

Registration decision: The Team New Zealand Trust

The facts

1. The Team New Zealand Trust (the Applicant) was created by a declaration of trust dated 13 May 1993. The trustees of the Trust were incorporated as a board under the Charitable Trusts Act 1957 on 31 August 2004.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity under the Charities Act 2005 (the Act) on 15 May 2008.
3. The Applicant's purposes are set out in clause 5 of the Trust Deed:

5.1 Purposes: *The Trustees shall hold the Trust Fund upon trust to pay or apply the income and the capital of the Trust Fund in such amounts, at such times, and subject to such terms and conditions, as the Trustees may decide for all or any of the following purposes, namely to:*

- (a) *Promote, foster and advance the education, training and development of persons involved in yachting in New Zealand at all levels of participation for the purpose of increasing their expertise and skill as sailors and in all maritime disciplines, practices and usages, so as to foster safety at sea and the understanding and application of principles and practices of good seamanship;*
- (b) *Establish, maintain, manage or develop research and development facilities and a technology resource (including but not solely consisting of such related areas as sail and boat design, engineering, electronics, meteorology and navigation) to be available upon such terms and conditions as the Trustee may from time to time determine, to participants in yachting in New Zealand;*
- (c) *Promote, foster and advance the establishment and administration of training and education facilities and school and club activities to encourage the safe enjoyment of yachting in New Zealand;*
- (d) *Promote, foster and advance in New Zealand water skills and water safety; and*
- (e) *Promote, foster and advance such other charitable purposes as the Trustee may decide.*

5.2 Means of achieving purposes: *The Trustees may, in order to achieve the purposes of the Trust, in addition to all other powers vested in the Trustees:*

- (a) *Encourage and support in any manner whatsoever the participation by New Zealand and New Zealanders in yachting races, regattas, displays and other events both within and without New Zealand, the standards of which require, in the opinion of the Trustees, the display, development and improvement by New Zealanders of such education, training, skill and seamanship as is referred to in clause 5.1(a), and/or the participants in which exemplify in the opinion of the Trustees the finest standards of such education, training, skill and seamanship;*

- (b) *Provide or make grants for the provision or for the development and improvement of such equipment as is used in yachting, and to support the investigation and promotion of new inventions, developments and innovations relevant to or derived from yachting whether or not they may also be used in the community generally;*
- (c) *Provide a focus for and actively encourage corporate sponsorship of any of the purposes set out in clause 5.1 or this clause 5.2;*
- (d) *Make grants of aid and assistance to persons involved in yachting and/or their dependants in circumstances of need (whether or not these situations arose from yachting), and more particularly to enable New Zealanders to participate in yachting competitions and events of the types referred to in clause 5.2(a) both in New Zealand and overseas;*
- (e) *Obtain benefits to the community by promoting New Zealand internationally through yachting and more particularly to obtain international recognition of New Zealand and all of its people, thereby raising the self-esteem of New Zealanders, fostering in all New Zealanders, particularly in the youth of New Zealand, pride in their country, and encouraging the skill and industry and the pursuit of excellence in all activities including, but not limited to those related to yachting;*
- (g) *Undertake such other activities and enterprises to further the charitable purposes of the Trust as the Trustees may decide."*

4. The Commission analysed the application for registration and on 8 January 2009, sent the Applicant a notice that may lead to a decline on the basis that the research referred to in clause 5.1(b) would not necessarily be disseminated to, or accessible by, the public and would therefore not amount to advancing education. The Applicant was also asked to provide examples of the types of support and assistance undertaken under clauses 5.2(a) and 5.2(d), and to provide details of the nature of the Applicant's expenditure if it was to participate in another America's Cup challenge.

5. On 17 February 2009, the Applicant's solicitors responded to the notice making the following submissions:

- *"The facilities and resource contemplated in clause 5.1(b) are to be available to participants in yachting in New Zealand. This is a sufficiently broad class of the public and the benefit of facilities and resources being available, albeit on terms, is obvious." (paragraph 2.1(e))*
- *"The possibility of terms and conditions being imposed on the availability of facilities, resources or technology does not negate dissemination so as to make the purpose in clause 5.1(b) non-charitable. Terms and conditions may be necessary for numerous practical reasons. For example, in some circumstances it may be necessary to have terms which require that new technology remains secret in the short-term in order to maintain a competitive advantage. However it is clear that, despite such a condition, when new technology is inevitably revealed new developments and technological advances become apparent and available to the wider yachting community and the dissemination of knowledge occurs." (paragraph 4.1)*

- *"It is not necessary that clauses 5.2(a) to 5.2(g) be charitable in and of themselves." (paragraph 5.1)*
- *"we note that the clause 5.2(a) promotion of participation in events such as the America's Cup is an adjunct means by which to achieve the charitable objects in clause 5.1 of the Declaration. . . .*

... the immediate public benefit of this expenditure in the context of the Trust's charitable objects is in:

- (a) Showing to the New Zealand public (including but not limited to those who participate in yachting) a highly visible example of the combination of expert seamanship and technological innovation.*
- (b) By that example, presenting to the public a readily appreciable standard for the safe conduct of maritime disciplines and usages in arguably the most demanding global match racing environment, where sailing skill and disciplines must be employed in circumstances which are at times potentially dangerous.*
- (c) Promoting by that example an expectation and desire on the part of the public (including but not limited to those who participate in yachting) that safe practices, good seamanship, discipline and utmost skill should be pursued in yachting in New Zealand and should be improved over time, with a view to emulating the standards achieved at the highest level of competition.*

In addition to these immediate public benefits, there are others to consider. The past experience of the Trust shows that there is undoubtedly a wide interest and national pride associated with New Zealand participation in America's Cup regattas even when they may be unsuccessful. That reflects the adjunct objects of clause 5.2(e) and is within the 'catch-all' category of charitable objects in clause 5.1(e) of the Declaration.

Moreover there is no doubt that if a challenge was successful it would bring to New Zealand, enormous economic benefits." (paragraphs 6.10, 6.12 to 6.14)

6. On 1 May 2009, the Registration and Monitoring Committee considered the information provided by the Applicant. The Committee recommended that a letter be sent to the Applicant requesting further information about the Applicant's activities, specifically:
 - further detail in relation to the activities of the trust undertaken in furtherance of the objects set out in clauses 5.1(a), (c), (d), and (e) of the declaration of trust;
 - a copy of the trust's financial statements for the previous year; and
 - an explanation of rights and obligations as between Team New Zealand Trust, Team New Zealand Limited, and the Team New Zealand 2000 Trust.

7. The Commission sent the Applicant a letter requesting this further information on 6 May 2009.

8. On 5 June 2009, the Applicant responded to the request for further information providing its financial statements for the year ended 31 March 2008 and submitting:

"... a permitted means of achieving the charitable purposes referred to in clause 5.1 of the Trust declaration is providing support for New Zealand participation in 'high end' yachting competition. The Trust considers that its support for Team New Zealand Limited and New Zealand's participation in successive America's Cup regattas and related competition has directly contributed to the fulfilment of each of the objects in clause 5.1(a) to (d)."

9. The Commission analysed the Applicant's submissions and on 13 August 2009, sent the Applicant a second notice that may lead to a decline on the basis that the purposes set out in clauses 5.1(b) and the means of achieving the purposes, set out in clause 5.2, were sufficiently broadly worded to allow non-charitable purposes to be undertaken.

10. On 14 September 2009, the Commission received a letter from the Applicant dated 2 September 2009 and an attachment from the Applicant's barrister dated 8 September 2009. The barrister's letter stated:

- *"section 5(3) of the Charities Act 2005 (CA) ... codifies the common law position on incidental non-charitable purposes. This section states that, to avoid doubt, the presence of an ancillary non-charitable purpose does not prevent registration. ... Indeed the whole point of section 5(3) of the CA is to accommodate non-charitable purposes. (paragraph 3.1)*
- *"clause 5.2 commences with limiting words. ... It precludes the application of the powers unless they are in pursuit of one or more of the purposes ... the words operate as a 'blue pencil' to rule out recourse to means unless they are to fulfil the Trust's purposes." (paragraph 3.3)*
- *"the powers in clause 5.2 are expressly subordinated and are means to the end of achieving the clause 5.1 purposes, rather than ends in themselves." (paragraph 3.4)*
- *"commentators confirm that common law orthodoxy only requires an activity inquiry in cases of uncertainty, etc." (footnote 3)*
- *"there will undoubtedly be private benefits that accrue from the way the Trust elects to promote the acquisition and development of skills and by that to promote safety at sea and good seamanship, and similarly from the development of technology resources. Those might even be considered to be significant and inevitable. But none of that detracts from the fact that in my opinion they are by-products of the Trust's actions in pursuit of the clause 5.1 purposes. (paragraph 3.14)*
- *"By supporting TNZL the Trust does not support non-charitable purposes. Though TNZL's activities on their own might be non-charitable, its purposes are not. That is because the activities are undertaken solely on the basis that the capital assets and profits derived from them must be applied to the purposes of the Trust. As long as the Trust's purposes are charitable it does not matter that TNZL's business is high end competitive yachting." (paragraph 4.3)*

The issue

11. The Commission must consider whether the Applicant meets all of the essential requirements for registration under the Act. In this case, the key issue for consideration is whether the Applicant is a trust of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes, as required by section 13(1)(a) of the Act. In particular, whether the Applicant's purposes fall within the definition of charitable purpose in section 5(1) of the Act.

The law on charitable purpose

12. 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.
13. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefitting the public or a sufficient section of the public.
14. Section 5(3) of the Act provides that any non-charitable purpose must be ancillary to a charitable purpose.
15. 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.

Charities Commission's analysis

Stated purposes (clause 5.1)

16. The Commission considers that the purpose in clause 5.1(e) is charitable by definition. The purposes set out in clauses 5.1(a) to (d) do not indicate an intention to relieve poverty or advance religion, they have therefore been considered in relation to advancement of education and other matters beneficial to the community.

Advancement of education

17. The modern concept of "education" covers formal education, training and research in specific areas of study and expertise. It can also include less formal education in the development of individual capabilities, competencies, skills, and understanding, as long as there is a balanced, and systematic process of instruction, training, and practice.² In order to

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

² *Re Mariette* [1915] 2 Ch 284. (See also *Chesterman v Federal Commissioner of Taxation* (1923) 32 CLR 362; *Lloyd v Federal Commissioner of Taxation* (1955) 93 CLR 645;

advance education, learning must be passed on to others. If research is being conducted, it must be carried out in an objective and impartial way, and the useful results made available or accessible to the public.

18. In *Re Shaw (deceased)*, the Court held that "if the object be merely the increase of knowledge, that is not in itself a charitable object unless it be combined with teaching or education".³

19. In *Re Collier (deceased)* Hammond J set out the test for determining whether the dissemination of information qualified as charitable under the head of advancement of education:

*"It must first confer a public benefit, in that it somehow assists with the training of the mind, or the advancement of research."*⁴

20. The Commission considers that the purposes stated in clauses 5.1(a), (c) and (d), appear to be charitable under the advancement of education because they relate to educating the public about sailing skills and water safety.

21. The purpose set out in clause 5.1(b) is to:

"Establish, maintain, manage or develop research and development facilities and a technology resource (including but not solely consisting of such related areas as sail and boat design, engineering, electronics, meteorology and navigation) to be available upon such terms and conditions as the Trustee may from time to time determine, to participants in yachting in New Zealand;"

22. In paragraphs 2.1(e), 4.1, 6.3, and 6.4 of his letter of 17 February 2009, the Applicant's solicitor, states:

"The facilities and resource contemplated in clause 5.1(b) are to be available to participants in yachting in New Zealand. This is a sufficiently broad class of the public and the benefit of facilities and resources being available, albeit on terms, is obvious." (paragraph 2.1(e))

*"The possibility of terms and conditions being imposed on the availability of facilities, resources or technology does not negate dissemination so as to make the purpose in clause 5.1(b) non-charitable. Terms and conditions may be necessary for numerous practical reasons. For example, in some circumstances it may be necessary to have terms which require that new technology remains secret in the short-term **in order to maintain a competitive advantage**. However it is clear that, despite such a condition, when new technology is inevitably revealed new developments and technological advances become apparent and available to the wider yachting community and the dissemination of knowledge occurs."* (paragraph 4.1 emphasis added)

Chartered Insurance Institute v London Corporation [1957] 1 WLR 867; *Flynn v Mamarika* (1996) 130 FLR 218.)

³ *In re Shaw (deceased)* [1957] 1 WLR 729, 737.

⁴ [1998] 1 NZLR 81, 91-92.

"It can be seen that historically new yachting technologies and materials have been developed and tested for yachtsmen competing at the top of the sport and then 'trickle down' into general use with time to also benefit the wider yachting community. Indeed one commentator who has noted this process has also stated that the America's Cup has been the source of most new technological developments in yachting since it first started in 1851." (paragraph 6.3)

*"This observation about the importance of the America's Cup to technology development has very real examples in the experience of the Trust. Attached to this letter as **Attachment 2** is an addendum prepared by Team New Zealand's Technical Director. It summarises examples of technological developments which were originally conceived or developed as part of the Trust's support of New Zealand participation in the America's Cup regattas. Those developments have found their way into much more common usage in the context of yachting often contributing to equipment efficiency and safety at sea. These are specific examples of the technology and resource contemplated by the Declaration having become available more widely."* (paragraph 6.4)

23. The Commission is not satisfied that the purpose in clause 5.1(b) indicates a primary intention of making research results available to the public because the research and development facilities and technology resource are only "available upon such terms and conditions as the Trustee may from time to time determine to participants in yachting in New Zealand". The wording of this section would allow research results to be made available to a very limited group of participants in yachting which may not amount to a sufficient section of the public.⁵ For example, the Commission would not consider that providing equipment and innovations to assist a limited number of sportspeople to compete in high-end yachting competitions would provide benefit for a sufficient section of the public.
24. The Applicant has stated that "when new technology is inevitably revealed new developments and technological advances become apparent and available to the wider yachting community and the dissemination of knowledge occurs." The Commission notes, however, that courts have expressed a great deal of scepticism about the appropriateness of defining the purpose of a trust by reference to alleged downstream benefits where those benefits were not themselves the trust's express purpose. For example in *Amateur Youth Soccer Association v Canada (Revenue Agency)* Rothstein J held:

*"The fact that an activity or purpose happens to have a beneficial by-product is not enough to make it charitable. If every organisation that might have beneficial by-products, regardless of its purposes, were found to be charitable, the definition of charity would be much broader than what has hereto for been recognised in the common law."*⁶

⁵ See *Carne v Long* (1860) 2 De G F & J 75; 45 ER 550; cited in *Re Mason (deceased)* [1971] NZLR 714, 721.

⁶ (2007) 287 DLR (4th) 4 (SCC) at 22; quoted with approval by Joseph Williams J in *Travis Trust v Charities Commission* HC Wellington CIV-2008-485-1689 3 December 2008 at para 32.

25. The Commission is therefore not satisfied that the purpose in clause 5.1(b) is charitable under the advancement of education.

Other matters beneficial to the community

26. In order for a purpose to qualify as "any other matter beneficial to the community", the purpose must be beneficial to the community and be within the spirit and intendment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth). The purposes set out in the Preamble are as follows:⁷
- 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.⁸
27. Courts have held the protection of human life to be analogous to the purposes set out in the Preamble⁹, and clearly, the protection of human life would provide a community benefit. Therefore to the extent that the purposes in clauses 5.1(a), (c), and (d) promote water safety, these appear to be charitable purposes under this head.
28. Courts have held the provision of public facilities such as halls,¹⁰ libraries, and museums¹¹ to be charitable under this head. The Commission does not consider, however, that the purpose set out in clause 5.1(b) indicates an intention to provide facilities which are available to the public. The Commission does not consider that the purpose in clause 5.1(b) is analogous to the spirit and intent of the purposes listed in the Preamble to the Statute of Elizabeth or analogous to a charitable purpose as decided by the courts, therefore it is not charitable under this head.

⁷ *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.

⁸ (43 Eliz I c 4).

⁹ See *Johnston v Swann* (1818) 3 Madd 457; *Thomas v Howell* (1874) LR 18 Eq 198; *Re Richardson* (1887) 56 LJCh 784; *Re David* (1889) 41 ChD 27, CA; *Beaumont v Oliveira* (1869) LR 4 Ch 309.

¹⁰ *Re Cumming* [1951] NZLR 498.

¹¹ *Murdoch v Attorney-General* (1892) 11 NZLR 502.

Means of achieving purposes (clause 5.2)

29. In paragraphs 5.1 and 6.10 of his letter of 17 February 2009, the Applicant's solicitor, states:

"It is not necessary that clauses 5.2(a) to 5.2(g) be charitable in and of themselves."

" . . . we note that the clause 5.2(a) promotion of participation in events such as the America's Cup is an adjunct means by which to achieve the charitable objects in clause 5.1 of the Declaration. . . ."

30. On page 1 of its letter of 5 June 2009, the Applicant states:

"... a permitted means of achieving the charitable purposes referred to in clause 5.1 of the Trust declaration is providing support for New Zealand participation in 'high end' yachting competition. The Trust considers that its support for Team New Zealand Limited and New Zealand's participation in successive America's Cup regattas and related competition has directly contributed to the fulfilment of each of the objects in clause 5.1(a) to (d)."

31. In paragraphs 3.1, 3.3, and 3.4 and footnote 3 of his letter of 14 September 2009, the Applicant's barrister states:

"section 5(3) of the Charities Act 2005 (CA) ... codifies the common law position on incidental non-charitable purposes. This section states that, to avoid doubt, the presence of an ancillary non-charitable purpose does not prevent registration. . . . Indeed the whole point of section 5(3) of the CA is to accommodate non-charitable purposes." (paragraph 3.1)

"clause 5.2 commences with limiting words. It prefaces the powers that are given the trustees under that clause by saying they may be used in order to achieve the purposes of the Trust. This is directory of the way the Trustees may employ the powers they are given. It precludes the application of the powers unless they are in pursuit of one or more of the purposes ... the words operate as a 'blue pencil' to rule out recourse to means unless they are to fulfil the Trust's purposes." (paragraph 3.3)

"the powers in clause 5.2 are expressly subordinated and are means to the end of achieving the clause 5.1 purposes, rather than ends in themselves." (paragraph 3.4)

"commentators confirm that common law orthodoxy only requires an activity inquiry in cases of uncertainty, etc." (footnote 3)

32. The Commission notes that section 5(3) of the Act states:

*"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.*

33. While ancillary purposes or powers do not have to be charitable in their own right, they must still further the charitable purposes of the entity.¹²
34. Case law indicates that an examination of incidental powers may be necessary in order to determine an entity's real fundamental purpose. For example, in *MK Hunt Foundation Ltd v Commissioner of Inland Revenue*¹³ the court held:

"In examining the memorandum, one must of course, distinguish between objects and powers, and in that regard bear in mind Lord Tomlin's statement in Keren Kayemeth le Jisroel Ltd v Commissioners of Inland Revenue [1932] A.C. 650; [1932] All ER Rep 971:

'I well appreciate the argument which says that if you once find that the main object is charitable you cannot destroy the charitable character of the main object, because the ancillary powers, which are incidental to it, are, some of them, in themselves, not charitable. That argument may indeed be well founded, but when the question is whether the primary object is itself charitable, it is legitimate, in reaching a conclusion upon that head, to consider the effect of the incidental powers, and it may well be that the incidental powers are such as to indicate or give some indication that the primary object is not itself charitable' (ibid., 658; 977).

In the result he came to the view that the main object was not charitable. The statute there under consideration contained the phrase 'for charitable purposes only', and Lawrence L.J. had said in the Court of Appeal, [1931] 2 KB 465:

'It is not enough that the purposes described in the memorandum should include charitable purposes. The memorandum must be confined to those purposes' (ibid., 481).

In so holding, Lawrence L.J. makes it clear in his judgment that he had in mind, not merely the phrase 'charitable purposes only', but also the cases which show that non-charitable objects will prevent recognition of the body in question as a charitable trust."

¹² See for example the approach taken by the court with regard to political purposes in *National Antivivisection Society v Inland Revenue Commissioners* [1947] 2 All ER 217.

¹³ [1961] NZLR 405, 407-408.

35. Similarly, in *Commissioner of Inland Revenue v Carey's (Petone and Miramar) Ltd*¹⁴ Gresson P stated:

"This aspect of the question before us seems to us to invoke similar (though not identical) considerations to those which exercised the mind of Lord Greene in Royal Choral Society v Commissioners of Inland Revenue [1943] 2 All ER 101 (though that was the case of the objects of a charitable institution, not the objects of a charitable trust). He said:

'It is true that you have to find the purpose of the alleged charitable establishment. It may very well be that a purpose which, on the face of it looks to be the real purpose, on close examination, is found not to be the real purpose. A body of persons may purport to set themselves up for educational purposes; but on a full examination of the facts, it may turn out that their purpose is nothing of the kind, and is one merely to provide entertainment or relaxation to others, or profit to themselves. In other words, the presence of the element of entertainment or pleasure may be either an inevitable concomitant of a charitable or educational purpose, or it may be the real fundamental purpose, and education may merely be a by-product. Whether a case falls within one class or the other is, no doubt, a question of fact, save and so far as it may depend on the construction of written documents' (ibid., 106).

So in this case what must be decided is whether the real fundamental purpose of this trust is charitable."

36. In *Auckland Medical Aid Trust v Commissioner of Inland Revenue*¹⁵ Chilwell J stated "[t]he law would resist finding a charitable purpose if a trust were dressed up within a cloak of charitable purposes that cloak being in fact used for non-charitable purposes."

Clause 5.2(a)

37. Clause 5.2(a) of the Applicant's Trust Deed states that the trustees may, in order to achieve the purposes of the trust:

"Encourage and support in any manner whatsoever the participation by New Zealand and New Zealanders in yachting races, regattas, displays and other events both within and without New Zealand, the standards of which require, in the opinion of the Trustees, the display, development and improvement by New Zealanders of such education, training, skill and seamanship as is referred to in clause 5.1(a), and/or the participants in which exemplify in the opinion of the Trustees the finest standards of such education, training, skill and seamanship;"

¹⁴ [1963] NZLR 450, 456.

¹⁵ [1979] 1 NZLR 382, 395.

38. In *Re Nottage*¹⁶ Kekewich J stated:

"I cannot bring myself to hold that the sport of yacht-racing is beneficial to the community in the sense in which that phrase is used by Lord Macnaghten in the case in the House of Lords and by other learned judges. I cannot see that the benefit of the community is the natural direct and necessary result of this gift; and though I am far from saying that the result of the gift is not beneficial, I must hold that it is not beneficial to the community so as to constitute this a charitable gift."

39. In more recent decisions, courts have held that participation in some amateur sports can provide sufficient public benefit in certain circumstances. In *Travis Trust v Charities Commission*¹⁷ Williams J made the following comments in relation to sports and recreation:

"In the area of sport and leisure, the general principle appears to be that sport, leisure and entertainment for its own sake is not charitable but that where these purposes are expressed to be and are in fact the means by which other valid charitable purposes will be achieved, they will be held to be charitable. The deeper purpose of the gift or trust can include not just any of the three original Pemsel heads but also any other purpose held by subsequent cases or in accordance with sound principle to be within the spirit and intendment of the Statute of Elizabeth. In the areas of sport, the deeper purpose is usually health or education."

40. As identified in the *Travis Trust* case, sport, leisure, and entertainment for its own sake is not charitable, unless these are the means by which charitable purposes are achieved. For example, if members of the public are able to participate in a physical activity which has cardiovascular benefits, this is likely to be charitable under the fourth head as promotion of public health.
41. In *Re Laidlaw Foundation*¹⁸ the Ontario High Court of Justice held that a multi-disciplinary event for amateur sportspeople representing a large number of countries was a charitable purpose which provided sufficient public benefit. In the current circumstances, however, a limited number of professional sportspeople are paid to compete on behalf of a club using expensive, high-performance equipment which is beyond the reach of most people. Although the skills and competencies of those elite sportspeople who are selected to participate in these events are likely to be developed, the Commission considers that this is unlikely to provide sufficient public benefit to be considered charitable under either the advancement of education or "other matters beneficial to the community".
42. In paragraph 6.10 of his letter of 17 February 2009 the Applicant's solicitor states that "the clause 5.2(a) promotion of participation in events such as the America's Cup is an adjunct means by which to achieve the charitable objects in clause 5.1". He states that the immediate public aspect of this benefit in the context of the Trust's charitable objects is in showing the

¹⁶ [1895] 2 Ch 649, 654.

¹⁷ *Travis Trust v Charities Commission* (High Court, Wellington, 3 December 2008, Joseph Williams J, CIV-2008-485-1689) para 52.

¹⁸ (1984) 13 DLR (4th) 491.

public an example of expert seamanship and technological innovation. From this example, an appreciable standard for the safe conduct of maritime disciplines in a demanding match racing environment will be presented to the public and an expectation and desire for safe practices, good seamanship, discipline and utmost skill in yachting will be promoted.

43. The Commission does not consider that showing the public an example of expert seamanship and technological innovation in infrequently held high-end yachting events, such as the America's Cup, will have sufficient educative value to qualify as ancillary to the charitable purpose of educating the public about sailing skills. Nor will it necessarily promote water safety as set out in clauses 5.1(a), (c), and (d).

Clause 5.2(b)

44. Clause 5.2(b) states that the Trustees may:

"Provide or make grants for the provision or for the development and improvement of such equipment as is used in yachting, and to support the investigation and promotion of new inventions, developments and innovations relevant to or derived from yachting whether or not they may also be used in the community generally;"

45. In *Commissioner of Taxation v Triton Foundation*¹⁹ the Federal Court of Australia held that a foundation set up to provide non-financial assistance to inventors provided sufficient public benefit. In reaching this conclusion, the court noted that the foundation's purposes were particularly directed at young people, but were also available to "any member of the community who had the desire or inclination to use them", and a number of the resulting inventions had been of benefit to the community.
46. As indicated in relation to clause 5.1(b) above, the Commission does not consider that providing equipment and innovations to assist elite professional sportspeople to compete in high-end yachting competitions will be charitable under either the advancement of education or "other matters beneficial to the community".
47. The Commission considers that the Applicant's situation is distinguishable from that set out in the *Triton Foundation* case. Firstly, because the Applicant can make financial grants, and second, because the words "whether or not they may also be used in the community generally" indicates that there may be no intention of any public benefit being provided from these innovations and inventions.
48. In paragraph 7.3(c) of his letter of 17 February 2009 the Applicant's solicitor states that "[c]lause 5.2(b) does not negate the express terms of clause 5.1(b) and in all events may admit non-charitable activity as long as it is incidental to one or more charitable purposes."

¹⁹

(2005) 147 FCR 362.

49. The Commission does not consider that the purpose in clause 5.2(b) will necessarily result in the public being educated about sailing skills. In some cases, the equipment and innovations developed under this clause may promote water safety, but in many cases the intention and outcome may be merely to assist the professional sportspeople to win yacht races. The Commission does not, therefore, consider that clause 5.2(b) is ancillary to the charitable purposes in clauses 5.1(a), (c), and (d).

Clause 5.2(c)

50. Clause 5.2(c) states that the Trustees may:

"Provide a focus for and actively encourage corporate sponsorship of any of the purposes set out in clause 5.1 or this clause 5.2;"

51. The Commission considers that where corporate sponsorship is sought in order to genuinely educate the public about sailing skills or promote water safety, this will be ancillary to a charitable purpose. However, where this is undertaken in order to further the non-charitable purpose in clause 5.1(b) or the remaining purposes in clause 5.2, this will not be ancillary to any charitable purpose.

Clause 5.2(d)

52. Clause 5.2(d) states that the Trustees may:

"Make grants of aid and assistance to persons involved in yachting and/or their dependants in circumstances of need (whether or not these situations arose from yachting), and more particularly to enable New Zealanders to participate in yachting competitions and events of the types referred to in clause 5.2(a) both in New Zealand and overseas;"

53. The Applicant's solicitor, in paragraphs 6.7 and 6.9 of his letter of 17 February 2009, states that the first part of clause 5.2(d) is intended to assist people involved in the purposes in clause 5.1 if they "fall on hard times", but that the Applicant has not yet given any assistance under this purpose.
54. The Commission considers that the first part of clause 5.2(d) will only be charitable if it is directed at people who are poor, in need or suffering genuine hardship and the purpose provides relief. This will include assistance to anyone who does not have access to the normal things in life that most people would take for granted.²⁰ To provide "relief", the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.²¹

²⁰ *Inland Revenue Commissioners v Baddeley* [1955] AC 572; [1955] 1 All ER 525, applied in *re Pettit* [1988] 2 NZLR 513 and *Re Centrepont Community Growth Trust* [2000] 2 NZLR 325.

²¹ *Joseph Rowntree Memorial Trust Housing Association Ltd v Attorney-General* [1983] Ch 159; [1983] 1 All ER 288. See also *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342.

55. Paragraph 6.8 of the Applicant's solicitor's letter of 17 February 2009 indicates that the second part of clause 5.2(d) is intended to encourage participation in "high end" competition. The Applicant's solicitor states that:

"there could be instances where worthy potential participants could not do so because of financial constraints. This might not fall exactly into the concept of the relief of poverty, but it was an adjunct to the achievement of the undoubtedly charitable objects in clause 5.1."

56. The Commission agrees that enabling a limited number of elite sportspeople to participate in high end yachting competitions in the second part of clause 5.2(d) is unlikely to be a charitable purpose under the relief of poverty. In addition, for the reasons given above, the Commission does not consider that this will be charitable under the advancement of education or "other matters beneficial to the community".
57. The Commission does not consider that clause 5.2(d) will necessarily result in the public being educated about sailing skills nor will it promote water safety. The Commission does not, therefore, consider that clause 5.2(d) is ancillary to the charitable purposes in clauses 5.1(a), (c), and (d).

Clause 5.2(e)

58. Clause 5.2(e) states that the Trustees may:

"Obtain benefits to the community by promoting New Zealand internationally through yachting and more particularly to obtain international recognition of New Zealand and all of its people, thereby raising the self-esteem of New Zealanders, fostering in all New Zealanders, particularly in the youth of New Zealand, pride in their country, and encouraging the skill and industry and the pursuit of excellence in all activities including, but not limited to those related to yachting;"

59. The Commission does not consider that promoting New Zealand internationally through yachting and obtaining international recognition of New Zealand will advance education because this head of charity does not include advertising or promotion of particular points of view.²²
60. In paragraph 6.13 of his letter of 17 February 2009 the Applicant's solicitor states:

"there is undoubtedly a wide interest and national pride associated with New Zealand participation in America's Cup regattas even when they may be unsuccessful. That reflects the adjunct objects of clause 5.2(e)"

61. While this purpose may provide some benefits for New Zealanders, the Commission does not consider that this purpose is designed to meet a need of the community that is within the spirit and intendment of the purposes listed in the Preamble to the Statute of Elizabeth. The Commission therefore considers that this purpose is not charitable under "other matters beneficial to the community".

²² *Re Collier (deceased)* [1998] 1 NZLR 81.

62. In addition, the Commission does not consider that promoting New Zealand internationally through yachting and obtaining international recognition of New Zealand, will necessarily result in the public being educated about sailing skills, nor will it promote water safety. The Commission does not, therefore, consider that clause 5.2(e) is ancillary to the charitable purposes stated in clauses 5.1(a), (c), and (d).

Clause 5.2(g)

63. Clause 5.2(g) states that the Trustees may “[u]ndertake such other activities and enterprises to further the charitable purposes of the Trust as the Trustees may decide.”
64. The Commission considers that clause 5.2(g) is ancillary to the Applicant’s charitable purposes.

Support for Team New Zealand Limited

65. The Applicant, in its letter of 5 June 2009, states:

“The Trust considers that its support for Team New Zealand Limited and New Zealand’s participation in successive America’s Cup regattas and related competition has directly contributed to the fulfilment of each of the objects in clause 5.1(a) to (d).”

66. For the reasons listed above, the Commission does not consider that supporting Team New Zealand Limited and its participation in successive America’s Cup regattas and related competitions is a charitable purpose, nor is it ancillary to a charitable purpose.
67. The Commission does not consider that the Applicant’s support for Team New Zealand Limited is restricted to only those activities which will further the apparently charitable purposes in clauses 5.1(a), (c), and (d) of the Applicant’s Trust Deed. For example, the Commission notes that the Applicant’s financial statements for the year ended 31 March 2008 show that on 10 March 2007 the Applicant subscribed to 580 ordinary shares issued by Team New Zealand Limited at an issue price of \$37,600 per share for a total consideration of \$21,808,000. This brought the total value of the Applicant’s 790 shares in the company to \$25,944,000. However, 21 days later (31 March 2007) the trustees determined the total value of the Applicant’s 790 shares in the company to be only \$15,300,000. This investment in Team New Zealand Limited therefore appears to have resulted in an immediate loss to the Applicant of \$10,644,000.
68. The Applicant’s barrister, in paragraph 4.3 of his letter of 8 September 2009, concedes that Team New Zealand Limited’s activities on their own “might be non-charitable”. The Commission agrees and considers that the Applicant’s support for Team New Zealand Limited to carry out the non-charitable purposes set out in clauses 5.1(b), 5.2(a), (b), (c), (d) and (e) of the Applicant’s Trust Deed indicates that, to that extent, the Applicant itself is not fulfilling charitable purposes.

Conclusion

69. The Commission concludes that the Applicant's purposes in clauses 5.1(a), (c), (d) and (e) appear to be charitable, but that the purposes in clauses 5.1(b), 5.2(a), (b), (c), (d) and (e) are non-charitable and these are independent purposes which are not ancillary to a charitable purpose.

Section 61B of the Charitable Trusts Act

70. 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).²³
71. The Commission considers that the Applicant's purposes set out in clauses 5.1(a), (c), (d) and (e) appear to be charitable, but, for the reasons set out above, the Commission does not consider that the purposes set out in clauses 5.1(b), 5.2(a), (b), (c), (d), and (e) are charitable. The Commission considers that the Applicant is providing substantial support for non-charitable purposes which are undertaken by Team New Zealand Limited and therefore the Applicant does not have substantially charitable purposes.

72. In *Re Beckbessinger Tipping J* held:

"In the case of designated and identifiable organisations it may well be necessary to have evidence as to whether or not they are charitable to determine the flavour of the gift. The Court cannot in my judgment say, ... that because a gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose."²⁴

73. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and its activities (as directed by section 18(3)(a) of the Charities Act). The Commission does not consider that these provide evidence of "a substantially charitable mind" with an intention to create a charitable trust, but which was not conveyed by the drafting. The Commission does not consider that the purposes indicate an intention to create a substantially charitable trust.

²³ *Re Beckbessinger* [1993] 2 NZLR 362, 373.

²⁴ *Re Beckbessinger* [1993] 2 NZLR 362, 376.

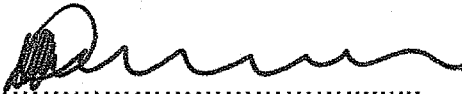
74. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Charities Commission's determination

75. 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. Furthermore, section 61B of the Charitable Trusts Act 1957 does not apply to validate the trust.

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

11/2/10
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Date