust as a valid charitable trust.¹⁷
33. In the current case, the Commission does not consider that the Applicant has substantially charitable purposes and therefore section 61B of the Charitable Trusts Act 1957 cannot operate to validate the trust.

Charities Commission's determination

34. The finding of the Commission is 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

15/6/09
Date

¹⁶ *Re Ashton (deceased)* [1955] NZLR 192, 197; *Re Beckbessinger* [1993] 2 NZLR 362, 373.

¹⁷ *Re Ashton (deceased)* [1955] NZLR 192, 205; *Re Pettit* [1988] 2 NZLR 513, 543; *Re Howey* [1991] 2 NZLR 16, 21; *Re Beckbessinger* [1993] 2 NZLR 362, 374; *Re Collier (deceased)* [1998] 1 NZLR 81, 97.