

Registration decision: The Christchurch Heritage Trust

The facts

1. The Christchurch Heritage Trust (the Applicant) was created on 19 November 1996, and was incorporated as a board under the *Charitable Trusts Act 1957* on 20 November 1996.
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 June 2008.
3. The Applicant's objects are set out in clause 4 of the Trust Deed:

"4. OBJECTS

- 4.1 *The object for which the Trust is established is (within New Zealand) the retention and protection of heritage and character buildings, places and objects in the Christchurch metropolitan area*

PROVIDED THAT the Board shall not be obliged to carry out all the aforesaid objects at any one time and which objects to the exclusion of any one or more of the other are undertaken by the Board at any time shall be at the Board's complete and uncontrolled discretion

- 4.2 *The Board shall have the power to carry out the objects in such manner and in such ways as from time to time it shall see fit at its complete and uncontrolled discretion and shall not be bound to see to the application of any moneys or property paid or applied for such purpose"*

4. The Commission analysed the application for registration and on 24 February 2009, sent the Applicant a letter requesting further information about the activities undertaken under clause 4.1 of the Trust Deed. Information was also sought about which buildings in Christchurch the fund had been applied to and how often such buildings were open to the public.
5. The Applicant responded on 19 March 2009 stating that it carries out a range of activities that:
 - "1. *Educate heritage building owners through drawing on its own experiences, of how to undertake the restoration of their own buildings*
 2. *Promotes the need for heritage protection to the general public through:*
 - *Presentations to various Organisations, Clubs etc*
 - *Purchasing and installing Heritage Plaques on notable Heritage Buildings*
 - *Participation in heritage building promotion activities*

3. *Lead by example in purchasing significant heritage buildings and using these as both models and experimentation in restoration methods*
4. *Assist other Trusts and Private Building Owners through*
 - *Providing Loan monies/bridging finance to enable heritage building projects to be completed i.e. Riccarton Park Teahouse*
 - *Providing small grants to Organisations for their heritage projects*
 - *Investigating and arranging for fire warning/suppression systems to be installed in unique old wooden heritage/character buildings – e.g. Cramner Bridge Club, Avon Boat Shed*
5. *Raise the awareness of the younger generation by providing an annual heritage building directed Scholarship through both Lincoln and Canterbury Universities*
6. *Participate in Heritage Week through providing Sponsorship, awards, advertising*
7. *Act as an advocate for heritage building issues through*
 - *Submissions to the Christchurch City Council on its heritage policy*
8. *Undertake research into more cost effective means of enabling heritage buildings to be upgraded to meet the provisions of the Building Code through*
 - *Collaborating with Canterbury & Auckland Universities in studies/projects to provide modern alternative methods and materials to strengthen heritage buildings ...*

It should be noted that it is not the policy of the Trust to be a landlord, but only to keep buildings until they are restored and are commercially viable in their own right, thus ensuring they remain as part of Christchurch's Heritage building stock for others to enjoy.

In summary the Trust carries out a wide ranging programme of heritage type activity which it believes is essential if the heritage fabric of Christchurch is to remain and falls within the definition of a "charitable entity".

To this end it provides "public Benefit" in saving heritage buildings (while the buildings are not open to the public, such as a Museum whilst in the Trusts ownership "open days" were arranged and tours for specific groups arranged. As taverns, restaurants etc the public were free to enter the premises in normal trading hours to take advantage of the facilities offered) and advances "education" through scholarships, participation in heritage week activities, presentations etc".

6. The Commission analysed this information and on 17 July 2009, sent the Applicant a notice that may lead to a decline on the basis that the purposes in clause 4.1 were so wide as to provide for non-charitable activities. Furthermore, the Commission considered that the Applicant could provide private pecuniary profit to individuals through loans and small grants to commercial owners.
7. The Applicant responded to the notice on 20 August 2009, making the following submissions:

- (1) The Applicant provides public benefit through:
 - (i) signage – heritage plaques being installed on heritage classified buildings;
 - (ii) education – addressing interested groups on the importance of heritable buildings to Christchurch;
 - (iii) tourism – Christchurch residents benefit from tourists wanting to visit and photograph heritage buildings;
 - (iv) advocacy – making submissions on resource consent applications for the demolition or alteration of a heritage or character building.

- (2) In any of the heritage buildings the Applicant has been associated with there has been the following public access:
 - (i) commercial – Excelsior Tavern, Café and Backpackers – the public have the right of entry as they would to any tavern, café or backpackers
 - (ii) retail – Smith’s Bookshop – the public have access to the bookshop during normal retail shopping hours as they would with any other shop in the central city
 - (iii) community – Riccarton Teahouse

With the co-operation of the owners or occupiers the Applicant has made special arrangements for public viewing on restoration completion of a building project or during Heritage Week.

- (3) Loans are made to organisations to help them to carry out operations before more deterioration can occur (Riccarton House) and are of a bridging finance nature. The loans are made at an interest rate equivalent to that the Applicant would have received had it kept the money in the bank

- (4) Grants are made to help building owners protect their buildings against fire (Bridge Club), water damage or other causes that may see the building destroyed or deteriorated beyond saviour.

The issues

8. 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.

The law on charitable purpose

9. 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.
10. 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.
11. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
12. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the Applicant's activities at the time the application was made, the Applicant's proposed activities, and any other information that the Commission considers relevant.

Relevant cases

13. In *Re Verrall*², the Court held that promoting the permanent preservation of buildings for the benefit of the nation was a charitable purpose.
14. Similarly in *Re Bruce*³, the Court of Appeal held that the purposes of afforestation, and the making of domains or national parks in New Zealand were charitable. The Court concluded that these objects were required to have an overriding public benefit. In particular, Hosking J considered whether enhancing private land could be a charitable purpose. He concluded that:

"If the land were sold the buyer might decline to go on with the system, or he might cut down the trees that had grown. It is difficult to conceive by what method of covenant or bargain the successive owners of private land or the land itself could be bound by an obligation to maintain the requisite course of management for the future."

Approach of the United Kingdom's Charity Commission

15. The Charity Commission for England and Wales will only consider organisations set up for preservation purposes to be charitable if they can demonstrate that:

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

² [1916] 1 Ch 100.

³ [1918] NZLR 16, 32.

- there is independent expert evidence that the building or site is of sufficient historical or architectural interest;
- the building or site is not used for non-charitable purposes;
- sufficient public access is provided to the building or site;
- any private benefit to individuals is incidental.⁴

Charities Commission's analysis

16. The Commission considers that the purposes set out in clause 4.1 do not indicate an intention to relieve poverty or advance religion. These purposes have therefore been considered in relation to the advancement of education and "any other matter beneficial to the community".

Advancement of education

17. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced. Education does not include advertisements for particular goods or services or the promotion of a particular point of view.⁵
18. The Applicant has indicated that it is carrying on some activities that are likely to advance education, such as providing scholarships for students at Lincoln University and the University of Canterbury, involving students in heritage weeks, and undertaking research in collaboration with the University of Canterbury and the University of Auckland. The Commission considers that these activities are likely to be charitable under the advancement of education and will provide sufficient public benefit.
19. Other activities, such as educating heritage building owners on how to undertake restoration on their own buildings, may also amount to advancing education, but may not provide sufficient public benefit to be considered charitable.

Other matters beneficial to the community

20. 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 *Charitable Uses Act 1601* (Statute of Elizabeth). 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

⁴ <http://www.charity-commission.gov.uk/publications/rr9.asp> (accessed 17 July 2009).

⁵ *In re Shaw (deceased)* [1957] 1 WLR 729; as interpreted in *Re Hopkins' Will Trusts* [1964] 3 All ER 46. See also *Re Collier* [1998] 1 NZLR 81.

- 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.⁶

21. In *Travis Trust v Charities Commission*⁷, Joseph Williams J noted that:

“... 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.”

22. As mentioned above, in *Re Verrall*⁸ the court held permanent preservation of buildings for the benefit of the nation to be a charitable purpose.

23. The Commission has considered information provided by the Applicant about its restoration activities. The Commission has been unable to identify any particular requirement that the buildings that the Applicant helps to restore must be permanently preserved for the public, and the Applicant has not provided any evidence of such a requirement. The Commission therefore considers that the purpose set out in clause 4.1 does not meet the requirement of permanent preservation set out in *Re Verrall*.⁹

24. The Applicant has indicated that public access to the commercial, retail, and community buildings that it has been associated with is the same as that which would be available to any shop, tavern, café or backpackers.

25. While there may be limited public access to some of the buildings that the Applicant has been associated with, the Commission does not consider that the purpose set out in clause 4.1 limits assistance to those heritage buildings which are permanently preserved for the benefit of the nation. Therefore, this is not a charitable purpose under “any other matter beneficial to the community”.

⁶ *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.

⁷ CIV-2008-485-1689, High court, Wellington, 3 December 2008 (Joseph Williams J.) at para 20.

⁸ [1916] 1 Ch 100.

⁹ [1916] 1 Ch 100.

Public or private benefit

26. 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
27. In *Re Bruce*¹², the Court of Appeal held that the purposes of afforestation, and the making of domains or national parks in New Zealand were charitable. The Court concluded that these objects were required to have an overriding public benefit. In particular, Hosking J considered whether enhancing private land could be a charitable purpose. He concluded that:
- "If the land were sold the buyer might decline to go on with the system, or he might cut down the trees that had grown. It is difficult to conceive by what method of covenant or bargain the successive owners of private land or the land itself could be bound by an obligation to maintain the requisite course of management for the future."*
28. The Applicant has advised that it assists the owners of heritage buildings by providing education, and financial assistance in the form of grants and loans.
29. The Applicant stated, in its response of 20 August 2009, that it makes "loans at interest rate equivalent to that the Trust received had it kept the money in the bank". This is likely to be at least 2% less than the interest rate which would be charged by a bank or other lender.
30. This situation is not dissimilar to that of *Hadaway v Hadaway*.¹³ In that case, a testator by his will bequeathed the residue of his personal estate upon trust for the purpose of establishing and founding a bank, the object of which was to be primarily to assist the planters and agriculturalists of St Vincent (Windward and Leeward Islands) by way of loans at a low rate of interest. The Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable.¹⁴ In that case, the court held that any eventual benefit to the community was too remote:

"The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a

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 Coates* (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 [1918] NZLR 16, 32.

¹³ [1955] 1 WLR 16 (PC).

¹⁴ [1955] 1 WLR 16, 19.

*loan to an individual planter and any benefit to the community the gift 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.*¹⁵

31. For the above reasons, the Commission considers that where the Applicant is providing education or financial assistance to the owners of heritage buildings, there may be an opportunity for the owners of the property to receive a private benefit. For example, a direct benefit could accrue to the owners by way of a reduction in their maintenance costs or the owners could benefit upon sale of the property from any increase in value resulting from enhancements funded by the Applicant.

Conclusion

32. The Commission concludes that while some charitable activities may be carried out by the Applicant, the purposes set out in clauses 4.1 are not restricted to those which would be considered to be charitable.

Section 61B of the Charitable Trusts Act

33. 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. However, section 61B of the Charitable Trusts Act 1957 can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes.
34. 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).¹⁶
35. The Commission considers that the particular purpose stated in clause 4.1 is non-charitable for the reasons given above. If the purposes in clauses 4.1 were "blue-pencilled out", the Applicant would be left with no specific purpose. The Commission therefore concludes that the Applicant does not have substantially charitable purposes.
36. In *Re Beckbessinger*¹⁷, 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, s 61B can be used to save it. The testator must be shown to have had a

¹⁵ [1955] 1 WLR 16, 20.

¹⁶ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

¹⁷ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

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."

37. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities and considers that these do not 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 considers that the Applicant's purposes do not indicate an intention to create a substantially charitable trust.
38. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the *Charitable Trusts Act 1957* cannot operate to validate the trust.

Charities Commission's determination

39. 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

15/12/09
Date