

Registration decision: The Fernhill Heritage Foundation

The facts

1. The date that The Fernhill Heritage Foundation (the Applicant) was created is unknown, as the Applicant's Trust Deed is undated.
2. The Applicant applied to the Charities Commission (the Commission) for registration as a charitable entity on 13 February 2009.
3. The objects of the trust are listed in clause 4 of the Applicant's Trust Deed:

"The Trust Fund shall be applied and used exclusively for charitable purposes. 'Charitable purpose' shall have the same meaning as it has in the Charities Act 2005. The Trust Fund shall be applied in particular -

- (a) *To provide financial assistance for the preservation and maintenance of the heritage building and grounds at Fernhill;*
- (b) *To make the exterior of the heritage building and the grounds at Fernhill available to viewing by interested members of the public;*
- (c) *To provide such management and control as shall be deemed necessary to achieve the objectives of the trust;*
- (d) *The Trust Fund shall only be used for charitable purposes within New Zealand."*

4. The Commission analysed the application for registration and on 25 May 2009, sent the Applicant a notice that may lead to decline on the basis that the Applicant's principal purpose would benefit the owners of Fernhill and would not provide sufficient public benefit to be considered charitable.
5. The Applicant's solicitor responded on 13 July 2009, stating that the property on which Fernhill is located is currently held by Trustees Executors Ltd as bare trustee for the unincorporated Dunedin Club. She submitted that the Applicant's activities "primarily benefit the public at large and that the Foundation does not benefit members of the Dunedin Club (or, alternatively, that any benefits to members of the Dunedin Club are merely 'ancillary')."
6. The solicitor also submitted that the intention is to transfer the property to the Applicant, which "will ensure that the benefit of any increase in the property's value as a result of preservation and maintenance of the land and building benefits The Fernhill Heritage Foundation, and not the Dunedin Club."
7. The Commission's view is that, while it must have regard to the proposed activities of the Applicant (under section 18 of the Act), the potential purchase of the property at some future stage is too remote and uncertain to constitute a relevant matter that would change the Commission's view on whether the Applicant's purposes can be considered charitable.

The issues

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

The law on charitable purpose

9. Under section 13(1)(a) of the Act, a trust qualifies for registration if it is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes.
10. Section 5(1) of the Act defines charitable purpose as including every charitable purpose, whether it relates to the relief of poverty, the advancement of education, the advancement of religion, or any other matter beneficial to the community. In addition, to be charitable at law, a purpose must be for the public benefit.¹ This means that the purpose must be directed at benefiting the public or a sufficient section of the public.
11. For a purpose to qualify as “any other matter beneficial to the community” under section 5(1), the benefit to the community must be capable of being identified and defined. Where an entity is set up to provide or maintain particular facilities for the benefit of the public, any restrictions on public access must be reasonable and appropriate in the circumstances.
12. In considering an application for registration, section 18(3)(a) of the Act requires the Commission to 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; ...”*

Relevant cases

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

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

² [1916] 1 Ch 100.

³ [1918] NZLR 16, 32.

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

Approach of the United Kingdom's Charity Commission

15. The Charity Commission for England and Wales will only consider organisations set up for preservation purposes to be charitable if they can demonstrate that:
- there is independent expert evidence that the building or site is of sufficient historical or architectural interest
 - the building or site is not used for non-charitable purposes
 - sufficient public access is provided to the building or site
 - any private benefit to individuals is incidental.⁴

Charities Commission's analysis

16. The Commission considers that the purpose set out in clause 4(d) is ancillary and that clause 4(c) could be considered a power. The remaining purposes set out in clauses 4(a) and (b) do not indicate an intention to relieve poverty or advance religion. These purposes have therefore been considered in relation to advancement of education and "any other matter beneficial to the community".

Advancement of education

17. In order for a purpose to advance education, it must provide some form of education and ensure that learning is advanced.
18. The Applicant's solicitor, in her letter of 13 July 2009, advised that Fernhill "is a dignified example of mid-Victorian colonial architecture, set in spacious landscaped grounds". She noted that if the Applicant is able to purchase the property, it intends to provide guided tours to the public.
19. The purpose set out in clause 4(b), however, is only "to make the exterior of the heritage building and grounds of Fernhill available to viewing by interested members of the public". The Commission considers that this purpose will not necessarily advance education.

Other matters beneficial to the community

20. 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 intentment of the purposes set out in the Preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth).⁵

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

⁵ *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*

21. The Commission has been unable to identify any particular requirement that the building and grounds must be permanently preserved for the public and the Applicant has not provided any evidence of such a requirement. The Commission therefore considers that the purpose set out in clause 4(a) does not meet the requirement of permanent preservation set out in *Re Verrall*.⁶
22. The Commission notes that the public access referred to in clause 4(b) refers to the exterior of the building and the grounds. According to the introduction to the Applicant's Trust Deed, there is also limited access available to the interior of the building for members of the public who "have been able to enjoy some of the Club's amenities, with conferences, dinners and weddings catered for by special arrangement."⁷ The Dunedin Club's website, however, appears to indicate that access to the building's interior is restricted to guests of Club members because it states:
- "The fine cuisine and delightful atmosphere of the Club's dining rooms are a **special privilege of membership of the Club**. If you are looking for a tranquil environment to host your next business meeting or corporate function, the Club is an ideal venue."*⁸[Emphasis added]
23. The Commission considers that the purpose set out in clause 4(b) may provide some limited benefits to the community.

Public or private benefit?

24. The public benefit criterion necessarily requires that any private benefits arising from the Applicant's activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves.⁹ In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.¹⁰
25. Where an applicant has purposes which aim to maintain and improve property which is held by an individual or a non-charitable entity, rather than the applicant itself, there may be an opportunity for the owners of the property to receive a private benefit from the applicant's purposes. For example, a direct benefit could accrue to the owners by way of a reduction in their maintenance costs or the owners could benefit upon sale of the

[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.

⁶ [1916] 1 Ch 100.

⁷ <http://www.dunedinclub.co.nz/site/sectionc.html>.

⁸ <http://www.dunedinclub.co.nz/site/sectionc.html>.

⁹ *Commissioners of Inland Revenue v Oldham Training and Enterprise Council* (1996) STC 1218; *Travel Just v Canada (Revenue Agency)* 2006 FCA 343 [2007] 1 CTC 294.

¹⁰ *Gilmour v Coats* (1949) AC 26; *Re Blyth* [1997] 2 Qd R 567, 582; *DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342, 350.

property from any increase in value resulting from enhancements funded by the applicant.

26. The Commission considers that private benefits for the owners of Fernhill are likely to result from the Applicant's purpose as stated in clause 4(a).
27. In addition, following the Court's decision in *Re Bruce*¹¹, as the Applicant is not the current owner or legal occupier of the property, it is unclear what authority the Applicant would have to ensure that the purpose in clause 4(b) is carried out.

Conclusion

28. The Commission concludes that the purposes set out in clauses 4(a) and (b) are non-charitable purposes, which are not ancillary to any charitable purposes.

Section 61B of the Charitable Trusts Act

29. 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.
30. 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).¹²
31. The introductory part of clause 4 states generally that "The Trust Fund shall be applied and used exclusively for charitable purposes" and clause 4(d) states that the "The Trust Fund shall only be used for charitable purposes within New Zealand." However, the Commission considers that the particular purposes stated in clauses 4(a) and (b) are non-charitable for the reasons given above. If the purposes in clauses 4(a) and (b) were "blue-pencilled out", the Applicant would be left with no specific purposes and the Applicant's solicitor has not indicated that the Applicant intends to further any purposes other than those set out in clauses 4(a) and (b). The Commission therefore concludes that the Applicant does not have substantially charitable purposes.

¹¹ [1918] NZLR 16.

¹² *Re Beckhessinger* [1993] 2 NZLR 362, 373.

32. In Re Beckbessinger¹³, 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."

33. The Commission has analysed the wording of the Applicant's purposes, surrounding context, and activities (as directed by section 18 of the 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.

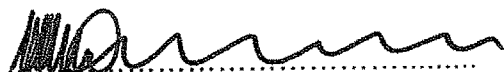
34. On these bases, the Commission considers that the Applicant's purposes are not substantially charitable and therefore section 61B of the Charitable Trusts Act cannot operate to validate the trust.

Charities Commission's determination

35. 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

21/9/09

Date

¹³ Re Beckbessinger [1993] 2 NZLR 362, 376.