

Disqualification Orders Decision following deregistration of Freedomsway Foundation Trust Aotearoa

The facts

1. The Freedomsway Foundation Trust Aotearoa (the Trust) was registered by the Charities Commission (the Commission) on 23 February 2009, backdated to 30 June 2008.
2. On 25 May 2011, in a written decision numbered D2011-3, the Commission:
 - made the decision to deregister the Trust being satisfied that the Trust had engaged in serious wrongdoing or a person had engaged in serious wrongdoing in connection with the Trust;
 - made the decision to remove the Trust from the Register with effect from 25 May 2011;
 - agreed the proposal to make an order that “an application for the re-registration of the Trust as a charitable entity not be made before the expiry of three years after the date of removal”;
 - agreed the proposal to make an order that “Aaron Wineera Elkington and Phyllis Millward Elkington be disqualified from being officers of a charitable entity for a period of three years after the date of removal”; and
 - agreed the proposal to make an order that “Jonathan Richard Clary be disqualified from being an officer of a charitable entity for a period of six months after the date of removal.
3. The Trust was removed from the Charities Register with effect from 25 May 2011.
4. On 25 May 2011, the Commission forwarded a copy of its decision to the Trust, and a letter advising of its intention to make orders regarding the Trust and the officers Aaron Wineera Elkington, Phyllis Millward Elkington and Jonathan Richard Clary. This letter advised that the Trust and the officers had the right to object to these orders (in accordance with section 36 of the Charities Act) and gave a deadline of 23 June 2011 for making submissions.
5. Jonathan Richard Clary submitted an objection to disqualification to the Commission on 1 June 2011. Mr Clary also makes specific criticisms of the Commission’s investigation that require a response from the Commission.
6. No formal objections to the proposed ban on re-registration and disqualification orders have been received from the Trust or the officers Aaron Wineera Elkington and Phyllis Millward Elkington.

The issues

7. The Registration and Monitoring Committee must consider whether to confirm its earlier intended course of action, recommending orders under section 31(4) of the Charities Act 2005 be made:
 - that an application for the re-registration by the Trust as a charitable entity must not be made before the expiry of three years after the date of removal.
 - that officers Aaron Wineera Elkington and Phyllis Millward Elkington be disqualified from being officers of a charitable entity for a period of three years after the date of removal.
 - that officer Jonathan Richard Clary be disqualified from being an officer of a charitable entity for a period of six months after the date of removal.

Relevant law

8. Section 31(4) of the Act provides that the Commission may, where it has removed an entity from the register make either or both of the following orders:
 - (a) *an order that an application for re-registration of the entity as a charitable entity must not be made before the expiry of a specified period:*
 - (b) *an order disqualifying an officer of the entity from being an officer of a charitable entity for a specified period that does not exceed 5 years.*
9. Section 36 of the Act provides:
 - (1) *In considering whether to ... make an order under section 31(4), the Commission must*
 - (a) *observe the rules of natural justice; and*
 - (b) *give the entity a reasonable opportunity to make submissions to the Commission on the matter.*
 - (2) *In considering whether to disqualify a person from being an officer of a charitable entity under section 31(4), the Commission must,*
 - (a) *observe the rules of natural justice; and*
 - (b) *give the person a reasonable opportunity to make submissions to the Commission on the matter.*

Analysis

10. Mr Clary submitted a written objection to his proposed disqualification on 1 June 2011. Mr Clary's submission appears directed to the grounds upon which the Commission proposes to disqualify him, contained within paragraphs 82 to 84 of decision D2011-3.
11. Mr Clary was appointed to the Trust as an Officer on 24 February 2010, two months prior to the Commission commencing its investigation on 6 May 2010.

12. Mr Clary submits:

- 12.1. He was the reason the Trust submitted its first Annual Return and he knew that the Trust would be investigated following the submission of incomplete information making up the Annual Return for the year ending March 2009. In this regard, he perceives he is being held responsible for the Elkingtons' previous inability to manage their Trust documents and affairs;
- 12.2 He was the "eyes, ears and hands" of the Elkingtons and the Trust, which he carried out by "acting on their behalf whenever possible";
- 12.3 In acting on behalf of the Trust and the Elkingtons, he objected "to being held responsible for duties, obligations of any nature that seem to be based upon assumption rather than a real mandate or knowing what I was doing for them."
- 12.4 He objected to the Commission's finding that he had demonstrated the same lack of understanding as the Elkingtons regarding the operation of a Trust. He specifically states, "I was NEVER brought on board to operate the trust, manage or deal with any relationships they made, have had between trustees and beneficiaries or deal with any aspect of the financial transactions in any form."
- 12.5 He considers he has expertise regarding the distinction between Trust expenses and the Trustees' personal expenses. He noted this experience was one of the reasons the Elkingtons asked him to assist with the operations of the Trust.

13. Mr Clary outlines a number of criticisms about the Commission's investigation. The relevant criticisms that require discussion are these:

- 13.1 The Commission's alleged failure to seek further information from the Trust about the appointment of a financial advisor (referred to in paragraph 84 of decision D2011-3);
- 13.2 The Commission's alleged failure to offer services to assist the Trust to help it with its problems;
- 13.3 The assertion that Mr Clary, the Trust and the Elkingtons, have not received any of the correspondence sent by the Commission to the Trust and its officers.

Commission's consideration of the submissions

Commission's response to the submitter's criticisms in paragraph 13.1

14. The Commission notes the decision of his Honour Justice McKenzie in *New Zealand Computer Society Incorporated* where his Honour comments - in respect of a charity seeking leave to adduce further evidence to the High Court - *'that it was the entity's responsibility to place all relevant material before the Commission to enable the Commission to make a decision'*.¹ The Commission had a number of communications with the Trust throughout the period from May to December 2010 and is satisfied that it has provided every opportunity to the Trust and its officers to present information to the Commission.
15. The Commission considers it has:
 - observed the rules of natural justice in its dealings with the Trust;
 - undertaken all inquiries relevant to its investigation of the Trust;
 - provided the Trust, and its officers, every opportunity to provide the requested information to the Commission and notes that the Commission consented to extensions requested by the Trust to enable it time to respond fully to the Commission's information requests.
16. The Commission notes that Mr Clary's submission still does not provide any evidence of the existence of a financial advisor appointed to assist the Trust.

Commission's response to the submitter's criticisms in paragraph 13.2

17. The Commission notes that there are many links to education resources available on its public website and considers the Trust and its officers could have accessed these resources if it considered it required training, help and support. Moreover, if the Trust felt the Commission's publicly available resources did not address its issues, it could have contacted the Commission to seek further advice and guidance.
18. The Commission was in a phase of investigating the Trust and the acts and omissions of its officers. Providing education, advice and support during the Commission's investigation would not have changed the fact that serious wrongdoing had occurred within the Trust.
19. The Commission is open to providing the Trust and its officers with contact particulars for regional training and development resources that it may wish to engage in the future.

¹ *New Zealand Computer Society Incorporated*, WN CIV-2010-485-924, 28 February 2011, at paragraph 33

Commission's response to the submitter's criticisms in paragraph 13.3

20. The Commission notes that all correspondence sent to the Trust between 6 May 2010 and 26 May 2011, including notice of the Commission's intention to disqualify the Trust and its officers, was sent to the address of the sole contact specified by the Trust. It has always been the Trust's obligation at law to maintain a current postal address and to advise the Commission of any changes of address.
21. The Commission is satisfied that it has complied with the provisions of section 57 of the Charities Act 2005, relating to the service of notices.

Response to the submitter's objections to disqualification

22. In essence, Mr Clary advances one reason as to why he should not be disqualified for the proposed six-month period. In his view, given that he was simply a conduit for the Trust and the Elkingtons, it is unfair for the Commission to hold him accountable for the failure of the Elkingtons to meet their obligations under the Charities Act 2005.
23. The Commission notes that the majority of the grounds upon which the Trust was deregistered related to the Trust's omissions existing prior to Mr Clary's appointment as an officer. This mitigating factor was the basis on which the Commission proposed a six-month disqualification period for Mr Clary as opposed to a three-year disqualification period proposed for the Elkingtons and the Trust.
24. It is clear from Mr Clary's correspondence that he was well aware of the Trust's state of the affairs when he commenced acting as one of its officers. The Commission considers that he had every opportunity to educate himself on the statutory and common law obligations of an officer and trustee of the Trust prior to providing his services to the Trust.
25. From the correspondence submitted by Mr Clary throughout the Commission's investigation, the Commission remains of the view that Mr Clary lacked knowledge that a prudent trustee would acquire in the normal course of exercising a trustee's responsibilities. For example, his email of 26 July 2010 in which he considers it reasonable that any and all personal expenditure of the Elkingtons in one way or another advanced the Trust's charitable purposes (paragraph 63 Decision D2011-3).
26. In circumstances where no records could be produced to justify such a statement, the Commission does not consider that a prudent trustee would consider that any and all personal expenditure of other trustees was reasonable expenditure for the purposes of advancing the charitable purposes of a Trust.
27. The Commission is also not convinced that a prudent trustee acting with due skill and care would disclose the personal access information of trustees' bank accounts - with or without the consent of the trustees.

28. The Trust's deregistration proceeded on the basis that the Commission had found serious wrongdoing by the Trust, or a person associated with the Trust, and the reasons for that finding were (as set out in paragraph 81 of decision D2011-3):
- Breach of trustees' obligations to keep true and fair accounts;
 - Refusing to, or inability to, supply requested financial information to the Commission;
 - Failing to supply complete bank statements;
 - Failing to understand the relationship between trustees and beneficiaries and the distinction between trust expenses and personal expenses;
 - Mixing of trust and personal funds; and
 - Significant and fundamental failures as Officers in respect of duties and obligations at trust law and non-compliance with the Trust's Rules.
29. The Commission considers it would be contrary to the public interest in the orderly and appropriate conduct of the affairs of charities, for a registered charity committing serious wrongdoing to be eligible to apply for re-registration to the Charities Register immediately following its deregistration.
30. Similarly, it would undermine public trust and confidence in the charitable sector to welcome back on to the Charities Register officers who have committed serious wrongdoing in connection with a deregistered charity.
31. No compelling reasons have been presented to the Commission that would justify not proceeding with the proposed disqualification orders against Aaron Wineera Elkington, Phyllis Millward Elkington, and the Freedomway Foundation Trust Aotearoa.
32. The Commission does not consider Mr Clary's objection is sufficient to justify the Commission not proceeding with the proposed disqualification order against him.

Commission's determination

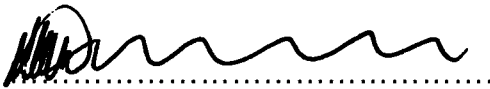
33. The Commission concludes that, in accordance with section 31(4)(a) of the Act and as the Trust has been removed from the Register, an order be made that an application for the re-registration of the Trust as a charitable entity must not be made before the expiry of three years after the date of removal.
34. The Commission concludes that, in accordance with section 31(4)(b) of the Act and as the Trust has been removed from the Register, orders be made that officers Aaron Wineera Elkington and Phyllis Millward Elkington be disqualified from being officers of a charitable entity for a period of three years after the date of removal.

35. The Commission concludes that, in accordance with section 31(4)(b) of the Act and as the Trust has been removed from the Register, an order be made that officer Jonathan Richard Clary be disqualified from being an officer of a charitable entity for a period of six months after the date of removal.

For the above reasons, the Commission determines to make orders that:

- (i) an application for the re-registration of the Freedomsway Foundation Trust Aotearoa as a charitable entity must not be made before the expiry of three years after the date of removal of the Trust from the Charities Register, being 25 May 2014;
- (ii) officers Aaron Wineera Elkington and Phyllis Millward Elkington be disqualified from being officers of a charitable entity for a period of three years after the date of removal of the Freedomsway Foundation Trust Aotearoa from the Charities Register, being 25 May 2014;
- (iii) officer Jonathan Richard Clary be disqualified from being an officer of a charitable entity for a period of six months after the date of removal of the Freedomsway Foundation Trust Aotearoa from the Charities Register, being 25 November 2011.

Signed for and on behalf of the Charities Commission



Trevor Garrett
Chief Executive

16/8/11

Date