IN THE COURT OF APPEAL OF NEW ZEALAND

CA308/2014
[2015] NZCA 449

BETWEEN	THE FOUNDATION FOR ANTI-AGING RESEARCH First Appellant
	THE FOUNDATION FOR REVERSAL OF SOLID STATE HYPOTHERMIA Second Appellant
AND	THE CHARITIES REGISTRATION BOARD Respondent

Hearing:	3 September 2015
Court:	Randerson, Wild and Winkelmann JJ
Counsel:	S D Barker for Appellants D Harris for Respondent
Judgment:	21 September 2015 at 10:30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] This appeal arises from an interlocutory judgment of the High Court in the context of appeals brought by the appellants under the Charities Act 2005 (the Act).[1]

[2] The first appellant is The Foundation for Anti-Aging Research (FAAR). The second is The Foundation for Reversal of Solid State Hypothermia (FRSSH). Both are entities established by deed and incorporated under the Charitable Trusts Act 1957. The respondent (the Board) refused applications by each of the appellants for registration as a charitable entity under the Act. This led to both appellants filing appeals to the High Court under s 59 of the Act.

[3] The appellants sought interlocutory orders in the High Court for leave:

(a) To adduce further evidence on appeal;

(b) To call evidence orally; and

(c) To cross-examine an analyst from the Department of Internal Affairs (the department responsible for administration of the Act).[2]

[4] Williams J granted leave to the appellants to adduce additional evidence in limited respects but otherwise declined to make the orders sought. On appeal, Ms Barker focused her argument for the appellants on the refusal to order an oral hearing. She submitted that ss 59 and 61 of the Act and/or Part 20 of the High Court Rules (HCR) permitted an oral hearing of an appeal in appropriate cases. This was, she said, such a case.

[5] The appellants' written submissions did not attempt to challenge the High Court's refusal to allow further evidence beyond the limited extent granted. Ms Barker was not in a position to advance any oral submissions on this point at the hearing of the appeal although she offered to file further submissions if we required them. We do not propose to allow a challenge to the extent of further evidence

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1 *The Foundation for Anti-Aging Research v The Charities Registration Board* [2014] NZHC 1153 [High Court judgment].

2 Other orders were sought which are no longer at issue.

permitted by the High Court. If the appellants had wished to advance this point they have had ample time to do so. Ms Harris for the Board properly advised us that she had not prepared any argument on this issue since the appellants had not dealt with it in their submissions. We record that the appellants filed a further extensive affidavit in the High Court by Mr B P Best, a director of The Life Extension Foundation of Florida. The affidavit was sworn on 3 September 2014 after the judgment under appeal was delivered. If the appellants wish to adduce this evidence in support of their appeal to the High Court, this issue will need to be resolved in that Court.

[6] Ms Barker confirmed the appellants did not seek to challenge the High Court's decision declining permission to cross-examine the Department of Internal Affairs analyst.

[7] Thus the sole question for consideration is whether ss 59 and 61 of the Act and/or the HCR permit an oral hearing of an appeal to the High Court under the Act.

Background

[8] Prior to the passage of the Act, charitable status at common law was recognised on a case by case basis by analogy with previous common law decisions falling generally within the "spirit and intendment" of the preamble to the Statute of Charitable Uses 1601 (UK) 43 Eliz I c 4.[3] Since charitable status may permit a trust or other entity to enjoy the benefit of exemptions under income tax legislation, New Zealand authorities prior to the Act have generally arisen in the course of disputes with the Commissioner of Inland Revenue under tax legislation.[4]

[9] Under the Act, registration as a charitable entity may be sought under Part 2. In order to qualify for registered charitable status, an entity must meet the criteria in s 13 of the Act. A trust must be of a kind in which income is derived by the trustees in trust for charitable purposes.[5] The concept of charitable purpose is defined by s 5 of the Act which relevantly provides:

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3 *Re Greenpeace of New Zealand Inc* [2015 NZSC 105, [2015] 1 NZLR 169 at [18].

4 See for example *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) and *Latimer v Commissioner of Inland Revenue* [2002] 1 NZLR 535 (HC).

5 Charities Act 2005, s 13(1)(a).

> **5 Meaning of charitable purpose and effect of ancillary non-charitable purpose**
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> (1) In this Act, unless the context otherwise requires, **charitable purpose** includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
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> …
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> (3) To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
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> (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
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> (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
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> (b) not an independent purpose of the trust, society, or institution.

[10] The majority of the Supreme Court in *Re Greenpeace* held that the Act builds on the pre-existing common law understanding of charitable purpose.[6] Case law on that topic remains appropriate to guide the interpretation and application of s 5.[7] Ms Barker accepted that the appellants were required to establish that:

> (a) The income derived from their activities is or would be exclusively for charitable purposes;[8] and
>
> (b) Their purposes are beneficial to the community or a sufficient section of it.

[11] The Board's determination in relation to FAAR was given on 18 July 2013. It was summarised in these terms:

> 3. The Board has determined that the Foundation is not qualified to be registered as a charitable entity under the *Charities Act 2005* (the Act). The Board considers that the Foundation has an independent (non-ancillary)

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6 At [12].
7 At [12] and [17].
8 Except to the extent that any non-charitable purpose is merely ancillary to a charitable purpose.

> purpose that is not charitable at law, contrary to the registration requirements set out in section 13 of the Act and case law. We consider that the Foundation pursues an independent purpose to fund cryonics research (research into the cryopreservation and reanimation of people). This purpose does not advance education and or any other purpose that is charitable at law. Further, we are also not satisfied that the Foundation's purposes provide sufficient public benefit, which is a requirement for charitable status.
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> (footnotes omitted)

[12] An identical finding was made on the same day in respect of the application for registration by FRSSH.

The legislative processes under the Act

[13] The Board established under the Act has, amongst other things, functions, duties and powers relating to the registration and de-registration of charitable entities.[9] The Board is permitted to delegate its functions to the Chief Executive or any member of the Board.[10] The receipt and processing of applications for registration is conferred explicitly upon the Chief Executive.[11] An application for registration must be made in the prescribed form and must be accompanied by a copy of the rules of the entity seeking registration.[12] There are certain other formal requirements to be met but it is not in dispute that the application form itself is essentially a box-filling exercise with little substantive content. Rather the main focus of the Board at the initial stage is on the applicant's purposes as revealed by its rules.

[14] As soon as practicable after receiving a properly completed application for registration, the Chief Executive must consider whether the entity qualifies for registration.[13] The Chief Executive may request that further information or documents be supplied by the applicant.[14] Section 18(3) sets out the critical obligations imposed upon the Chief Executive:

> (3) In considering an application, the chief executive must—

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9 Charities Act 2005, s 8(3).
10 Charities Act, s 9(1).
11 Charities Act, s 10(c).
12 Charities Act, s 17.
13 Charities Act, s 18(1).
14 Charities Act, s 18(2).

(a) 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; and

(b) observe the rules of natural justice; and

(c) give the applicant—

(i) notice of any matter that might result in its application being declined; and

(ii) a reasonable opportunity to make submissions to the chief executive on the matter.

[15] After considering an application, the Chief Executive must recommend to the Board that it either grants or declines the application.[15] If the Board is satisfied the entity qualifies for registration, it must grant the application and direct the Chief Executive to register the entity.[16] No formal process is prescribed for the Board to follow when granting or declining the application but before declining an application the Board must be satisfied the Chief Executive has complied with s 18(3).[17] If the Board is not satisfied that an entity is qualified to be registered, the Chief Executive must notify the entity of the Board's decision and the reasons for it.[18]

The process followed in this case

[16] The record of the process followed in respect of the applications for registration by the appellants shows it extended over a period of more than 18 months from the time the applications were made in late 2011 to the time the decisions were made declining the applications in July 2013. The record shows there was extensive correspondence between the Charities Commission (as it was then described) and the appellants.

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15 Charities Act, s 19(1).
16 Charities Act, s 19(2).
17 Charities Act, s 19(3) and (5).
18 Charities Act, s 19(4).

[17] On 26 April 2012, FRSSH was advised that its application might be declined. The reasons given were the lack of acceptance by the mainstream scientific community as to the feasibility of cryonic reanimation; the low public uptake over the last 45 years; the lack of evidence to show that its purposes were charitable; the high costs associated with the process of cryonics; and the lack of evidence of sufficient public benefit. Soon afterwards,[19] FAAR was requested to provide further information so the Commission could be satisfied that FAAR's activities were exclusively charitable.

[18] In response to these requests, both FAAR and FRSSH responded at length by letter. Each attached a number of documents. These materials focused on the proposed activities and purposes of both entities and the issue of public benefit. The correspondence continued. The Commission maintained the view that the appellants' purposes were not exclusively charitable and did not provide sufficient public benefit to qualify for registration.

[19] On 28 May 2013 the appellants each separately submitted extensive further information and analysis in support of their applications. This included a lengthy letter from a firm of United States attorneys attaching a list of relevant scientific journal papers and other exhibits. In addition, some seven affidavits were provided by research scientists, scientific officers and executives involved in activities of entities relevant to the appellants' purposes. These were directed to the nature of research being conducted; the extent to which the research was accepted in the scientific community; and the public benefits that could be expected from research to be undertaken using funding provided by the appellants. The affidavits were lengthy and detailed. They attached a great many documents in support.

[20] We were told that, in practice, an oral hearing is not accorded. Rather, the process involves the Chief Executive providing a report and recommendation to the Board which then considers the application and issues a formal decision in writing. In the present case, the Chief Executive provided to the Board an extensive report covering legal and factual issues along with a recommendation that the applications be declined. The Board considered these reports and issued decisions which we

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[19] On 9 May 2012.

were told were substantially in the terms contained in the Chief Executive's reports and recommendations.[20] In each case, the decisions run to 32 pages. They are expressed in substantially similar terms given the common nature of the entities concerned and the charitable purposes for which they sought registration.

The right of appeal

[21] A person aggrieved by a decision of the Board under the Act may appeal to the High Court. The right of appeal is conferred by s 59(1) in these terms:

> **59 Right of appeal**
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> (1) A person who is aggrieved by a decision of the Board under this Act may appeal to the High Court.

[22] The remaining parts of s 59 are procedural in nature. The powers available to the High Court in considering the appeal are set out in s 61:

> **61 Determination of appeal**
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> (1) In determining an appeal, the High Court may—
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> (a) confirm, modify, or reverse the decision of the Board or the chief executive or any part of it:
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> (b) exercise any of the powers that could have been exercised by the Board or the chief executive in relation to the matter to which the appeal relates.
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> (2) Without limiting subsection (1), the High Court may make an order requiring an entity—
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> (a) to be registered in the register of charitable entities with effect from a specified date; or
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> (b) to be restored to the register of charitable entities with effect from a specified date; or
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> (c) to be removed from the register of charitable entities with effect from a specified date; or
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> (d) to remain registered in the register of charitable entities.
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> (3) The specified date may be a date that is before or after the order is made.
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> (4) The High Court may make any other order that it thinks fit.

[20] The report and recommendations of the Chief Executive were not before us.

(5) An order may be subject to any terms or conditions that the High Court thinks fit.

(6) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

[23] The provisions for appeals in the Act are supplemented by Part 20 of the HCR. With specified exceptions not relevant for present purposes, Part 20 applies to all appeals to the High Court under any enactment.[21] It applies subject to any express provision in the enactment under which the appeal is brought.[22] Part 20 prescribes rules for the filing of a notice of appeal and the contents of any such notice. With the exception of appeals under the Commerce Act 1986 the notice of appeal must not name the decision-maker as a respondent.[23] However, the decision-maker is entitled to be represented and heard at the hearing of an appeal on all matters arising in it unless the decision-maker is a District Court or the Court orders otherwise.[24]

[24] Rule 20.18 provides that appeals are by way of rehearing. The Supreme Court has confirmed in relation to general appeals such as that conferred by s 59 that the appeal is usually conducted on the basis of the record of the court or tribunal appealed from.[25] There may be exceptions to this general approach which we discuss in more detail below.

[25] Rule 20.16 is of particular relevance to this appeal since it deals with the Court's power to permit an appellant to adduce further evidence on appeal:

20.16 Further evidence

(1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.

(2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.

(3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the

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21 High Court Rules [HCR], r 20.1(1).
22 HCR, r 20.1(3).
23 HCR, r 20.9(2) and (3)(a).
24 HCR, r 20.17.
25 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4].

evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.

(4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[26] Key points regarding this rule are that, except in relation to interlocutory applications, a party may adduce further evidence only with the leave of the Court. The Court's power to permit further evidence may be exercised only if there are special reasons for doing so. Any further evidence permitted under this rule must be given by affidavit unless the court directs otherwise.

[27] Finally, the powers of the Court on an appeal under Part 20 are prescribed by r 20.19. These powers are available to the extent they are not inconsistent with the powers specified in s 59 of the Act:

20.19 Powers of court on appeal

(1) After hearing an appeal, the court may do any 1 or more of the following:

(a) make any decision it thinks should have been made:

(b) direct the decision-maker—

(i) to rehear the proceedings concerned; or

(ii) to consider or determine (whether for the first time or again) any matters the court directs; or

(iii) to enter judgment for any party to the proceedings the court directs:

(c) make any order the court thinks just, including any order as to costs.

…

The judgment in the High Court

[28] Williams J rejected the appellants' argument that ss 59 and 61 of the Act effectively ousted the regime for the introduction of further evidence under r 20.16.[26] Particular reliance had been placed by the appellants on s 61(4) in terms of which the

[26] High Court judgment, above n 1, at [41].

Court may make any order it thinks fit. The Judge interpreted s 61(4) as expanding the list of possible outcomes available under subss (1) and (2) "probably consequentially or for ancillary purposes".[27] It was, the Judge thought, designed to allow the Court the widest possible scope to do what was necessary in light of the substantive conclusions reached by the Court. In the Judge's view, it related to the disposition of the appeal and did not address appeal procedure. As such, it did not displace the express wording of r 20.16.

[29] The Judge then carefully reviewed a range of High Court judgments dealing with the correct approach to an application to adduce further evidence under r 20.16.[28] Williams J also referred to two judgments of this Court in competition cases.[29] To the extent necessary, we will discuss these cases below. The Judge's conclusions may be summarised in these terms:[30]

(a) The authorities were clear there was no general right to a de novo hearing arising from the nature of the particular procedure adopted by the statutory decision-maker at first instance.

(b) Nevertheless, more targeted evidence would be admitted on appeal either on the "usual grounds" or for more general reasons of fairness to the appellant.

(c) Updating evidence would be allowed but only where it was necessary for the court to consider that material in order to properly address the appeal. Other categories might include cases where the appellant was taken by surprise by findings or reasons not traversed with the applicant by the statutory decision-maker or in order to correct a clear mistake.

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27 At [41].

28 *Canterbury Development Corp v Charities Commission* [2010] 2 NZLR 707 (HC); *Re Education New Zealand Trust* (2010) 24 NZTC 24,354; *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC); *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC); *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC); and *Re New Zealand Computer Society* (2011) 25 NZTC 20-033.

29 *Telecom v Commerce Commission* [1991] 2 NZLR 557 (CA) and *Commerce Commission v Woolworths* [2008] NZCA 276, (2008) 8 NZBLR 102,336.

30 High Court judgment, above n 1, at [58]–[60].

(d) In cases where the decision at first instance was in the nature of an informal inquisitorial process without a hearing, the court might adopt a more liberal approach towards the introduction of further evidence on appeal.

[30] The Judge expressed his final conclusion on the point in these terms:

> Thus, as Heath J put it in *Greenpeace*,[31] within the bounds of an appeal process that is generally based on the record at first instance, the Court will be guided by the "interests of justice" in considering whether exceptions ought properly to be made. That is not relaxing the r 20.16 test. Rather, it is applying that test in the particular statutory context of each case.

[31] After dealing specifically with the particular items of evidence the appellants had sought to adduce, the Judge briefly addressed the grounds advanced by the appellants for seeking an oral hearing.[32] The Judge said much of the force of that application was lost given his finding that there was no right to a de novo hearing. However, he added that the material before the Court (supplemented by the additional material he allowed to be adduced) was perfectly capable of speaking for itself; allowing the witness to support this material with oral evidence was both unnecessary and likely to turn the process into a de novo hearing which was not permitted; and although there were disputed questions of fact, no issue of credibility arose.

[32] Finally, the Judge observed that if, on hearing the appeal, the Court considered factual issues had arisen that needed to be resolved in order to dispose of the matter, the Court had the power to send the application back to the Board for fresh consideration.

The appellants' arguments on appeal

[33] Ms Barker clarified that the appellants did not contend there was a right to an oral hearing in all appeals under s 59 of the Act. Rather, she submitted that the High Court on appeal had a discretion to order an oral hearing in appropriate cases. An oral hearing would entail the calling of evidence and cross-examination as if the

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31 *Re Greenpeace*, above n 28, at [32]–[33].

32 High Court judgment, above n 1, at [64]–[69].

appeal were a trial. Ms Barker accepted that in most cases, the iterative process for consideration of applications for charitable status by the Board worked well but there were particular cases, especially where new types of charitable purpose were at issue, which would benefit from a more extensive hearing of evidence on appeal.

[34] There were a number of factors Ms Barker relied upon to support her submission. These were that the charitable sector was important to New Zealand society;[33] the stakes were high for an applicant for registration since the existence or otherwise of charitable status could be critical to the entity's survival; the Court should adopt a flexible approach to appeals under s 59 having regard to these factors and to the wide powers of the Court to make such orders as it considered fit in terms of s 61(4) of the Act.

[35] While accepting the Board had, in the case of the appellants, complied with its obligations under s 18(3)(c) of the Act, natural justice considerations could in some cases require an oral hearing on appeal in order to "get to the bottom" of the issues.[34] This was so given the inquisitorial nature of the Board's processes and the absence of an oral hearing at first instance. Other factors warranting an oral hearing included the correction of factual error or other obvious mistakes and updating evidence (for example, new science or research projects relevant to the inquiry).

[36] Ms Barker also drew our attention to changes brought about by the Act in the way charitable status issues are dealt with. She submitted that prior to the introduction of the Act, charities were entitled to a full hearing under the Tax Administration Act 1994. As well, the Charities Bill had originally provided for appeals to the District Court which would have allowed an oral hearing under the District Court Rules at the time. But the appeal provisions were altered at a late stage of the Parliamentary process to provide for appeals to the High Court. She submitted Parliament could not have intended to make such a substantial change unless expressed in clear language. She said Parliament had not given reasons for making the change.

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[33] As recognised in s 3(b) of the Charities Act which provides that one of the purposes of the Act is to encourage and promote the effective use of charitable resources.

[34] Noting that under s 18(3)(b) the chief executive must observe the rules of natural justice.

[37] Finally, Ms Barker relied on the Supreme Court's judgment in *Austin, Nichols* for the proposition that, in exceptional cases, an oral hearing is permissible.[35]

Discussion

[38] The starting point for our consideration of the appellants' argument must be the Act in the form in which it was enacted and the provisions of Part 20 of the HCR. We agree with Williams J that there is nothing in the Act to support the proposition that an appellant under s 59 of the Act is entitled to an oral hearing and nothing to suggest that the High Court has a discretion to order a de novo hearing in appropriate cases.

[39] Section 59 merely confers a right of appeal to the High Court by a person aggrieved by a decision of the Board. It says nothing about the nature of the hearing to be conducted on appeal. Similarly with s 61 which specifies the powers available to the High Court upon the determination of the appeal. These powers are to confirm, modify or reverse all or part of the Board's decision or to exercise any of the powers that could have been exercised by the Board or the Chief Executive. We also agree with Williams J that the power under s 61(4) for the High Court to make "any other order that it thinks fit" is intended to confer power to make any consequential or ancillary orders the Court may consider to be appropriate upon the determination of the appeal. Section 61(4) is not directed to procedural issues nor intended to oust or override the procedural provisions of the HCR.

[40] The right of appeal under s 59 is plainly a right of general appeal. As such, it is to be determined by way of rehearing in terms of r 20.18 of the HCR. As the Supreme Court has confirmed in *Austin, Nichols*, an appeal of this nature is generally conducted on the record of the court or tribunal appealed from.[36] Ms Barker relied on the Supreme Court's statement that the general rule may not apply where:[37]

> … exceptionally, the terms in which the statute providing the right of appeal is expressed indicate that a de novo hearing is envisaged.

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35 *Austin, Nichols*, above n 25, at [4].
36 Ibid.
37 Ibid.

[41] By way of example, the Supreme Court referred to the decision of this Court in *Shotover Gorge Jet Boats Ltd v Jamieson*.[38] Ms Barker relied on this to support her argument but we are satisfied that the case is plainly distinguishable having regard to the terms of the statute conferring the right of appeal and the rules of the District Court which had jurisdiction to determine the appeal at issue. The *Shotover Gorge* case was concerned with the grant of concessions to operate commercial jetboats on the Shotover River. The Lakes District Waterways Authority had statutory authority to make bylaws granting such concessions. Although it was not obliged to conduct a hearing, it had in fact permitted a full public hearing. The empowering legislation permitted a right of appeal to the District Court. Crucially, the legislation provided that:[39]

> For the purposes of hearing the appeal the Court shall have all the powers vested in it in its civil jurisdiction.

[42] On the facts, the Court had no difficulty in concluding that the legislation required a full rehearing de novo.[40] The fact that the empowering legislation conferred upon the District Court all the powers vested in it in its civil jurisdiction was a central factor in this Court reaching its conclusion. A full hearing of oral evidence was to be granted if any party so insisted. That followed because an oral hearing is the normal way in which the District Court exercises its civil jurisdiction.[41] It was nevertheless open to the parties to agree that all or part of the evidence taken at first instance should be treated as evidence for the purposes of the District Court hearing.

[43] In contrast, there is nothing in the Act in the present case to suggest that a full rehearing de novo is required or permitted as a matter of discretion. The provisions of Part 20 clearly point to a rehearing on the record with only limited scope for additional evidence. In the absence of any direction to the contrary under the Act, Part 20 of the HCR applies. Rule 20.16 in particular restricts the scope of any further evidence on appeal to cases where there are special reasons to do so. Even where further evidence is permitted, it is to be given by affidavit unless the Court

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38 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437 (CA).
39 Lakes District Waterways Authority (Shotover River) Empowering Act 1985, s 5(2).
40 *Shotover Gorge*, above n 38 per Cooke P at p 441; Casey J at p 442 and per Bisson J at p 444.
41 Per Cooke P at p 440.

otherwise directs. These provisions make it plain that the usual rule confining the appeal to the record in the court or tribunal at first instance is to apply with only limited power to permit further evidence to be admitted.

[44] We accept Ms Barker's submission that, prior to the introduction of the Act, disputes over charitable status were usually resolved in the context of income tax legislation. Part 4A of the Tax Administration Act provides an elaborate process for determination of such dispute and, ultimately, a full hearing of the evidence is permitted either before the Taxation Review Authority or the High Court.[42]

[45] We accept too that the Charities Bill as introduced provided for a right of appeal to the District Court.[43] The Bill provided that the District Court's decision on the determination of an appeal was to be final.[44] If the Bill had proceeded in the form in which it was introduced, we accept that the District Court Rules at the time would have permitted the District Court to rehear the whole or any part of the evidence[45] and the Court would have had "full discretionary power to hear and receive further evidence on questions of fact, either by oral evidence or by affidavit".[46]

[46] However, after hearing submissions, the majority report of the Select Committee recommended changes to the appeal rights under the Bill:[47]

> The majority also considers that, given the experience of the High Court in considering matters relating to charitable entities, it would be the most appropriate forum for hearing appeals. The majority recommends amending clauses 67, 68, and 69 to give the High Court jurisdiction to consider appeals against Commission decisions, and also recommend amendments to ensure the Court has sufficient powers to appropriately consider these appeals. In addition, the majority recommends that clause 69(6) be omitted. This provision, which made the decision of the Court final, was not appropriate in our view, as the initial appeal to the High Court should not be the final resort for charities.

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42 Tax Administration Act 1994, Part 8A.
43 Charities Bill 2004 (108-1), cl 67.
44 Charities Bill 2004 (108-1), cl 69(6).
45 District Courts Rules 1992, r 560(3)(a).
46 District Courts Rules 1992, r 560(4).
47 Charities Bill 2004 (108-2) (select committee report) at 13–14.

[47] The Bill was amended to reflect these recommendations but we were not referred to any further parliamentary materials or Hansard records that might provide any further explanation of the reasons for the changes made. The most that could be inferred from the change recommended by the Select Committee is that appeals against decisions of the Board ought to be determined by the High Court because of its experience in charitable cases, with a further right of appeal beyond the High Court if necessary. We are not prepared to infer, as Ms Barker invited us to do, that Parliament may have made changes to the appeal rights originally provided in the Bill without appreciating that the High Court would have more limited powers to rehear or allow further evidence than those available in the District Court. Rather, we consider it is appropriate to assume that Parliament was aware of the effects of the changes made.

[48] Addressing the other issues raised by the appellants, we accept the general proposition that rights of appeal ought to be effective and that the court should approach its task in a way that best promotes the interests of justice. Such an approach is consistent with the general law and with the objective of the HCR of securing the just, speedy and inexpensive determination of any proceeding.[48]

[49] However, the Court must also exercise its powers in accordance with law. This necessarily includes compliance with the rules of court. The approach adopted by Part 20 of the HCR to the hearing of general appeals is designed to ensure that they are dealt with in a manner that is both just and efficient. This Court has recognised that to adopt a general policy of rehearing appeals would have major resource and institutional implications.[49] Hearing general appeals on the record of the court or a tribunal whose decision is under appeal generally achieves these objectives. Nevertheless, in prescribed circumstances, the High Court has a discretion to permit additional evidence for special reasons. Further evidence will necessarily require de novo assessment and consideration of how it affects the decision under appeal.[50] Any additional evidence is generally to be adduced by affidavit but the High Court may, in its discretion, permit otherwise if it sees fit.

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48 HCR, r 1.2.
49 *Commerce Commission v Woolworths Ltd*, above n 29, at [51].
50 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31].

[50] We are satisfied that the approach prescribed by the HCR will be effective for appeals under s 59 of the Act. In general, an applicant for registration as a charitable entity should put all relevant material before the Board at first instance.[51] As Cooke P put it in *Telecom v Commerce Commission*, the court should be alert to the danger of the first instance processes being merely a "dummy run" prior to more extensive consideration of the issues on appeal.[52]

[51] We agree there may be cases where, in order to secure the objective of a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate. The requirement for special reasons necessarily means that the exercise of discretion to adduce further evidence will usually only be exercised in exceptional circumstances but they need not be rare. Rule 20.16(3) itself gives by way of example of a special reason, evidence relating to matters that have arisen after the date of the decision under appeal where the evidence is or may be relevant. The court will be guided by the usual criteria of freshness, relevance and cogency.[53] Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.[54]

[52] There may be other circumstances which could justify the exercise of the discretion to admit further evidence such as the correction of obvious factual errors or where natural justice requires.[55] The latter might arise where, for example, the Board has taken matters into account to which the appellant did not have the opportunity to respond and which the court on appeal considers to be material to the determination of the appeal. We note in passing the existence of judicial review as an alternative means of challenging steps taken by the Board or the Chief Executive on natural justice grounds or for other procedural or legal error.[56]

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51 *Canterbury Development Corp v Charities Commission*, above n 28, at [107].

52 *Telecom v Commerce Commission*, above n 29, at 558.

53 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192; *Paper Reclaim Ltd v Aotearoa International Ltd (No 1)* [2006] NZSC 59, [2007] 2 NZLR 1; *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

54 *Telecom v Commerce Commission*, above n 29, at 558 and *Commerce Commission v Woolworths*, above n 29, at [54].

55 *Commerce Commission v Woolworths*, above n 29, at [54].

56 Charities Act, s 61(6).

[53] While we accept there may be questions of disputed fact in cases under the Act, we consider it unlikely that the High Court would be assisted on s 59 appeals by hearing oral evidence. It would only be in unusual cases that the credibility of witnesses would be at issue. That is because the record, as in this case, generally comprises the application to the Board and any accompanying documents such as the constitution and rules of the applicant, the decision of the Board and material produced by the applicant. Ms Harris advised us that s 59 appeals are not usually opposed. The Board's role is generally limited to making submissions and providing assistance to the Court.[57] In these circumstances it is unlikely the High Court would be assisted on appeal by oral evidence. Rather, a High Court has the familiar duty of assessing all the material placed before it. This is essentially an evaluative exercise. The Court considers all the evidence afresh and reaches its own independent conclusions on the issues raised.[58] No particular deference is required to the view of the first instance decision-maker but the High Court must be persuaded that the original decision was wrong.[59]

[54] Although the High Court has referred to the possibility of a more liberal approach to the admission of further evidence in High Court appeals under s 59 because there has been no hearing before the Board at first instance, we regard this as no more than a factor that may be relevant (amongst other considerations) to the exercise of the High Court's discretion to admit further evidence in a particular case.

[55] We note too that if the High Court considers there are material issues that cannot be effectively resolved in the context of the appeal, the Court has the power to remit any such issue to the Board for reconsideration.

Conclusions

[56] We are unable to discern any error in the High Court's decision in this case. We are satisfied for the reasons given there is no entitlement to an oral hearing of appeals to the High Court in cases arising under s 59 of the Act. Nor are we persuaded that the High Court has any general discretion in appropriate cases to

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57 *National Council of Women of New Zealand Inc v Charities Registration Board* [2014] NZHC 1297, (2014) 26 ¶NZTC 21-075 at [46]–[53].

58 *Austin, Nichols*, above n 25, at [5] and [16].

59 *Austin, Nichols*, above n 25, at [13].

grant a full oral hearing in the form for which the appellants contended, namely with evidence being led and rights of cross-examination as if the Court were conducting a civil trial.

[57] Appeals under s 59 of the Act proceed by way of rehearing under the HCR. The rehearing is generally to be conducted on the record of the application before the Board. Where appropriate, the High Court may grant leave for special reasons to adduce further evidence on appeal in circumstances such as those discussed in this judgment where it is appropriate to do so in order to secure the just and effective determination of the appeal. Any such evidence is generally to be given by affidavit but the Court possesses a discretion to permit cross-examination on any such affidavit. This is likely to be permitted only in unusual circumstances where the Court considers this will materially assist in disposing of the appeal.

[58] We are satisfied that the powers available under the HCR allow sufficient flexibility to ensure that the objectives of securing the just and effective disposal of appeals under s 59 will be met. The ability to permit the introduction of further evidence for special reasons and to permit cross-examination meets all of the reasons advanced by the appellants in support of their submission that an oral hearing was needed.

Result

[59] The appeal is dismissed.

[60] In accordance with the agreement of the parties, there is no order for costs.

Solicitors:
Charities Law, Wellington for Appellants
Crown Law Office, Wellington for Respondent