IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-3859
[2014] NZHC 1153

UNDER	section 59 of the Charities Act 2005
IN THE MATTER OF	an appeal against the decision of the Charities Registration Board, established under s 8 of the Charities Act 2005, declining the appellant's application for registration as a charitable entity under the Charities Act 2005
BETWEEN	THE FOUNDATION FOR ANTI-AGING RESEARCH THE FOUNDATION FOR REVERSAL OF SOLID STATE HYPOTHERMIA Applicants
AND	THE CHARITIES REGISTRATION BOARD Respondent

Hearing:	5 December 2013
Counsel:	S D Barker for Appellants B J Keith and A R Williams for Respondent
Judgment:	28 May 2014

JUDGMENT OF WILLIAMS J

Introduction

[1] The Foundation for Anti-Aging Research (FAAR) and the Foundation for Reversal of Solid State Hypothermia (FRSSH) applied to the Charities Commission (now the Charities Registration Board (the Board)) for registration as a charitable entity under the Charities Act 2005 (the Act). Both applications were rejected. The Foundations have appealed to this Court.

[2] FAAR and FRSSH are somewhat connected. Mr Derek Smith is a trustee of both Foundations and their objectives overlap. The appeals will therefore be heard together. The Foundations now jointly apply for:

(a) leave to adduce further evidence;

(b) leave for evidence to be given orally;

(c) service of the appeal on the Attorney General; and

(d) leave to cross-examine an analyst from the Department of Internal Affairs.

[3] The Board opposes all applications.

[4] Once I have set out the background of the appellants and their applications for registration as charitable entities, I will address the current applications in the order set out above.

Background

FAAR

[5] FAAR was established by deed executed on 20 September 1999 and incorporated under the Charitable Trusts Act 1957 on 27 October 1999.

[6] The purposes of FAAR are set out in cl 3 of its trust deed as follows:

(a) 1to establish and fund the operation of a non-profit making hospital (the Hospital) to treat ageing human beings with therapies that are substantiated by peer-review published scientific studies; and

(b) to provide for funding of scientific research at the Hospital aimed at discovering medical therapies that will alleviate and eliminate degenerative diseases in human beings;

(c) to provide other funding of scientific research projects outside the Hospital for the purpose of discovering medical therapies that will alleviate and eliminate degenerative disease in human beings;

(d) to establish and support a facility to accept anatomical specimens for the purpose of conducting research aimed at reversing disease, senescence, traumatic injury and deanimation; and

(e) to support other non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and deanimation.

FRSSH

[7] FRSSH is the more recently established of the two organisations. It was established by deed executed on 14 July 2011 and incorporated under the Charitable Trusts Act 1957 on 13 September 2012. The purposes of FRSSH are set out in cl 3 of its trust deed. The clause is lengthy and I need not set it out in full here.[1] It is sufficient to note that FRSSH's primary function will be to fund research in areas similar to those the focus of FAAR's purposes.

[8] The deed goes on to say that the fruits of the scientific research funded may be used for the general benefit of all mankind, particularly as individuals who may benefit from advancements in regenerative medicine and deceased individuals who have been placed into cryopreservation for the purposes of reanimation.

[9] FRSSH also aims to fund research into the development of cryopreservation techniques, medical protocols and databases. It notes that it may fund such research "directly" by making grants to universities, medical centres, non-profit organisations

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1 Clause 3.2 of the Deed states:

> The principal purpose of the Foundation shall be to fund scientific research. The fruits of the scientific research funded may be used for the general benefit of all of mankind, including individuals who may benefit from advancements in organ and tissue transplantation, regenerative medicine, genetic engineering, cloning, DNA transplant engineering, cell colony cloning, immunologic engineering, molecular engineering (nanotechnology) during their lifetime, and including deceased individuals who have been placed into cryopreservation or individuals who have made legal arrangements to be placed into cryopreservation or who may wish to make legal arrangements to be placed into cryopreservation for the purpose of future reanimation.

Clauses 3.3 to 3.11 go on to set out how the principal purpose will be achieved including funding research to restore cryopreserved individuals; funding research to develop appropriate medical protocols to carry out reanimation; funding research aimed at creating a 'database' of the identities of cryopreserved individuals for future use; funding research "directly" by grants or "indirectly" by developing scientific research organisations; emphasising research relating to repairing or reversing the effects of today's "primitive cryopreservation methods"; retaining the discretion to fund other research products in the future; intending operate the Foundation in accordance with s 501(3)(c) of the United States Internal Revenue Code 1986, so long as no New Zealand laws are contravened; not engaging in any activities that are prohibited under the United States Internal Revenue Code; and not intervening or participating in any political campaign, in accordance with US tax law.

and private companies or "indirectly" by funding other organisations who do the same research or by investing in those organisations.

Application process

[10] The application form for registration as a charitable entity simply requires the entity to complete a number of check-boxes regarding the general sector and geographical area in which the entity operates, the activities or services it provides for beneficiaries, who the beneficiaries are and the entity's sources of funding. It is clear from the application form that the particular focus of the inquiry is based on the entity's rules such as a trust deed, constitution or charter. The Board dedicates a significant portion of its website to explaining what is meant by a charitable purpose at law and states that this question is answered primarily by considering an entity's rules.

[11] Other than the entity's rules, it is clear that the Board tries to limit the amount of extra documentation received unless the Board indicates an application may be declined. This was what transpired in the current case.

FAAR's application

[12] On 9 May 2012, a letter pursuant to s 18 of the Act was sent to FAAR requesting further information on its activities. On 9 August 2012, FAAR responded via its solicitor that the Foundation "intends to focus on activities under cl 3(2)(e) 'to support other non-profit organisations involved in conducting research aimed at reversing disease, senescence, traumatic injury and de-animation.'" It proposed to fulfil this purpose by making substantial grants to the Charitable Medical Research Foundation (CMRF), a registered Liechtenstein charity. The core purpose of that charity is to provide funding of scientific projects related to the practise of cryonics.

[13] On 13 July 2012, the Department of Internal Affairs Charities Services wrote to FAAR to notify it that the application may be declined because FAAR did not have exclusively charitable purposes. The letter provided FAAR with information as to why Charities Services must consider activities as well as purposes. On 9 August

2012, the Foundation provided further submissions that addressed this point. From the information provided in the Board's report, it appears the submissions included:

(a) reasons why supporting CMRF's research advances their charitable purposes;

(b) an analysis of the relevant case law on charitable purposes;

(c) 'supporting documentation' including a letter from Dr Richard Kratz relating to 21st Century Medical's research into the vitrification of corneas, a document entitled 'Scientists' Open Letter on Cryonics' and an extract from a recent ALCOR magazine showing membership statistics; and

(d) a document titled "The Charitable Benefits of Cryonics Research" relating primarily to research funded by FRSSH, but providing a general picture of cryonics research.

[14] Another letter was sent by Charities Services on 11 December 2012 to notify FAAR that, after consideration of its submissions and the further information provided, its purposes were not exclusively charitable and do not provide sufficient public benefit. FAAR then provided further submissions again including several affidavits.

[15] In giving reasons for its decision to decline registration, the Board made references to the relevant charities law authorities, case law and a number of the documents provided to the Board by the Foundation. Although it is not clear exactly the extent to which the information provided by the Foundation was relied upon by the Board, it is now all part of the record on appeal.

FRSSH's application

[16] A similar course of events followed FRSSH's application for registration. On 26 April 2012, the Foundation received a letter of notification that its application might be declined as its purposes are not exclusively charitable. FRSSH responded

on 28 June 2012 with submissions addressing the test for charitable purposes and an analysis of the case law. It also attached the same documents as mentioned above at paragraph [13](c) and (d).

[17] A second letter was sent to inform FRSSH that, after considering its submissions and the information provided, the application did not meet the criteria for registration. FRSSH provided further submissions on 28 May 2013, including affidavits from the same individuals who provided affidavits in respect of FAAR.

[18] The material submitted by FRSSH was referenced by the Board throughout its decision in the same manner as in the FAAR decision.

Board's decisions

[19] The Board found that, despite a much fuller list of purposes, FAAR's overwhelming purpose was to fund cryopreservation and reanimation research. The Board assessed those purposes under such of the orthodox *Pemsel* Heads of Charity as were engaged in the application: education, relief of the aged and the generic "any other analogous benefit" head.[2] The Board also considered whether any benefits as may accrue were sufficiently public in nature but in reality the 'public' test and the 'analogous benefit' test were considered together.

[20] The Board found that the proposed research purpose was not education because it was not a "useful subject of study" in terms of the United Kingdom Queen's Bench decision in *McGovern*.[3] Cryopreservation and reanimation lacked sufficient academic credibility and was too speculative to have an educative purpose. There is no New Zealand authority dealing with this question, and this is apparently the first time *McGovern* has been applied here.

[21] The Board also rejected relief of the aged on the basis that the clients of cryopreservation were already deceased when preserved in that manner, so they were by definition not aged. Under the *Pemsel* analogous benefits category, the Board effectively rejected the proposition that any benefits were sufficiently "public" to

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2 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.
3 *McGovern v Attorney-General* [1982] 1 Ch 321.

qualify. Cryopreservation was too expensive – between $150,000 and $200,000 for whole body preservation and between $50,000 and $80,000 for neuro preservation. These prices meant, the Board felt, this service would be narrowly available and essentially private.

[22] The Board's conclusions in respect of FRSSH were materially identical.

[23] For these reasons the Board found that both FAAR and FRSSH are not trusts of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by s 13(1)(a) of the Act. Both applications for registration as a charitable entity were declined on 18 July 2013.

Leave to adduce further evidence

[24] Applications for leave to adduce further extensive evidence are made. The relevant rule is r 20.16(3) of the High Court Rules, which provides that the Court may grant leave on appeal only if there are special reasons for hearing the evidence. The applicant says that this rule is displaced by the less constrained terms of the appeal powers in the Charities Act, but I will come back to that.

[25] The rule is as follows:

> **Rule 20.16 Further Evidence**
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> (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.
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> (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 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.
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> (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

The evidence proposed to be adduced

[26] In general the further evidence sought to be adduced in both appeals can be categorised as follows:

(a) evidence relating to the nature of the research proposed to be funded by the Foundations;

(b) full website evidence of the Cryonics Institute (an offshore research organisation);

(c) updating evidence in response to certain findings of the Board;

(d) references cited by the Foundations but not expressly considered by the Board in its decisions;

(e) new material obtained under the Official Information Act 1982 that was allegedly withheld from the appellants; and

(f) various newspaper, magazine and academic articles, book chapters, lectures, interviews and YouTube clips relating to cryonic research.

[27] Some evidence is purported to be updating material. Some existed at the time of the Board's decision. In respect of the Cryonics Institute website, the appellants seek to provide context to the extracts considered by the Board. In respect of the allegedly withheld material received under the Official Information Act, the appellants submit they should have an opportunity to adduce it as new evidence and respond to it. I will address this material in more detail at the end of this judgment.

Appellants' submissions

[28] The Foundations submit that there are "special reasons" for which leave is sought pursuant to r 20.16(3). These can be broadly summarised as follows:

(a) the evidence relates to matters that have arisen after the decisions were appealed against;

(b) the Court must ensure the Foundations have a proper opportunity to meet the factual grounds on which the Board found against them;

(c) the website evidence considered by the Board was taken out of context in that it viewed selective quotations and extracts which risk a mischaracterisation of the Foundations' purposes and activities;

(d) the evidence is necessary to avoid manifest injustice to the Foundations;

(e) the evidence is necessary to correct manifest errors and palpable misunderstandings; and

(f) the special nature of Board's assessment processes in that it is not an adjudicative body. It does not determine disputes between parties or conduct first instance hearings nor is it bound to apply the rules of evidence.

[29] The appellants then submit (inconsistently with their first submission) that the starting point for applications for leave to adduce further evidence is not r 20.16 but ss 59-61 of the Charities Act. Section 59 sets out the right of appeal for persons aggrieved by decisions of the Board. Section 60 allows the Court to make interim orders pending determination of the appeal. Section 61 sets out the powers of the Court in relation to orders made in determination of an appeal.[4]

[30] In particular, the appellants rely on s 61(4) of the Act which provides:

> The High Court may make any order that it thinks fit.

[31] In counsel's submission this provision is intended to allow appeals against decisions of the Board to be constructed as hearings *de novo*. Counsel submits that Parliament did not intend for charities to be restricted in adducing the evidence necessary on appeal to prove critical matters of fact for the purpose of determining whether the appellants' purposes are charitable.

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4 These provisions are set out in full at [37]-[39] of this judgment.

[32] In short, counsel submits that because of the unique nature of the Board's processes, appeal in relation to applications for charitable status should be reargued in full from a fresh evidential base.

Board's submissions

[33] The Board submits that r 20.16 is the correct starting point for appeals of this nature. Rule 20.1 provides that Part 20 of the High Court Rules applies to all appeals to the High Court except for those under the Criminal Procedure Act 2011, the Arbitration Act 1996 and the Bail Act 2000 and those expressly excluded by the relevant source legislation. Counsel submits that appeals from the Charities Registration Board are not exempt from these rules.

[34] The Board further submits that the appellants cannot rely on ss 59-61 of the Act as the starting point for their application because those sections relate to the determination of appeals, not the procedure the court must follow in *considering* an appeal.

[35] The Board submits that applications to adduce further evidence under r 20.16 should be granted to remedy a material absence or where a material point or substantial context was not raised by the first instance decision-maker. Rule 20.16(3) provides as an example of a special reason that leave may be granted where the 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. The Board submits that the appellants essentially wish to reargue their applications without constraint in a *de novo* hearing, a course of action the Board says is not open to them.

The legislation

[36] The right of appeal to the High Court is found in s 59 of the Act as follows:

> **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.

(2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington and with the [Board] within—

(a) 20 working days after the date of the decision; or

(b) any further time that the High Court may allow on application made before or after the expiration of that period.

(3) Every notice of appeal must specify—

(a) the decision or the part of the decision appealed from; and

(b) the grounds of appeal in sufficient detail to fully inform the High Court and the [Board] of the issues in the appeal; and

(c) the relief sought.

[37] Section 60 provides:

60 High Court may make interim order pending determination of appeal

(1) At any time before the final determination of an appeal, the High Court may make an interim order requiring an entity—

(a) to be registered in the register of charitable entities with effect from a specified date; or

(b) to be restored to the register of charitable entities with effect from a specified date; or

(c) to remain registered in the register of charitable entities.

(2) The specified date may be a date that is before or after the order is made.

(3) At any time before the final determination of an appeal relating to a decision under section 55, the High Court may make an interim order preventing or restricting the exercise of a power by the [chief executive] under that section.

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

(5) If the High Court refuses to make an interim order, the person or persons who applied for the order may, within 1 month after the date of the refusal, appeal to the Court of Appeal against the decision.

(6) If an interim order is made under subsection (1), the [chief executive] must,—

(a) amend the register of charitable entities in accordance with the order as soon as is reasonably practicable after receiving the order; and

(b) include a copy of the order in the register of charitable entities, unless the Court orders otherwise.

(7) To enable the [chief executive] to fulfil the duties imposed by this section, the Registrar of the Court in which the interim order is made must send a copy of the order to the [chief executive] as soon as practicable.

[38] The Court's appellate powers are set out in s 61:

61 Determination of appeal

(1) In determining an appeal, the High Court may—

(a) confirm, modify, or reverse the decision of the [Board or the chief executive] or any part of it:

(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.

(2) Without limiting subsection (1), the High Court may make an order requiring an entity—

(a) to be registered in the register of charitable entities with effect from a specified date; or

(b) to be restored to the register of charitable entities with effect from a specified date; or

(c) to be removed from the register of charitable entities with effect from a specified date; or

(d) to remain registered in the register of charitable entities.

(3) The specified date may be a date that is before or after the order is made.

(4) The High Court may make any other order that it thinks fit.

(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.

Three issues

[39] There are three issues to be addressed:

(a) Does s 61(4) of the Charities Act displace r 20.16?

(b) What is the correct approach to r 20.16?

(c) Should leave be granted?

The controlling provision

[40] The appellant argues that s 61(4) of the Charities Act governs appeal procedure. The appellant argues that this allows the Court to "make any order that it thinks fit" with respect to the admission of further evidence on appeal. This, it is argued, ousts the tighter regime under r 20.16.

[41] I agree with the Board that there is no merit in this submission. Section 61 relates to this Court's powers in relation to determination of the appeal: that is, as to its disposition. It does not relate to appeal procedure. The reference in subsection (4) to the Court being empowered to make "any other order it thinks fit" is designed to expand the list of possible outcomes available under subsections (1) and (2), probably consequentially or for ancillary purposes. It is designed to allow the Court the widest possible scope to do what is necessary in light of the substantive conclusions reached in the appeal before the Court. It does not address appeal procedure at all and therefore does not displace the express and specific wording of r 20.16.

[42] Rule 20.16 is the controlling provision accordingly.

The correct approach to r 20.16

[43] A number of cases in both the charity sector and elsewhere have addressed the appropriate approach under r 20.16. I have found it useful to review those cases in some detail before turning to my own conclusions.

Charities cases

[44] The leading case concerning leave to adduce further evidence in appeals under the Charities Act is *Canterbury Development Corporation v Charities*

Commission.[5] At issue in this case was the decision of the (then called) Charities Commission to decline registration to three organisations whose principal purpose was the promotion of economic development in the Canterbury region.

[45] Ronald Young J considered that in the normal course of appeals from the Charities Commission, the High Court would consider the same relevant factual material as was before the Commission unless leave was granted with the necessary justification under r 20.16. Although in that case the parties had agreed to allow further evidence (affidavits dealing with factual matters relevant to the applications) to be provided to the Court, the Judge cautioned that "this approach should not become habitual in appeals pursuant to s 59."[6] The onus is on the applicant to ensure that all relevant factual material is before the Commission.[7] Because of the agreement reached between the parties the Court did not have to consider whether there were any special reasons to grant leave and what form those reasons would take.

[46] This approach was confirmed in *Re Education Trust* where counsel for the appellant Trust argued that the nature of the process followed by the Commission and other administrative bodies is an undue limit on applicants and that courts should more readily permit further evidence on appeal.[8] In fact the Trust had agreed with the Commission as to the ambit of further evidence to be adduced by the Trust, so the following comment by Dobson J was strictly obiter:[9]

> I am not satisfied that any absolute, or even presumptive, exemption from the provisions of r 20.16 is warranted as a matter of course in appeals from decisions of the Commission. The sort of circumstances ... justifying a relaxation of the requirements of that rule can always be considered on an application for leave to adduce additional evidence, and there is no basis for concern that restrictions on the grant of leave would give rise to a breach of natural justice, or inadequacy of material to argue any given appeal. I am not persuaded that any procedure inconsistent with that directed in *Canterbury Development Corporation* is warranted.

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5 *Canterbury Development Corp v Charities Commission* [2010] 2 NZLR 707.
6 At [106].
7 At [107].
8 *Re Education Trust* (2010) NZTC 24,354 at [59].
9 At [63].

[47] A more recent iteration of the law surrounding r 20.16 is in the decision of McKenzie J in *Re Queenstown Lakes Community Housing Trust.*[10] That case which concerned the Commission's decision to remove the Trust from the Register of Charities. The Trust sought leave to adduce further affidavit evidence on appeal. While MacKenzie J supported the sentiments of Ronald Young J in *Canterbury Development Corporation,* he saw the attenuated nature of the Commission's processes as relevant under r 20.16:[11]

> An appeal under the Act differs in form from most appeals governed by Part 20. The Commission is not determining a dispute between parties. There is no formal hearing at which evidence is presented. These distinguishing features are in my view relevant to the rigour with which High Court Rule 20.16 is to be applied.
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> ...
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> I would add that I consider that the special nature of an appeal under the Act justifies some relaxation of the usual tests of cogency, credibility and freshness. I consider that the appropriate focus is on whether the Court will be assisted by the evidence, and whether the Commission will have an adequate opportunity to respond to the new material in its submissions.

[48] In *Re Greenpeace New Zealand Inc* the High Court considered r 20.16 in the context of the Commission's alleged reading of certain extracts of the Greenpeace website in isolation of the remaining content.[12] In granting leave Heath J observed that the underlying test for r 20.16 is one "based on the interests of justice,"[13] and that leave is generally determined by reference to the cogency and materiality of evidence not available to the decision-maker at the relevant time.[14]

[49] In *Greenpeace* the website evidence was information available to the Commission at the time it made its decision. But since Greenpeace was unaware of what information was garnered from the website and the extent to which it was relied on by the Commission, Heath J permitted the somewhat abnormal application. He noted:[15]

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10 *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502 (HC).
11 At [25].
12 *Re Greenpeace New Zealand Inc* [2011] 2 NZLR 815 (HC).
13 At [33].
14 At [32].
15 At [33].

> Here, the special reason for admitting the evidence is to ensure that Greenpeace has a proper opportunity to meet the grounds on which the Commission found against it on political activity grounds, by providing the best evidence now available of information viewed by the Commission at the time its decision was made.

[50] A decision about website evidence to the same effect was reached in *Liberty Trust v Charities Commission* where the Court held that all material on the Trust's website should be regarded as evidence before the Commission, not just those extracts that the Commission considers to be relevant.[16]

[51] In *Re New Zealand Computer Society Inc* the applicants sought to adduce the categories of evidence on appeal. First, evidence that could have been obtained prior to the Commission making its decision and second, updating evidence that had arisen after the decision.[17] The Society was concerned that the Commission did not conduct a formal hearing and was not bound by the normal rules of evidence. In relation to the former category of evidence, MacKenzie J found similarly to *Canterbury Development Corporation* that it was the Society's responsibility to place all relevant material before the Commission.[18] The second category of evidence (which included updates to the Society's constitution) were, said the Judge, more properly the subject of a fresh application for registration as opposed to an appeal.[19]

Competition cases

[52] The issue of leave to adduce further evidence has also arisen in the competition law setting.

[53] In *Telecom v Commerce Commission* the Court of Appeal declined leave to adduce further evidence in an appeal against a decision of the Commerce Commission under the old r 696 (materially identical to the modern r 20.16).[20] Cooke P was wary not to "lay down any exhaustive test" but he said:[21]

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16 *Liberty Trust v Charities Commission* [2011] 3 NZLR 68 (HC) at [50].
17 *Re New Zealand Computer Society* (2011) 25 NZTC 20-033.
18 At [30].
19 At [34].
20 *Telecom v Commerce Commission* [1991] 2 NZLR 557 (CA).
21 At 558.

> [I]n exercising these powers the Court must be alert to the danger of allowing what the legislature intends to be a genuine appeal against a decision of an expert body – a decision reached, after a somewhat distinctive procedure of investigation, draft determination and conference, to be converted to a trial, the prior proceedings being but a prelude or a 'dummy run.' This consideration must weigh strongly against the allowance of any evidence which is little more than an improvement on, or a revised version of, material that was before the Commission.

[54] More recently in *Commerce Commission v Woolworths*, the Court of Appeal discussed at some length the question of whether the complex, iterative and inquisitorial nature of the Commerce Commission's process in competition cases provided a sound basis for the High Court in that case essentially allowing a *de novo* hearing on appeal from the Commission.[22] The Court of Appeal was clear that for the most part, the answer was a firm no, despite the fact that *de novo* appeals would put the High Court in a better position to judge the correctness of the Commission's decision at first instance. The Court of Appeal's reasons were grounded in both interpretation of the governing provisions and in policy.

[55] As to the first ground, "special reasons" are required under r 20.16 and if evidence is admitted on appeal where its purpose is no more than to better address the Commission's factual conclusions and reasoning from those conclusions, then appellants would be entitled to a *de novo* hearing in almost all appeals from the Commission. That, the Court concluded, would be inconsistent with the "special reasons" threshold.[23]

[56] As to the second ground, allowing evidence that is really no more than general response evidence to the decision would have major resource implications for the courts generally in hearing appeals from inquisitorial administrative tribunals. That, the Court of Appeal said, would require express wording in the provision controlling relevant appeal procedures. The Court shared Cooke P's aversion (as he expressed it in *Telecom*) to adopting a procedure on appeal that was likely to reduce the first instance decision to a mere dummy run for the real trial on appeal in the High Court.

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22 *Commerce Commission v Woolworths Ltd* [2008] NZCA 276.

23 At [52].

[57] The Court's response was not entirely negative however. In a post script, the Court said:[24]

> We recognise that where there has been neither a conference nor a draft determination (as in the present case), there may be slightly greater scope for the admission of new evidence on appeal (for instance to address unexpected points, or to correct palpable misunderstandings).

Conclusions on appeal format

[58] Thus, the leading general Court of Appeal authorities and the specific decisions relating to charities are consistent and clear. There is no general right to a *de novo* hearing arising only out of the nature of the particular procedure adopted by the statutory decider at first instance. Yet the above survey of the ways in which applications to adduce evidence on appeal have in fact been treated, suggests there is an acceptance that more targeted evidence will be admitted on appeal either on the usual grounds or for more general reasons of fairness to the appellant.

[59] The Courts have always allowed updating evidence in on-the-record-only appeals (that being specifically covered in r 20.16), but only where it is necessary for the Court to consider that material in order properly to address the appeal. Such material will obviously meet the special reasons test. The Court of Appeal in *Woolworths* identifies two additional bases: where the appellant is taken by surprise by findings or reasons not traversed with the applicant by the statutory decider before the decision is issued, or in order to correct a clear mistake. These, and similar considerations were, in my view, at the heart of MacKenzie J's finding in the *Queenstown Lakes Community Housing Trust* case, that the courts should take a more liberal approach in relation to appeals from first instance deciders that utilise an informal inquisitorial process without a hearing.

[60] Thus, as Heath J put it in *Greenpeace*, 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.

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[24] At [54].

Should leave be granted under r 20.16?

[61] With these general principles in mind, I turn now to consider whether any of the 19 separate items of further evidence sought to be adduced[25] and additional academic references[26] meet the special reasons requirements of r 20.16.

[62] It is most efficient to address each of the items the subject of application in tabular form with brief reasons for acceptance or rejection in accordance with the requirements of r 20.16.

Evidence	**Special reason?**
Evidence of the full nature, volume and diversity of the research that is funded by the Life Extension Foundation, and that is proposed to be funded by the Foundations.	No. This information was, without further specification, available at the time of the Board's decision, and could have been provided.
The remainder of the Cryonics Institute website.	Yes. Reference is made in the Board's decisions to the Cryonics Institute website and it will be important for the sake of fairness, for the Court to have access to the full website.
Response to Iserson material on scientific credibility.	No. Here the applicants are seeking to respond to a reference made by the Board, not to adduce any particular evidence; this course of action is not envisaged by the statutory test.
Updated version of comparisons of cryonics procedures.	No. Although this is probably genuine 'updating evidence' it is not cogent or likely to be material to the Court's consideration of charitable purposes on appeal.
Evidence relating to Cam Christie (a cryopreserved individual related to FAAR)	No. The fact that someone has been cryopreserved would not materially assist the Court on appeal.

[25] These are set out in the appellant's Appendix B – *Outline of Further Evidence Sought to be Adduced.*

[26] These are set out in Appendix C – *References Cited by Foundations But Not Included in Annexure 6 (CBD Tab 32* – list of information in public domain stated to have been considered by the Board).

References cited by the Foundations but not included in annexure 6 (and therefore apparently not considered by the Board).	No. There is no authority to suggest that simply because the Board has not referenced certain material in its decision that it has not considered it.
DVD: *The Public Benefits of Low Temperature Scientific Research.*	It seems that the Foundations provided the Board with this DVD but it was not received. It will be relevant for the Court to consider whether the DVD contained material that could have made a difference.
Relevant new material received under the Official Information Act.	The ambit of this material is quite unclear. Some of it relates to the application for leave to cross-examine a DIA analyst. Its relevance will depend on the treatment of that application (see below). Otherwise there are no special reasons at this stage, but I accept this may change once OIA applications are finally resolved.
The original blank application form and updating evidence of the applications.	No. Application forms are a preliminary step in the registration process. It is clear in the Board's decision that it was aware from the Foundations' subsequent submissions and documentation provided that significant developments have occurred within the Foundations since the date of application.
'Big results from tiny particles' (article from Victoria University's graduate and alumni magazine *Victorious* from October 2013); and *'Slowing the aging process – it's in your genes'* detailing Massey University's research into anti-aging.	No. Although these articles may have arisen after the decision, they are general in nature and not specific to any research the Foundations propose to fund. Admitting them would open the floodgates, and all literature on ageing would be admissible.
'Can Google solve death?' feature article in September edition of Time Magazine.	No. Same reasons as above.
'Academics at Oxford University pay to be cryogenically preserved' article from The Independent June 2013.	No. Same reasons as above.
'Long-frozen embryo brings joy to adoptive parents' South Florida Sun-Sentinel, September 2013.	No. Same reasons as above.
Relevant chapters of mainstream literature and articles on cryonics.	No. Same reasons as above.
'Funding research to help fill the Government void' article 'to be published' in January 2013.	I am unaware if this article was in fact published. In any event it is neither relevant nor cogent assuming the title accurately reflects its content.

'Cryonics and Immortality: an interview with Stephen Valentine of Timeship' published in hplus magazine October 2013.	Yes. The Foundations propose to support the Timeship project. Admission may be necessary to correct error.
PowerPoint presentation detailing research carried out by paid interns at the Timeship property, October 2013.	Yes. The Foundations propose to support the Timeship project. Admission may be necessary to correct error.
Several video links of lectures given by those whose affidavits were considered by the Board in their decision.	No. The Board considered the material in the affidavits, and they are on the record.
'Dr Francis Collins: Politics on the Frontier of Science' from Wall Street Journal November 2013.	No. Although this article may have arisen after the decision, but it is general in nature and not specific to any research the Foundations propose to fund. Floodgates.
'How Government treated those for who we now celebrate holidays' 'to be published' in March 2013 version of Life Extension Magazine.	I am unaware if this article was in fact published, but even if it was, it is not sufficiently relevant or cogent to warrant admission.
'Scientists build first nanotube computer' from Wall Street Journal September 2013.	No. Although this article may have arisen after the decision, it is general in nature and not specific to any research the Foundations propose to fund. Floodgates.

[63] The application to adduce further evidence is granted accordingly to the extent set out in the table.

Application for leave to give oral evidence

[64] The Foundations seek a direction that the additional evidence be given orally. Much of the bite of that application is lost in light of my finding that there is no right in this case to a general *de novo* hearing. Nonetheless it is worth traversing the appellants' grounds for such application and the Crown's response.

[65] The appellants essentially say that the subject matter of these appeals involves very complex science and the Board has made a decision based on "a fundamental misunderstanding of the nature of the research that the Foundations propose to fund". Counsel advances the argument essentially on the following basis:

> It would be helpful in reaching a robust determination as to whether the purposes of the Foundations are charitable, for oral evidence to be given.

[66] This is because, the appellants say, there are disputed questions of fact and, I infer, it is in the interests of justice to equip this Court on appeal to resolve those disputes.

[67] The Crown opposes the application because there is no issue of individual credibility arising in the appeal and to allow such an application would turn the appeal into a *de novo* inquiry.

[68] The Crown is clearly right. The general rule (r 20.16(4)) is that additional evidence is given by affidavit unless the Court directs otherwise. The material I have allowed to be adduced is perfectly capable of speaking for itself. Allowing a witness to support this material with oral explanation is both unnecessary and likely to turn the process into a *de novo* hearing when, as I have said, that is simply not permitted.

[69] I note finally, as I did earlier, that this Court has wide powers of disposition on appeal under s 61 of the Charities Act. If, on hearing the appeal, the Court considers that factual issues arise that need to be resolved in order to dispose of the matter, there is the power to send the application back to the Board for fresh consideration. That is the place where any such factual conflicts can be resolved if the record on appeal is insufficient to allow this Court to do so.

Application for direction to serve the Attorney-General

[70] The appellants argue that the proceeding should be served on the Attorney-General as protector or guardian of charities. The appellants argue that the appeals raise a number of issues that will potentially impact on New Zealand's charities law "well beyond the factual situation pertaining to the Foundations themselves". The appellants implicitly argue more broadly that the Attorney-General should always be served or named as a party.

[71] The Crown argues essentially that New Zealand courts have, in the past, decided broad principles of charities law without appearance by the Attorney-General, and appellant charities, or aspiring charities, seem well able to marshal evidence and argument in support of their appeals.

[72] I agree with the appellants that the appeal does raise novel issues around the treatment of "new science" (I use that term neutrally) in charities law. I see no harm at all in directing that the appeal be served on the Attorney-General in light of the issues raised. Whether the Attorney-General wishes then to apply to intervene is a matter entirely for him.

[73] I make the direction accordingly.

Application for leave to cross-examine DIA analyst

[74] The appellants seek leave to cross-examine the analyst who provided the draft reasons and recommendations to the Board for its sign off. The appellants suspect that the analyst ranged more widely than formally indicated in the list of considered material provided as Annexure 6 to the decisions. The appellants suspect that the analyst has carried out "web dredges" and has not disclosed all the material considered in the search.

[75] In a separate argument, the appellants submit that the Board is not applying its mind to the issue on appeal but is merely "rubber stamping" the analyst's draft decision and recommendations. The appellants therefore wish to test with the responsible analyst "why certain findings were reached, what weight was placed on certain evidence, what assumptions were made, whether they were correct, and generally test the findings of fact that have been made, in the normal manner".

[76] The Crown opposes saying that the analyst is not the decision-maker, and that the appellants wish impermissibly to expose the private deliberative process of the Board. The Crown says the appellants cannot cross-examine the analyst if he was subpoenaed, citing the decision in *Orlov v New Zealand Law Society*.[27] In any event the Crown says it has disclosed all considered material as set out in Annexure 6.

[77] The process for considering applications is an iterative interplay between the Board and the analysts delegated by the chief executive of DIA to undertake the necessary assessment. This is provided for in ss 17-19 of the Act.

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27 *Orlov v New Zealand Law Society* [2012] NZCA 12, at [20] and [27].

[78] The Board of three members is established under s 8 of the Act. In performing or exercising functions, duties or powers as members of the Board each member must:[28]

(a) act independently in exercising his or her professional judgement; and

(b) is not subject to the direction from the Minister.

[79] Section 17 governs applications for registration as a charitable entity. It provides that the application must be in the form prescribed by the chief executive and that it must contain any other information or documentation prescribed by the chief executive.

[80] The chief executive first considers all applications (for which read a staff analyst), and then prepares a report and recommendations to the Board for final decision. Section 18(3) provides that in considering an application, the chief executive must:

(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;

(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.

[81] The chief executive will then recommend to the Board that it either grant or decline an application.[29]

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28 Charities Act 2005, s 8(4).

29 Section 19(1).

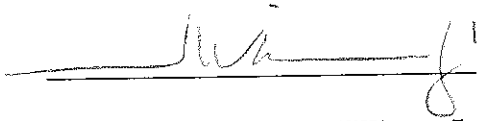
[82] Section 19(4) provides that if after a s 18(3) inquiry the Board is not satisfied that an entity is qualified to be registered, the Board must give the chief executive the reasons for its decision. The Board must be satisfied that the chief executive has complied with the process in s 18(3) before it acts under s 19(4).

[83] As a general principle, the written reasons of a statutory decider must speak for themselves, and it is generally not permitted to cross-examine that decider on those reasons except perhaps in exceptional cases of actual bias or bad faith. The written reasons must speak for themselves. In this case, the appellants are seeking to achieve the same objective by the roundabout route of cross-examining the analyst who drafted the advice that was the basis for the decision. This would be quite irregular. More importantly, I cannot see how this would assist the Court. It would be a time wasting distraction from the Court's duty to assess the adequacy of the reasons as actually given.

[84] The only concern I have, if any, relates to whether the advising analyst did indeed range more widely than the material contained in Annexure 6 but has not admitted doing so. The Crown submits that Annexure 6 is a complete record, as it is entitled to do. If there were any cogent evidence tending to support the appellants' contention in this respect, I might have been minded to allow that narrow, but important question, to be tested. But the appellants have pointed to nothing in particular to elevate this matter from mere suspicion to reasonable suspicion.

[85] There is no basis therefore to allow that inquiry to be undertaken. This application is dismissed accordingly.

[86] The appellant has been particularly successful in its applications. I do not therefore propose to make an award of costs.



Williams J