

## Registration Decision: Karmic Charity Trust

### The facts

1. Karmic Charity Trust (the Applicant) was established by a trust deed dated 2 September 2010. It was incorporated as a Board under the *Charitable Trusts Act 1957* on 8 September 2010. On 4 October 2010, the Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the *Charities Act 2005* (the Act).

2. The Applicant's purposes and other relevant dispositions are set out in clauses 2, 5, 7 and 8 of its trust deed:

2. *PURPOSE*

2.1 *The purpose of the Trust is to provide financial assistance for the rehabilitation by way of counselling and/or psychotherapy and support of those affected by abuse, neglect or lack of care.*

...

5. *BOARD OF TRUSTEES*

5.1 *The Board will comprise of no less than three trustees and no more than nine trustees.*

...

5.5 *The Board may continue to act notwithstanding any vacancy, but if their number is reduced below minimum number of trustees as stated in this deed, the continuing trustee/s may act for the purpose of increasing the number of trustees to that minimum but for no other purpose.*

...

7. *POWERS*

*In addition to the powers provided by the general law of New Zealand or contained in the Trustee Act 1956, the powers which the Board may exercise in order to carry out its charitable purposes are as follows:*

7.1 *to use the funds of the Trust as the Board thinks necessary or expedient in payment of the costs and expenses of the Trust, including the employment and dismissal of professional advisors, agents, officers and staff, according to principles of good employment and the Employment Relations Act 2000 or any subsequent enactment;*

...

8. *INCOME, BENEFIT OR ADVANTAGE TO BE APPLIED TO CHARITABLE PURPOSES*

8.1 *Any income, benefit or advantage will be applied to the charitable purposes of the Trust.*

8.2 *No trustee or members of the Trust or any person associated with a trustee shall participate in or materially influence any decision made by the trustees in respect of any payment to or on behalf of that trustee or associated person of any income, benefit or advantage whatsoever.*

*Any such income paid shall be reasonable and relative to that which would be paid in an arm's length transaction (being the open market value).*

8.3 *The provisions and effect of this clause shall not be removed from this deed and shall be implied into any document replacing this deed of trust.*

3. The Commission analysed the application for registration and on 17 November 2010, it sent the Applicant a letter requesting further information about its activities pursuant to section 18(3)(a) of the Act.

4. The Applicant responded by letter dated 24 November 2010 with the following information:

1. *We are a non profit organisation.*
2. *We have been operating for 12 months, from one of the trustee's home premises.*
3. *We have not made any profit yet.*
4. *We have only just partnered with Homes of hope therefore once we start making money all surplus will go to them for counselling of children affected by abuse, and or adults to re-unite the children to them*
5. *Connie and I have been doing all of this work as volunteers and have not been paid.*
6. *The orders we have processed so far have only paid for set up costs and marketing, coupled with ingredients and deliveries etc.*
7. *Our plan is to get a shop this coming year to increase turnover therefore by increasing surplus to give, as per our website we are looking at 33% operating costs, 33% marketing and wages and 33% given to homes of hope.*
8. *Once we achieve this, we will be able to create wages and surplus to give to Homes of hope.*
9. *What we need to be is a tax exempt to help us help others*
10. *We are not GST registered.*
11. *We plan on another social business being Karmic Cottons starting in the New Year, which will help the Karmic Charity trust as well. This will be set up in a shop*
12. *All the cupcakes sold are for fundraising for the charity.*

5. The Commission considered the information and on 3 December 2010, it sent the Applicant a second section 18 letter asking for a copy of any business plan for the Applicant, information about the wages to be paid, and information about Karmic Cottons.
6. On 14 December 2010, the Applicant sent a response to the second section 18 letter. That response was in the form of a PowerPoint presentation. The main elements of that response are as follows:

Credibility

- *The Karmic Charity Trust was created November 2009 and now supports Homes of Hope. We are both aligned to helping those affected by abuse neglect and lack of care. We have agreed to donate our surplus to Homes of Hope to be used for the rehabilitation of children and parents coming into their care. They have agreed to use these funds to pay for counselling and personal development to rehabilitate these affected*
- *The first social business created is Karmic Cupcakes.*

...

Activities of the Charity currently

- *We have been having a lot of response via our website – orders daily.*
- *We attend most events in town such as Gala days, Trade shows, and do street selling with baskets of cupcakes with our council food license.*

...

The New Charity Launch – with Karmic Cupcakes

- *Karmic Cottons*

Needing your help and others

- *Once we have the go ahead from you that we will be a registered charity with you we can then apply for tax exemption, we will then move forward and get all the baby tee's printed, and sign a lease for premises.*
- *We feel without your support we will not have enough recognition to create enough funds to keep our head above water. Currently we are really just breaking even. We are currently personally doing everything in our power to make this happen so everyone wins.*
- *Once we are recognised by your entity, we can then also go for National Sponsorship with TV and Radio advertising, coupled with approaching Corporate sponsors . . .*

Retail and PR Marketing Plan

- *We are currently looking for premises at Mount Maunganui for the most foot traffic for a space to have a cake shop café style for karmic Cupcakes, having Karmic Cottons share the space as a gift store section of the café.*
- *Connie and my intention is to lend the Charity \$15,000 each so we can achieve the start up costs – and that is all of our personal money we have. Our research tells us that there are no cake shops in the area and would be thoroughly welcomed.*

Staff and Wages

- *Connie and I will work fulltime for the Charity once we achieve our premises and will look for the charity to pay our wages of \$100,000 per annum.*
- *We will also look at 2 part-time staff on an hourly rate.*

7. The Commission analysed the information and on 22 December 2010, it sent a third section 18 letter, asking for more information about the \$100,000 to be paid to the two trustees, how the trustees will determine open market value for the services provided, and any plans to deal with conflicts of interest.

8. The Applicant's accountant responded on 27 January 2011 stating that:

*Maryanne is going to act as a Management Consultant for the trust and will not be involved in the shop on a day to day basis. Keeping Maryanne and Connie's roles separate will provide separation of duties from a governance standpoint. Maryanne's skills are in the funding and marketing area. Maryanne will be remunerated for her work (up to 10 hours per week) at a rate of \$35 per hour which is half her normal charge out rate. Connie will receive remuneration for her full-time role at market value which is considered to be \$50,000 per year.*

*It is the intention of the trust to concentrate on the Karmic Cupcakes product in the short-term and revisit Karmic Cottons in twelve months.*

9. The Commission analysed the information received and on 21 February 2011, it sent the Applicant a notice that may lead to a decline on the basis that the Applicant's purposes were not exclusively charitable and could provide private benefits for the trustees. The Commission also identified areas where the trustees did not appear to be complying with the requirements of the trust deed.

10. The Applicant responded by emails dated 24 and 28 February 2011 as follows:

*there is a major benefit to the public being our profits pay for counselling for those affected by abuse. Our accountant has clearly stated that her advise and a re-think of this charity has stated that we are both not taking a wage, coupled with our solicitor advised we would only need 2 trustees, not 3, that was only if we borrowed huge funds for buildings, etc, we at this stage we are not.*

1. *We are **not** taking 50k each as a wage, Connie will be responsible for the cake shop opening on the 14<sup>th</sup> March, completely running it and baking. This is a non profit organization.*
2. *We have our accountant following our business and doing our accounts and advising therefore no risk for dispute.*
3. *I have a fulltime job, therefore my contribution as a trustee is only for fund raising and marketing and only invoice for my time*
4. *We are happy to get support letters from our local MP Simon Bridges who supports our charity, coupled with Dorothy head of Homes of Hope.*

5. *We believe absolutely by opening this shop, that this social business will drives profits to help those affected by abuse, hence partnering Homes of Hope who house these victims. . . .*

11. On 30 March 2011, the Applicant informed the Commission that it had appointed two more trustees and that another trustee would be appointed shortly.

### **The issues**

12. The issue the Commission must consider is whether the Applicant meets all of the essential requirements for registration under the *Charities Act 2005* (the Act). In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular,
- a) Whether the Applicant's purposes fall within the definition of charitable purposes in section 5(1) of the Act?
  - b) Whether the Applicant's purposes will provide a benefit for a sufficient section of the public?

### **The law on charitable purposes**

13. Under section 13(1)(a) of the Act a trust must be of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
14. In order to be a valid trust at law, a trust that is for charitable purposes must be exclusively charitable or it will be void for uncertainty.
15. Section 5(1) of the Act states:
- 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.*
16. In addition, to be charitable at law, a purpose must be for the public benefit.<sup>1</sup> This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
17. Section 5(3) of the Act provides that a non-charitable purpose that is ancillary to a charitable purpose will not prevent an applicant from qualifying for registration.
18. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to have regard to the entity's activities at the time the application was made, the entity's proposed activities, and any other information that the Commission considers relevant.

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

## Charities Commission's analysis

### *Charitable purpose*

19. The Commission does not consider that the purpose set out in clause 2.1 of the Applicant's rules indicates an intention to advance education or religion. The Applicant's purpose and activities have therefore been analysed under the relief of poverty and other matters beneficial to the community.

### Stated purpose

20. In order to be charitable under the relief of poverty, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship, and it must provide relief.
21. For a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and must be within the spirit and intendment of the purposes set out in the Preamble to the *Charitable Uses Act 1601* (the Statute of Elizabeth):<sup>2</sup>
- relief of aged, impotent, and poor people
  - maintenance of sick and maimed soldiers and mariners
  - schools of learning
  - free schools and scholars in universities
  - repair of bridges, ports, havens, causeways, churches, sea banks, and highways
  - education and preferment of orphans
  - relief, stock or maintenance of houses of correction
  - marriage of poor maids
  - supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
  - relief or redemption of prisoners or captives and
  - aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.<sup>3</sup>
22. Over the years, the courts have recognised many new charitable purposes that are substantially similar to those listed in the Statute of Elizabeth, acknowledging that what is accepted as a charitable purpose must change to reflect current social and economic circumstances.

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

<sup>3</sup> *Charitable Uses Act 1601* 43 Elizabeth I c. 4.

23. In *Travis Trust v Charities Commission*<sup>4</sup>, Joseph Williams J noted that

*... regard must be had to the particular words of the preamble and, it has now long been held, any cases in which purposes have been found to be within the spirit and intendment of the preamble by analogy.*<sup>5</sup>

24. Furthermore, not all organisations, which have purposes that benefit the community, will be charitable. In *Williams Trustees v Inland Revenue Commissioners*,<sup>6</sup> Lord Simonds wrote:

*Now Sir Samuel Romilly did not mean, and I am certain Lord Macnaughten did not mean to say that every object of public general utility must necessarily be a charity. Some may be and some may not be. [...] Lord Macnaughten did not mean that all trust for purposes beneficial to the community are charitable, but that there were certain beneficial trusts which fell within that category: and accordingly to argue that because a trust is for a purposes beneficial to the community it is therefore a charitable trust is to turn round his sentence and to give it a different meaning.. So here, it is not enough to say that the trust in question is for public purposes beneficial to the community or for the public welfare: you must also show it to be a charitable trust.*<sup>7</sup>

25. In relation to the first limb of this test (beneficial to the community), the Supreme Court of Canada has summarised what is meant by the public benefit requirement. Gonthier J wrote that: "There must be an objectively measurable and socially useful **benefit** conferred; and it must be a benefit available to a sufficiently large section of the population to be considered a public benefit."<sup>8</sup>

26. Clause 2.1 of the Applicant's trust deed states:

*The purpose of the Trust is to provide financial assistance for the rehabilitation by way of counselling and/or psychotherapy and support of those affected by abuse, neglect or lack of care*

27. In *Tudor on Charities*, Jean Warburton has written that "the courts in New Zealand have refused to differentiate between the provision of health services in hospitals and other lawful institutions in determining charitable status and have accepted the provision of psycho-therapy services as charitable".<sup>9</sup>

<sup>4</sup> (2009) 24 NZTC 23,273 (William J).

<sup>5</sup> (2009) 24 NZTC 23,273 at 23,276-23,277 at para 20.

<sup>6</sup> [1947] 1 All ER 513, [1947] AC 447.

<sup>7</sup> [1947] 1 All ER 513, [1947] AC 447 at 455. (Applied by Kennedy J *In re Cumming* [1951] NZLR. 498.)

<sup>8</sup> *Vancouver Society of Immigrant and Visible Minority Women v MNR* [1999] 1 SCR 10 at para 41 per Gonthier J dissident. *Gino Dal Pont, Charity Law in Australia and New Zealand*, Oxford, Oxford University Press, 2000 at 174-175.

<sup>9</sup> *Tudor on Charities*, 9th edition, London, Sweet & Maxwell, 2003 at 108 para 2-083.

28. Moreover, in *Centrepoint Community Growth Trust v Commissioner of Inland Revenue*,<sup>10</sup> any member of the public was able to seek the help the trust offered. By using techniques of psycho-therapy the trust had treated people with emotional and psychological disturbances. It had thereby provided relief for the sick, even though its treatment was by psychological healing and not orthodox medical methods. The provision of these psycho-therapy services was one of the main purposes of the trust. The fact that it made a modest charge for some of its counselling and therapy activities did not affect the conclusion that the trust's activities were for purposes that were beneficial to the community.
29. The Commission therefore considers that the purpose stated in clause 2.1 may be charitable under the relief of poverty and other matters beneficial to the community.

#### Applicant's activities

30. As required by section 18(3)(a) of the Act, however, the Commission must also have regard to the Applicant's current and future activities and any other information that the Commission considers relevant.
31. While the Applicant's trust deed appears to be dated 2 September 2010, the Applicant's letter of 24 November 2010 states:
2. *We have been operating for 12 months, from one of the trustee's home premises.*
  3. *We have not made any profit yet.*
  4. *We have only just partnered with Homes of hope therefore once we start making money all surplus will go to them for counselling of children affected by abuse, and or adults to re-unite the children to them*
  5. *Connie and I have been doing all of this work as volunteers and have not been paid.*
  6. *The orders we have processed so far have only paid for set up costs and marketing, coupled with ingredients and deliveries etc.*
32. The Applicant's letter of 14 December 2010 states:
- We feel without your support we will not have enough recognition to create enough funds to keep our head above water. Currently we are really just breaking even.*
33. In this letter the Applicant also states that, if registered by the Commission, the trustees intend to take on the lease for a shop, to pay themselves \$100,000 per annum, and to "look at two part-time staff on an hourly rate". (Subsequently the Applicant's accountant stated that the trustees' intention was to pay one trustee \$50,000 and to pay the other an hourly rate of \$35 to act as a management consultant for the trust.)

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<sup>10</sup> [1985] 1 NZLR 763 at 698-699 per Tompkins J.



34. In its letter of 24 November 2010 the Applicant stated its intention to increase its turnover so that it will spend 33% of its income on operating costs, 33% on marketing and wages, and 33% on Homes of Hope for “counselling of children affected by abuse and or adults to re-unite the children to them.”
35. Although the Commission asked the Applicant to provide a copy of its business plan on 3 December 2010, this has not been supplied. Without a business plan or other such documentation, the Commission does not consider that the Applicant has provided sufficient evidence to show how the Applicant has determined that it will be able to apply 33% of its income to a charitable purpose or whether the Applicant will be able to generate **any** funds for a charitable purpose after payment of expenses.

Public or private benefit?

36. In order to be charitable, a purpose must provide public benefits rather than benefits to private individuals. Any private benefits arising from the Applicant’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.<sup>11</sup>
37. In *Hadaway v Hadaway*,<sup>12</sup> the Privy Council held that assisting persons carrying on a particular trade or business or profession would not be charitable unless there was a condition that this assistance could only be made for a purpose which was itself charitable. In that case the court held that any eventual benefit to the community was too remote:

*The promotion of agriculture is a charitable purpose, because through it there is a benefit, direct or indirect, to the community at large: between a loan to an individual planter and any benefit to the community the gulf is too wide. If there is through it any indirect benefit to the community, it is too speculative.*<sup>13</sup>

38. In *Commissioners of Inland Revenue v White and Others and Attorney General*<sup>14</sup> it was held that entity’s purpose to “promote any charitable purpose which will encourage the exercise and maintain the standards of crafts both ancient and modern, preserve and improve craftsmanship and foster, promote and increase the interest of the public therein” was charitable. However, in that case, Fox J states:

*“The three cases which I have last mentioned seem to me to establish that the promotion or advancement of industry (including a particular industry such as agriculture) or of commerce is a charitable object **provided that the purpose is the advancement of the benefit of the public at large and not merely the promotion of the interest of those engaged in the manufacture and sale of their particular products. ...The charitable nature of the object of promoting a particular industry depends upon the existence of a benefit to the public from the promotion of the object**”* [Emphasis added].

<sup>11</sup> *Inland Revenue Commissioners v Oldham Training and Enterprise Council* (1986) STC 1218; *Travel Just v Canada Revenue Agency* 2006 FCA 343 [2007] 1 CTC 294.

<sup>12</sup> [1955] 1 WLR 16 (PC).

<sup>13</sup> [1955] 1 WLR 16 at 20 (PC).

<sup>14</sup> (1980) 55 TC 651 at 659.

39. In *Commissioners of Inland Revenue v Oldham Training and Enterprise Council*,<sup>15</sup> the Court held:

*[T]he second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them [...] **Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote** [Emphasis added].*

40. In *Travel Just v Canada (Revenue Agency)*,<sup>16</sup> the Canadian Federal Court of Appeal considered a case relating to entity whose purposes were the creating of model tourism development projects and the production and dissemination of tourism information. The Court found that promoting commercial activity with a strong flavour of private benefit was not a purpose beneficial to the public.
41. Similar reasoning was applied in the High Court of New Zealand in *Canterbury Development Corporation v Charities Commission*,<sup>17</sup> when Young J held that providing private benefits for business owners was not a charitable purpose.
42. As indicated above, in her letter of 27 January 2011 the Applicant's accountant stated that the trustees' intention is to pay one trustee a salary of \$50,000 and to pay the other trustee an hourly rate of \$35 to act as a management consultant for the trust.
43. The Commission considers that the Applicant's activities appear to confer private benefits on two of its trustees, assisting them to carry on a particular business or businesses. Any benefits for the public which may flow from these activities are merely hoped for consequences and therefore are too remote to be considered charitable.

#### Applicant's submission

44. In its responses of 24 November 2010, 14 December 2010, and 28 February 2011 the Applicant referred to creating two social businesses, "Karmic Cupcakes" and "Karmic Cottons".
45. The concept of 'social business' is relatively new and the Commission considers that these terms do not have a single widely accepted meaning. These terms may include both not-for-profit organisations or projects and for-profit organisations or projects. In relation to the term 'social entrepreneurship' it has been stated:

<sup>15</sup> (1996) 69 Tax Cases 231 at 251.

<sup>16</sup> 2006 FCA 343 [2007] 1 C.T.C 294, 2007 D.T.C. 5012 (Eng.) 354 N.R. 360.

<sup>17</sup> HC WN CIV 2009-485-2133 [18 March 2010].

*Though the concept of 'social entrepreneurship' is gaining popularity, it means different things to different people. This can be confusing. Many associate social entrepreneurship exclusively with not-for-profit organisations starting for-profit or earned-income ventures. Others use it to describe anyone who starts a not-for-profit organisation. Still others use it to refer to business owners who integrate social responsibility into their operations.<sup>18</sup>*

46. In "Social and Commercial Entrepreneurship: Same, Different, or Both?" it is stated:

*Definitions of social entrepreneurship range from broad to narrow. In the former, social entrepreneurship refers to innovative activity with a social objective in either the for-profit sector, such as in social-purpose commercial venture (e.g. Dees & Anderson, 2003; Emerson & Twersky, 1996) or in corporate social entrepreneurship (e.g. Austin, Leonard, Reficco, & Wei-Skillern, 2004); or in the nonprofit sector, or across sectors, such as hybrid structural forms which mix for-profit and nonprofit approaches (Dees, 1998). Under the narrow definition, social entrepreneurship typically refers to the phenomenon of applying business expertise and market-based skills in the nonprofit sector such as when nonprofit organizations develop innovative approaches to earn income (Reis, 1999; Thompson, 2002).<sup>19</sup>*

47. The Commission does not consider that use of a term such as "social business" provides conclusive evidence that the Applicant is undertaking exclusively charitable purposes.

#### Conclusion

48. Although the purpose stated in clause 2.1 appears to be charitable, there is insufficient evidence to show that the Applicant will be able to generate any funds for this purpose. Instead the Applicant's activities appear to confer private benefits on two of its trustees. Any benefits for the public which may flow from the Applicant's activities are merely hoped for consequences and therefore are too remote to be considered charitable.

#### Section 61B of the Charitable Trusts Act 1957

49. In order to be a valid trust at law, a trust for charitable purposes must be exclusively charitable or it will be void for uncertainty. Section 61B of the *Charitable Trusts Act 1957* however, can operate in two situations to "save" a trust that has both charitable and "non-charitable and invalid" purposes. The first is where the entity's **stated purposes** include charitable and non-charitable purposes (in which case the non-charitable purposes may be "blue pencilled out"). The second is where the stated purposes are capable of both a charitable and a non-charitable **interpretation** and the primary thrust of the gift is considered to be charitable (in which case the purposes could be deemed to apply only in terms of the charitable interpretation).<sup>20</sup>

<sup>18</sup> <http://www.redalmarza.com/ing/pdf/TheMeaningofSocialEntrepreneurship.pdt>.

<sup>19</sup> "Social and Commercial Entrepreneurship: Same, Different or Both? Jan 2006, 30(1) *Entrepreneurship Theory and Practice* 1-22.

<sup>20</sup> *Re Beckbessinger* [1993] 2 NZLR 362, 373.

50. The Commission considers that section 61B of the *Charitable Trusts Act 1957* cannot be invoked in the current case. This is because the Applicant's purposes do not include both charitable and non-charitable purposes and because the non-charitable status of the Applicant is not a result of stated purposes which are capable of both a charitable and a non-charitable interpretation.

### ***Compliance with trust deed***

#### Number of trustees

51. Clauses 5.1 and 5.5 of the Applicant's trust deed state:

5.1 *The Board will comprise of no less than three trustees and no more than nine trustees.*

...

5.5 *The Board may continue to act notwithstanding any vacancy, but if their number is reduced below minimum number of trustees as stated in this deed, the continuing trustee/s may act for the purpose of increasing the number of trustees to that minimum but for no other purpose.*

52. On its application the Applicant indicated that it had only two trustees. The Commission pointed out the trust deed's requirement for a minimum of three trustees in its notice of 21 February 2011.

53. In its email response of 24 February 2011 the Applicant stated:

*our solicitor advised we would only need 2 trustees, not 3, that was only if we borrowed huge funds for buildings, etc, we at this stage are not.*

54. On 30 March 2011, the Applicant informed the Commission that it had appointed two more trustees and that another trustee would be appointed shortly. The number of trustees is therefore now above the minimum requirement set out in the trust deed.

#### Trustee remuneration

55. The general rule concerning remuneration of trustees is that, in accordance with the rule of equity, the trustees must not profit by their trust. Therefore, trustees are not, as a general rule, entitled to remuneration for their work for the trust; they are entitled to no compensation either for their personal trouble or for loss of time.<sup>21</sup>

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<sup>21</sup> *Peach v Jagger* (1910) 30 NZLR 423, 13 GLR 390, cited by Noel C Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees*, 6<sup>th</sup> Ed, Wellington, LexisNexis NZ Ltd, 2005 at 560-561.

56. Remuneration may be allowed where it is expressly or impliedly provided for in the instrument of trust.<sup>22</sup> However, the question of remuneration to trustees expressly allowed to charge for professional services has risen mostly in connection with solicitors, or other professionals who act as trustees: for example, bankers, auctioneers, agents of various kinds, and surveyors. It must be noted that such clauses allowing trustees to charge for professional costs are strictly construed by the courts.<sup>23</sup>
57. The reason underlying the rule of remuneration for trustees is that the interest and duty of the trustee must not be put in conflict. In other words, no one who has a duty to perform shall place him or herself in such a position that self-interest will conflict with that duty and that, if interest and duty do conflict, interest must give way.<sup>24</sup>
58. The Commission considers that there is no **express** clause in the trust deed allowing any trustee to be hired as a full-time or part-time employee. The only reference to payments to trustees appears in clause 8.2 which states:

*No trustee or members of the Trust or any person associated with a trustee shall participate in or materially influence any decision made by the trustees in respect of **any payment to** or on behalf of **that trustee** or associated person of any income, benefit or advantage whatsoever.  
Any such income paid shall be reasonable and relative to that which would be paid in an arm's length transaction (being the open market value).  
[Emphasis added]*

59. As this clause refers to payments to trustees or associated persons, it could be considered to **impliedly** provide for trustee remuneration.
60. While it does not form part of New Zealand legislation, the Commission notes that in the United Kingdom strict conditions must be satisfied before payments to trustees can be approved. These conditions include requirements that:
- the payments must be reasonable;
  - the payment must be 'for the best interest of the charity'; and
  - the number of trustees being paid should be a minority of the total number of trustees.<sup>25</sup>

<sup>22</sup> *Re Murray* [1967] NZLR 1 and *Stevens v Dalrymple* [1928] NZLR 95, [1928] 466 (CA), cited by Noel C Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees*, 6<sup>th</sup> Ed, Wellington, LexisNexis NZ Ltd, 2005 at 561.

<sup>23</sup> *Harbin v Darby* (1860) 28 Bev 325; *In re Fish, Bennett v Bennett* [1893] 2 Ch 413 (CA); *Clarkson v Robinson* [1900] 2 Ch 722; *In re Chalinder and Herington* [1907] 1 Ch 58, cited by Noel C Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees*, 6<sup>th</sup> Ed, Wellington, LexisNexis NZ Ltd, 2005 at 565.

<sup>24</sup> *Re Ebbett* [1974] 1 NZLR 392; *Re Thompson's Settlement* [1985] 2 All ER 720, cited by Noel C Kelly, Chris Kelly and Greg Kelly, *Garrow and Kelly Law of Trusts and Trustees*, 6<sup>th</sup> Ed, Wellington, LexisNexis NZ Ltd, 2005 at 561.

<sup>25</sup> Hubert Picarda, *The Law and Practice Relating to Charities*, Haywards Heath, Bloomsbury Professionals Ltd, 2010 at 637-638.

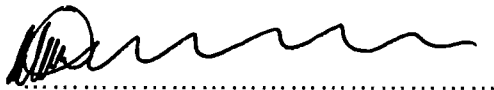
61. If such criteria were applied to the current case, the Commission would require evidence that paying one trustee a salary of \$50,000 and paying the other trustee an hourly rate of \$35 to act as a management consultant was reasonable considering the open market value for this type of work in this particular area. The Commission would also require evidence that employing these two trustees in these roles was in the best interests of the trust.
62. Until the appointment of the additional three trustees in March 2011, the Applicant would have failed to meet the United Kingdom requirements as the two trustees being paid were the only trustees.

### **Charities Commission's determination**

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

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

Signed for and on behalf of the Charities Commission



Trevor Garrett  
Chief Executive

13/4/11

Date