

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA171/2020
[2023] NZCA 553**

BETWEEN BETTER PUBLIC MEDIA TRUST
 Appellant

AND ATTORNEY-GENERAL
 Respondent

Hearing: 17 May 2023

Court: Courtney, Collins and Katz JJ

Counsel: E D Nilsson and S J Humphrey for Appellant
 D L Harris and S Cvitanovich for Respondent

Judgment: 9 November 2023 at 10.00 am

JUDGMENT OF THE COURT

- A The application for leave to adduce further evidence is granted.**
 - B The appeal is allowed.**
 - C The Better Public Media Trust should now be registered as a charity under the Charities Act 2005 with effect from the date of its application.**
 - D We make no order as to costs but the appellant is entitled to an order that its reasonable disbursements be paid by the Attorney-General.**
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REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Better Public Media Trust (the Trust) applied to be registered as a charity under the Charities Act 2005 (the Act). Its application was declined by the Charities Registration Board (the Board),¹ and an appeal from the Board’s decision was dismissed by the High Court.² The Trust appeals against the High Court judgment.

[2] The key issue raised by the appeal may be summarised in the following question:

Did the High Court err when it concluded the Trust did not qualify for registration as a charity under the fourth head of charitable purpose set out in s 5(1) of the Act because its purposes were not “beneficial to the community”?³

[3] We explain the meaning of charitable purpose under the Act at [27]–[55].

[4] Three interconnected questions have been identified by the parties for our consideration. Those questions ask whether the High Court erred:

- (a) when stating the Trust’s purposes;
- (b) when identifying the relevant principles governing whether or not the Trust purposes are charitable; and
- (c) in applying the legal principles concerning charitable purposes to the facts of this case.

¹ *Better Public Media Trust* Charities Registration Board Decision 2019-1, 24 April 2019 [Board decision] at [2] and [70]–[72].

² *Better Public Media Trust v Attorney-General* [2020] NZHC 350 [High Court decision] at [87].

³ Charities Act 2005, s 5(1).

[5] While the agreed questions provide a useful framework, we have not found it necessary to deal with every criticism from the Trust about the High Court judgment. This appeal is conducted by way of a rehearing.⁴ We are required to assess the facts and apply the relevant law to those facts.⁵ In this case, that involves us determining whether or not the Trust’s advocacy role is beneficial to the community and whether or not it qualifies as a charity by comparing its purposes with those of recognised charities.⁶ This is not a case in which the High Court’s factual findings were reached after seeing and hearing witnesses. In addition, we have had the benefit of further evidence from that presented in the High Court. The evidence (two affidavits of Myles Thomas, the Chairman of the Trust) has the purpose of updating this Court on the Trust’s recent activities. We have decided to allow that evidence because it is relevant and cogent. Allowing that evidence is consistent with the interests of justice. We are therefore in a stronger position than the High Court Judge to fully assess the evidence.

Background

[6] The Trust was incorporated in 2013. It was formed following two campaigns, one called “Save RNZ”, which opposed the commercialisation of Radio New Zealand, and the other, called “Save TVNZ 7”, which advocated against the closure of Television New Zealand Channel 7.

[7] The purposes of the Trust have evolved since the adoption of its first deed on 18 September 2015. Clauses 3.1 to 3.6 of the most recent iteration of the trust deed, dated 2 February 2018, describe the Trust’s purposes in the following way:

- 3.1 To advance public media in New Zealand.
- 3.2 To promote the role of public media in educating, informing and entertaining all New Zealanders.
- 3.3 To educate New Zealanders and promote informed debate about public media issues.

⁴ Court of Appeal (Civil) Rules 2005, r 47.

⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

⁶ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169 [*Re Greenpeace* (SC)] at [30] per Elias CJ, McGrath and Glazebrook JJ.

- 3.4 To support improved access to funding, operating conditions and platforms of distribution for use by public media providers.
- 3.5 To represent and advance the interests of media audiences.
- 3.6 To undertake other activities that are likely to further the charitable purposes of the Trust.

[8] “Public Media” is defined in cl 2.4 of the trust deed as:

... public interest, non-profit, publicly-owned, independent or non-commercial media (including television channels, television programmes, radio stations, radio programmes, news media, social media, websites, applications, games, software, and other online or communications media).

[9] We will analyse the definition of “public media” at [74]–[77].

[10] Mr Thomas, the Chairman of the Trust, has explained the Trust comprises more than 2,000 members who pay an annual membership fee of \$20–\$40. The Trust’s directors include prominent media academics and media law experts.

[11] Mr Thomas has filed an updating affidavit, which elaborates upon the activities of the Trust from the time the Trust applied for registration as a charity on 12 October 2015. Those activities include:

- (a) holding public lectures which focus upon public media topics;
- (b) making submissions to government and other bodies about public media issues;
- (c) providing commentary in the media about public media topics;
- (d) organising a competition for secondary school students with the aim of engaging students in public media issues; and
- (e) commissioning research into public media topics.

The structure of the balance of this judgment

[12] We shall:

- (a) explain the Trust’s activities;
- (b) summarise the key principles that govern the registration of charitable entities and, in particular, those entities that undertake advocacy;
- (c) summarise the decision of the Board and the High Court judgment;
- (d) analyse the Trust’s purposes and the means and manner by which it achieves those purposes;
- (e) compare the Trust’s purposes with other organisations that have acquired charitable status; and
- (f) explain our conclusions.

The Trust’s activities

[13] Section 18(3) of the Act provides that the Trust’s activities are relevant to considering its charitable status.⁷ Evidence of an applicant’s activities are not limited to situations where there is doubt or ambiguity arising from an entity’s constitutional documents.⁸

[14] Dr Peter Thompson is a former Chairman of the Trust and is currently one of the Trust’s directors. He is an Associate Professor of Media and Communication at Te Herenga Waka—Victoria University of Wellington and he has written extensively about the Trust’s purposes and activities. In an affidavit filed in support of the Trust’s application for registration, Dr Thompson described “public service media”, which the Trust has since renamed as public media:⁹

⁷ Charities Act, s 18(3)(a)(i) and (ii).

⁸ *Attorney-General v Family First New Zealand* [2022] NZSC 80, [2022] 1 NZLR 175 [*Family First* (SC)] at [23] per Winkelmann CJ, William Young, Glazebrook and O’Regan JJ.

⁹ Emphasis in original.

11. The traditional concept of ‘public service’ media [PSM] may include variations in regulatory, funding and institutional arrangements both in respect to individual media organisations (e.g. in Radio New Zealand and M[ā]ori Television Service in New Zealand, or the BBC and Channel 4 in the UK) and the wider media sector model (e.g. in New Zealand there are no public service requirements on private/commercial broadcasters whereas in the UK, the ITV companies also have some public service obligations).
12. What the term ‘public service’ means across all these cases is a commitment to serving the broad interests of the public as *citizens*, not only as *consumers*. This generally includes a commitment to a universally-accessible service, free at the point of reception, provision of a diverse range of content (including informative and educational genres) which addresses the needs of a wide range of audiences (including demographic, ethnic/indigenous and regional minorities).
13. PSM also offer benefits at the level of the media ecology. These include setting high standards of programming, encouraging competition for quality and innovation (not just for ratings and revenue), developing and sustaining talent, and investing in productive capacity. PSM also compensate for market failures which are liable to arise in a primarily commercial media system where the drive to optimise ratings and revenues leads to an exclusive focus on the most profitable content and audience demographics, along with a disincentive to maintain a full range of high quality local content (e.g. the cost of producing a local drama can be ten times greater than licensing one from overseas).
14. In addition, PSM support several functions at the level of the social system. This includes reflecting/validating cultural identity and encouraging empathy across different communities, and also facilitating democratic participation by providing citizens with the information needed to make sense of social, political and economic issues, recognise what is in their best interests (either as individuals or as civil society), and exercise their rights as franchised voters.
15. The concept of public service has historically been associated with radio and television *broadcasting*. However, the development of digital media technologies over the past two decades has seen the increasing convergence of audio-visual and print media along with new modes of content distribution (e.g. online streaming) and reception (e.g. mobile devices). For instance, Radio New Zealand has expanded its services over the Internet, including mobile apps, and is currently planning to develop a stronger television presence. For this reason, the term public service *media* (or just ‘public media’) is preferred.

[15] In his updating affidavit, Mr Thomas has described in further detail the activities of the Trust. We now turn to discuss some examples of the Trust's activities and how they relate to the Trust's stated purposes.

[16] In 2017, the Trust participated in the establishment of a "People's Commission on Public Broadcasting and Media". This involved the appointment of a panel of experts to act as a Commission to inquire into and report on the current state and future prospects of public media in New Zealand. The panel hosted seven workshops across six cities in New Zealand to gather the views of the public. More than two hundred written submissions were received. This research clearly engaged with the purpose of advancing the interests of media audiences by directly ascertaining those interests.

[17] Mr Thomas also explains in his affidavit the occasions on which the Trust has provided expert opinion or commentary on important issues relating to public media. This commentary has been on a range of issues, such as the allocation of government funding, proposals for TV programme classifications and time-bands, proposals for standardising the classification of commercial video on-demand content, collective bargaining in the media sector, and government support for the media sector during the COVID-19 pandemic. Some of the submissions by the Trust were at the request of other entities because of the Trust's expertise. The Trust consistently expressed well-researched and balanced views in response to these requests and stated its intent to present views on behalf of media audiences generally.

[18] The Trust has facilitated public lectures, debates and research papers. Mr Thomas's affidavit sets out examples of many public lectures and debates promoted by the Trust since 2017. A recent example of this was the Trust's response to the government's now abandoned proposal to merge Television New Zealand Ltd and Radio New Zealand. On 24 May 2022, the Trust hosted an online public address by the then Minister of Broadcasting and Media, who explained the policies that underpinned the merger proposal. After the Minister's address the Trust hosted an open online panel discussion. The panel included Dr Gavin Ellis and Dr Trisha Dunleavy who are academic commentators on the media, and the opposition spokeswoman for Broadcasting and Media. The discussion ensured a range of viewpoints on the issue were presented. It was also educative, aiming to inform the

viewers about the proposed legislative changes and particularly the effect that those changes might have on how media impacts democracy in New Zealand.

[19] Later in 2022, the Trust commissioned research to investigate the degree of public support for the proposed merger. The Trust's research concluded that a majority of people supported the merger rather than opposed it, based on a representative sample of 1,000 people. In its report of the research, the Trust chose to include contrary research by the Taxpayer's Union, ensuring that readers were fairly informed.

[20] Another example of the Trust's activities is its hosting of an annual competition open to New Zealand high school students offering prizes for the best papers on public media issues. The competition aims to educate and engage youth in thought and discussion about the role of public media in New Zealand. The winning entries from the past few years have addressed a range of topics, including trustworthiness and bias in media, representation of LGBTQIA+ youth in New Zealand media, and attitudes to the social media app TikTok. The competition also encouraged students to present their entries in creative ways, such as by producing videos or radio broadcasts.

[21] In its submission to the Parliamentary Committee considering the Aotearoa New Zealand Public Media Bill, the Trust again explained its role.¹⁰ The Trust said:

- 3.1 Media plays an important role in a nation's democracy, culture and social cohesion.
- 3.2 In politics, it influences the public dialogue over issues of the day significantly affecting a government's decisions over policy and direction. For example, the recent u-turn by government on GST for Kiwisaver Funds.
- 3.3 Culturally, it reflects and defines us every time we absorb it. For example the growing in prime-time reality cooking shows has seen an upturn in home-cooking, cheffing careers and even a change in our diets.
- 3.4 Social cohesion depends on the 'public sphere', of which mass media is a major part. Extensive research shows the power of media to polarise society leading to misunderstanding, mistrust and hatred. But media can also strengthen social cohesion, particularly for minority communities, and public service media (commonly referred to as public media) is widely regarded to be an important contributor to tolerance in society.

¹⁰ Aotearoa New Zealand Public Media Bill 2022 (146-2).

- 3.5 It would be unfair and misguided to expect private media to fulfil these vital functions. Only a robust, secure and independent public media network can strengthen democracy, culture and social cohesion, and it is essential as New Zealand faces significant pressures and challenges in these three areas.

Legal principles

Trusts as charitable entities

[22] Section 13 of the Act sets out the “essential requirements” for an entity to qualify for registration as a charity under the Act. A distinction is made in s 13(1)(a) and (b) between entities that are trusts and those that are a society or an institution:

- (1) An entity qualifies for registration as a charitable entity if,—
 - (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and
 - (b) in the case of a society or an institution, the society or institution—
 - (i) is established and maintained exclusively for charitable purposes; and
 - (ii) is not carried on for the private pecuniary profit of any individual; and
- ...

[23] Under s 13(2) of the Act, the “amount of income derived by the trustees in trust ... for charitable purposes” for the purposes of s 13(2)(a)(i) is determined by reference to rulings made under Part 5A of the Tax Administration Act 1994.¹¹

[24] The distinction drawn in s 13(1)(a) and (b) between trusts and societies or institutions reflects the explanation provided in *Latimer v Commissioner of Inland Revenue* when discussing s 61(25) of the Income Tax Act 1976, which was similar to s 13 of the Charities Act.¹² Writing for the Privy Council, Lord Millett said that:

¹¹ Charities Act, s 13(2)(a).

¹² *Latimer v Commissioner of Inland Revenue* [2004] UKPC 13, [2004] 3 NZLR 157 (PC).

[30] ... it is not necessary that a trust, as distinct from a society or institution, be established for charitable purposes; it is sufficient that the trust funds are applicable for charitable purposes. ...

[25] Thus, unlike a society or institution, a trust that seeks to be registered as a charity does not need to have been established or maintained exclusively for charitable purposes. What is important in the case of a trust is whether the income received by the trust is for a charitable purpose, which, as we have explained, is determined in accordance with s 13(2) of the Act.

[26] While there are important differences between s 13(1)(a) and (b) of the Act, the meaning of charitable purpose is pivotal to both sections.

Charitable purpose

[27] Section 5(1) of the Act defines “charitable purpose” in the following way:¹³

- (1) In this Act, unless the context otherwise requires, **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.

[28] The definition of “charitable purpose” is derived in part from the preamble to the Charitable Uses Act 1601, commonly referred to as the Statute of Elizabeth I. The definition of charitable purpose reflects the “four heads” of charity which were explained in the following way by Lord McNaughton in *Special Commissioners of Income Tax v Pemsel*:¹⁴

“Charity” in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.

¹³ Emphasis in original.

¹⁴ *Special Commissioners of Income Tax v Pemsel* [1891] AC 531, (1891) 3 TC 53 (HL) at 55.

Ancillary non-charitable purposes

[29] The definition of “charitable purpose” is explained further in s 5(3) and (4) of the Act:

- (3) 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.
- (4) For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is—
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

Political purpose advocacy

[30] In *Bowman v Secular Society*, Lord Parker maintained that a “trust for the attainment of political objects has always been invalid”.¹⁵ That assertion led to a series of cases which attempted to define “political”.¹⁶ Lord Parker’s words influenced for decades the approach taken by many courts when determining whether or not an entity with advocacy objectives could be considered a charity.

[31] For example, in *Molloy v Commissioner of Inland Revenue*, this Court had to consider whether or not the Society for the Protection of the Unborn Child came within the fourth head of charitable purpose.¹⁷ One of the Society’s objectives concerned its firm opposition to changing the law governing abortion. Writing for the Court, Somers J said:¹⁸

... we are unable to accept ... that the public good in restricting abortion is so self-evident as a matter of law that such charitable prerequisite is achieved. The issue in relation to abortion is much wider than merely legal. And the

¹⁵ *Bowman v Secular Society Ltd* [1917] AC 406 (HL) at 442 per Lord Parker of Waddington.

¹⁶ See for example, *Re Wilkinson (deceased), Perpetual Trustees Estate and Agency Company of New Zealand, Ltd v League of Nations Union of New Zealand and Another* [1941] NZLR 1065 (SC) at 1077; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (HC) at 529; and *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 695.

¹⁷ *Molloy v Commissioner of Inland Revenue*, above n 16.

¹⁸ At 697.

fact, to which we have already referred, that this public issue is one on which there is clearly a division of public opinion capable of resolution (whether in the short or the long term) only by legislative action means that the Court cannot determine where the public good lies and that it is relevantly political in character.

[32] One commentator has explained that “in essence” this Court in *Molloy* “followed the *Bowman* line of authority with regard to the political purpose doctrine”.¹⁹ In *Re Greenpeace New Zealand Inc (Re Greenpeace (SC))*, the majority of the Supreme Court said the decision of this Court in *Molloy* “seems correct” even without a political purpose exclusion,²⁰ a suggestion that was reinforced by the conclusions of the Supreme Court in *Attorney-General v Family First New Zealand (Family First (SC))*,²¹ which we shall explain at [43]–[53].

[33] Political purpose advocacy was a focal point of the Supreme Court’s decision in *Re Greenpeace (SC)*.²² The issues in that case included whether or not Greenpeace had been correctly denied registration by the Board because its intended objectives included the promotion of “nuclear disarmament and the elimination of all weapons of mass destruction”.²³ The Court of Appeal held that Greenpeace’s advocacy could well be beyond a level that was merely ancillary to its charitable purposes and remitted Greenpeace’s application back to the Board for reconsideration.²⁴ Greenpeace appealed to the Supreme Court. The following three principles contained in the judgment of the majority of the Court are particularly relevant to the current appeal.

[34] First, there must be a charitable purpose:²⁵

[30] The language and structure of s 5(1) make it clear that, although “any other matter beneficial to the community” may qualify, the object must also be a “charitable purpose”. ...

[35] Whether or not an object is a charitable purpose is to be assessed by analogy to objectives already held to be charitable.²⁶

¹⁹ Juliet Chevalier-Watts *Law of Charity* (2nd ed, Thomson Reuters, Wellington, 2020) at 350.

²⁰ *Re Greenpeace (SC)*, above n 6, at [73] per Elias CJ, McGrath and Glazebrook JJ.

²¹ *Family First (SC)*, above n 8.

²² *Re Greenpeace (SC)*, above n 6.

²³ At [77] per Elias CJ, McGrath and Glazebrook JJ (emphasis omitted).

²⁴ *Re Greenpeace of New Zealand Inc* [2012] NZCA 533, [2013] 1 NZLR 339 at [91]–[92].

²⁵ *Re Greenpeace (SC)*, above n 6.

²⁶ At [30] per Elias CJ, McGrath and Glazebrook JJ.

[36] Second, there is no general prohibition on advocacy. The Court held s 5(3) does not amount to:

[58] ... a general prohibition on advocacy unless it is ancillary to a charitable purpose. The latitude granted by s 5(3) is in respect of advocacy that cannot itself be characterised as a charitable purpose. If “promotion” by advocacy may itself properly be treated as charitable as a matter of common law ..., then s 5(3) does not impose a statutory exclusion.

[37] The Court later referred to an article by Professor LA Sheridan and said “[a]s Professor Sheridan observed in 1972, in relation to promotion of legislation, the true rule is that advocacy is ‘charitable in some circumstances and not in others’”.²⁷

[38] Third, the Court agreed with the approach taken by Kiefel J in her dissenting judgment in *Aid/Watch Inc v Commissioner of Taxation* “that charitable and political purposes are not mutually exclusive.”²⁸ The Court explained that an:

[76] ... assessment of whether advocacy or promotion of a cause or law reform is a charitable purpose depends on consideration of the end that is advocated, the means promoted to achieve that end and the manner in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit ...

[39] Significantly, the majority of the Supreme Court rejected the view that all advocacy which might involve law and social reform should be precluded from recognition as being charitable. The Court said that:²⁹

[72] The better approach is not a doctrine of exclusion of “political” purpose but acceptance that an object which entails advocacy for change in the law is “simply one facet of whether a purpose advances the public benefit in a way that is within the spirit and intendment of the [S]tatute of Elizabeth I” ...

[40] The Court unanimously recognised the difficulties the Court would face in trying to assess the public benefit of promoting nuclear disarmament and the elimination of all weapons of mass destruction.³⁰ Accordingly, Greenpeace’s application was remitted back to the Board for reconsideration in light of both the

²⁷ At [74] per Elias CJ, McGrath and Glazebrook JJ, citing LA Sheridan “Charitable Causes, Political Causes and Involvement” (1980) 2 *The Philanthropist* 5 at 12.

²⁸ *Re Greenpeace* (SC), above n 6, at [74] per Elias CJ, McGrath and Glazebrook JJ, citing *Aid/Watch Inc v Federal Commissioner of Taxation* [2010] HCA 42, (2010) 241 CLR 539 at [68]–[69].

²⁹ Per Elias CJ, McGrath and Glazebrook JJ, citing LA Sheridan, above n 27, at 16.

³⁰ *Re Greenpeace* (SC), above n 6, at [114] per Elias CJ, McGrath and Glazebrook JJ.

changes made to Greenpeace’s objects and the Court’s judgment. Subsequently, the Board concluded that Greenpeace’s objectives were not “capable [with being] for the benefit of the public” and declined to register Greenpeace under the Act.³¹

[41] Greenpeace appealed the decision of the Board and also judicially reviewed the Board’s decision. In the High Court, Mallon J allowed Greenpeace’s appeal, thereby rendering it unnecessary to consider the application for judicial review.³²

Her Honour said:

[176] ... Greenpeace NZ’s main activity is to advocate for the protection of the environment. It does that mainly by advocating for measures to mitigate climate change, for sustainable fishing for the protection of the ocean environment and for improving the quality of New Zealand’s freshwater. There is a charitable public benefit in that advocacy, as it contributes to the broad-based support and effort necessary for the end goal of protecting the environment. The advocacy takes a variety of forms. Where it involves commissioning independent scientific research that it makes available on its website, it also advances education. Greenpeace NZ’s purpose to promote peace, nuclear disarmament and the elimination of weapons of mass destruction is ancillary and therefore not disqualifying. It does not have an illegal purpose.

[42] No appeal has been pursued from the High Court’s judgment. Implicitly, the Crown has therefore accepted that Greenpeace’s advocacy to protect the environment through sustainable fishing, protecting the oceans and improving the quality of New Zealand’s freshwater meets the criteria for registration under the fourth head of charitable purposes.

[43] In *Re Greenpeace* (SC), Elias CJ observed that “[m]atters of opinion may be impossible to characterise as of public benefit either in achievement or in the promotion itself”.³³ The challenge of establishing a public benefit by entities whose primary purpose is to promote a social or political cause is well illustrated by the litigation involving Family First.³⁴

³¹ *Greenpeace of New Zealand Incorporated (GRE25219)* Charities Registration Board Dec 2018-1, 21 March 2018 at [50] and [102].

³² *Greenpeace of New Zealand v Charities Registration Board* [2020] NZHC 1999 [*Greenpeace* (HC 2020)].

³³ *Re Greenpeace* (SC), above n 6, at [73].

³⁴ *Re Family First New Zealand* [2018] NZHC 2273, [2019] 2 NZLR 673 [*Family First* (HC)]; *Family First New Zealand v Attorney-General* [2020] NZCA 366 [*Family First* (CA)]; and *Family First* (SC), above n 8. For a helpful summary of the proceedings see *Family First* (SC) at [4]–[7] per Winkelmann CJ, William Young, Glazebrook and O’Regan JJ.

[44] The purposes of Family First included the promotion of the traditional family unit as a foundational platform for society. The traditional family unit advocated by Family First was based upon the marriage of a man and a woman. Family First also engaged in advocacy opposing abortion, assisted dying, prostitution reform and censorship.

[45] In 2017, the Board decided that Family First no longer qualified for registration under the Act. The Board's decision was upheld by the High Court,³⁵ but reversed by a majority of this Court.³⁶

[46] Following a further appeal, the Supreme Court endorsed the decisions of the Board and High Court.³⁷ For present purposes, we need only summarise the Supreme Court's explanation as to why Family First's purposes were not charitable under the fourth head of charitable purposes namely, being beneficial to the community.

[47] The Court reaffirmed what it had said in *Re Greenpeace* (SC): to qualify under the fourth head of charitable purpose, there must be a public benefit to the entity's advocacy activities, and the relevant purpose must be charitable by analogy with objects already held charitable in other cases.³⁸

[48] The Supreme Court was satisfied that promoting the family as a foundation to a stable society could be a charitable object but:

- (a) support for the Family First's "particular version of the family and of marriage between a man and a woman" was not "self-evidently beneficial in a charitable sense";³⁹ and
- (b) a purpose that was based on discrimination, or which included elements of discrimination was not compatible with a charitable purpose.⁴⁰

³⁵ *Family First* (HC), above n 34.

³⁶ *Family First* (CA), above n 34.

³⁷ *Family First* (SC), above n 8.

³⁸ At [155] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ.

³⁹ At [135] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ.

⁴⁰ At [139] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ.

[49] In applying the “means and manner” analysis the Court held that Family First had failed to establish that its engagement in issues such as abortion, assisted dying, prostitution reform and censorship was ancillary to its broader purpose of promoting the family. The Court said:⁴¹

[142] ... These are free-standing political issues ..., a standalone object that is not merely ancillary “must itself be an object of public benefit or utility within the sense used in the authorities”. These are issues on which there are differing views: they involve the advancement of causes. It is not possible to say whether the views that are promoted are of benefit in the way the law recognises as charitable; they are matters of opinion. Nor is it possible to characterise their promotion or even the achievement of what is advocated for as charitable.

[50] The Court proceeded to explain:⁴²

[143] Unlike the situation discussed in *Greenpeace* (SC), advocacy of these causes is not advocacy for ends that are themselves charitable, like human rights, the protection of the environment or public amenities. That is an important difference between the present case and *Greenpeace* (SC).

[51] In his concurring judgment, Williams J recognised the challenges of analysing whether or not an entity qualifies under the fourth head of charity. He noted:⁴³

[164] ... The modern growth of advocacy-based organisations seeking charitable status has highlighted the problem. Whatever public benefit such advocacy may be said to provide, it will almost always be less direct and less tangible than that provided by ‘works’-based charities.

[52] Later in his judgment, Williams J said that:⁴⁴

[180] ... promoting controversial causes or ideas will not of itself be disqualifying. This is consistent with the authority and (more importantly) the pluralist underpinnings of our democratic culture. ... [T]he contest of ideas and perspectives is a predicate for a thriving community. But care is obviously needed, and it is perhaps in this context that manner and means, and the original charitable principle of selflessness, become very important. An advocacy group that addresses a controversial topic in a balanced way may well be charitable, even if it ultimately favours one side or the other. ...

[53] In his concluding paragraph Williams J explained:

⁴¹ Per Winkelmann CJ, William Young, Glazebrook and O’Regan JJ, citing *Re Greenpeace* (SC), above n 6, at [73] per Elias CJ, McGrath and Glazebrook JJ (footnotes omitted).

⁴² Per Winkelmann CJ, William Young, Glazebrook and O’Regan JJ (footnote omitted).

⁴³ Footnote omitted.

⁴⁴ Footnotes omitted.

[181] ... it does not much matter whether one describes Family First's purpose as advocacy for the family or advocacy for a particular traditional or conservative view of the family. The key question is whether Family First's manner and means of execution can be described as fair, balanced and respectful. As I have said, this will usually be a question of degree. For the reasons already traversed, I too am of the view that the answer to that question is plainly no.

[54] For completeness, we shall also explain the decision of the High Court of Australia in *Aid/Watch Inc v Federal Commissioner of Taxation*.⁴⁵ The appellant in that case was an organisation established to promote the more efficient use of Australian aid directed to the relief of poverty. Aid/Watch's activities included research and public campaigns intended to promote public debate and to bring about changes in government policy relating to the provision of foreign aid. A majority of the High Court held that Aid/Watch qualified as a charitable entity under the fourth head of charitable purposes, saying that the generation by lawful means of public debate about the efficacy of foreign aid directed to the relief of poverty was a purpose that was beneficial to society which was likely to contribute to the betterment of public welfare.⁴⁶

[55] Dr Juliet Chevalier-Watts has said that *Aid/Watch* has "opened up the gates for greater freedom of expression and a dynamic change in the charitable industry" of Australia.⁴⁷ She is however less sanguine when explaining the consequences of the Supreme Court's judgment in *Re Greenpeace (SC)*:⁴⁸

[T]his is because a political purpose must also demonstrate public benefit, and this will be assessed through the aims of the organisation, as well as through the means of achieving those aims, and the manner of any advocacy. Therefore, while the blanket exclusion of political purposes no longer exists in New Zealand charity law:

the purposes and activities of the charity must still be for the public good and analogous to what has been held to be within the spirit and intendment of the Statute of Elizabeth.

Consequently, it is likely that few political purposes, in reality, will be able to demonstrate the requisite public benefit.

⁴⁵ *Aid/Watch Inc v Federal Commissioner of Taxation*, above n 28.

⁴⁶ At [47] per French CJ, Gummow, Hayne, Crennan, and Bell JJ.

⁴⁷ Juliet Chevalier-Watts "Charitable Trusts and Political Purposes: Sowing the Seeds of Change? Lessons from Australia" (2014) 19 *CantaLR* 52 at 66.

⁴⁸ Chevalier-Watts *Law of Charity*, above n 19, at 369, citing *Family First (HC)* at [68]; and High Court decision, above n 2 (footnotes omitted).

The Board's decision

[56] On 10 March 2016, the Department of Internal Affairs (the Department) advised the Trust it did not satisfy the criteria for registration as a charity. The Department invited the Trust to make further submissions. Over the ensuing 30 months the Trust provided further evidence and submissions in support of its application, culminating in the Trust making its final submission to the Department on 28 September 2018.

[57] On 24 April 2019, the Board issued its decision declining the Trust's application.⁴⁹ In summary, the Board reasoned:⁵⁰

[18] ... the Trust has an advocacy purpose to promote [public media]. Specifically ... the Trust's focus is ... on promoting its views relating to the importance and benefits of [public media], and advocating for increased funding and support for [public media].

...

[33] ... to be a public amenity, the [Trust] must also promote (or provide) media that provide a means for citizens to communicate with one another.

...

[37] ... the Trust itself does not provide a medium, as it is primarily an advocacy organisation that promotes [public media] delivered by others, rather than delivering [public media] itself?.

[58] The Board's conclusion that the Trust's advocacy was not directed towards a charitable end rendered it unnecessary for the Board to consider the means and manner by which the Trust carried out its advocacy.⁵¹

[59] The Board also rejected the Trust's submission that it was deserving of charitable status because of its advancement of education.⁵²

⁴⁹ Board decision, above n 1.

⁵⁰ Footnotes omitted, emphasis omitted.

⁵¹ Board decision, above n 1, at [40].

⁵² At [60]–[61].

High Court judgment

[60] Cull J determined that the primary purpose of the Trust was one of advocacy.⁵³

This meant that:⁵⁴

[76] [An] assessment of whether advocacy ... is a charitable purpose depends on consideration of *the end* that is advocated, *the means* promoted to achieve that end and *the manner* in which the cause is promoted in order to assess whether the purpose can be said to be of public benefit within the spirit and intendment of the 1601 Statute.

[61] The Judge applied this three-stage test to the advocacy purpose of the Trust and in doing so she reached the following conclusions.

[62] First, in relation to the ends advocated by the Trust, Cull J reasoned the Trust's purpose in upholding the public function of the media could be charitable if it was "articulated at a very abstract level" and if "a generous interpretation [was given] to the meaning of the Trust's purpose".⁵⁵ The Judge suggested the Trust's purposes could be analogous to the advancement of education "in that both ensure people are able to engage in civil society and democracy."⁵⁶ Cull J also said that:⁵⁷

[70] If the *end* is articulated in any less abstract way from enhancing democracy and society – for instance, promoting greater public content in the media – then the *end* would not be charitable

[63] Second, the Judge considered the means by which the Trust achieved its purposes by considering the Trust's activities of:

- (a) promoting the role of the media in educating, informing and entertaining;
- (b) educating and promoting informed debate about media issues;

⁵³ High Court decision, above n 2, at [48]–[49] and [86(a)].

⁵⁴ *Re Greenpeace* (SC), above n 6, per Elias CJ, McGrath and Glazebrook JJ, cited in High Court decision, above n 2, at [52] (emphasis added by High Court).

⁵⁵ High Court decision, above n 2, at [61].

⁵⁶ At [67].

⁵⁷ Emphasis in original.

- (c) supporting improved access to funding, operating conditions, and platforms of distribution for public media; and
- (d) representing and advancing the interests of public media audiences.

[64] The Judge found the third means of activity we have set out at [63(c)] was not charitable because it “change[d] the tenor of [the] Trust’s purpose from agnostically protecting the public role of the media to championing that role at the expense of other interests.”⁵⁸

[65] The Judge found that the “[a]ssessment of the manner [in which the Trust advanced its purposes was] likely to raise [few] difficulties” because there was “no dispute that the Trust [had] acted legally [when] advocating for its stated purpose.”⁵⁹

[66] Cull J also noted “[a] further problem facing the Trust” was the lack of a “nexus between the Trust’s promotion of its purpose and the public benefit”.⁶⁰ The Judge therefore concluded that the advocacy purpose of the Trust was not charitable.⁶¹

[67] Finally, the Judge addressed an argument that the Trust has an independent educational purpose. The Judge rejected this argument, finding that “the educational activities of the Trust advance the Trust’s viewpoints on public media and support the advocacy purpose of the Trust.”⁶²

Analysis

[68] The Trust’s application for registration relied on both the “advancement of education” and the advancement “of any other matter beneficial to the community” categories of charitable purpose. As we have noted at [2] the appeal was presented on the basis that unless the Trust qualified under the “beneficial to the community” category of charity then, the Trust’s appeal would fail. In view of the way the appeal

⁵⁸ High Court decision, above n 2, at [72].

⁵⁹ At [60] (emphasis omitted).

⁶⁰ At [77].

⁶¹ At [86].

⁶² At [84].

has been conducted, the balance of our judgment will focus upon whether or not the Trust qualifies under the fourth category of charitable purpose.

The Trust's ends

[69] It is common ground that the Trust's primary purpose is to advocate for the provision of public media as that concept is defined in cl 2.4 of its trust deed.

[70] The Trust's principal criticisms of the High Court analysis of its purposes may be distilled to the following concern, which was expressed in two ways by the Trust.

[71] First, the High Court expressed reservations about the Trust's advocacy purpose when Her Honour said:

[48] ... it is plain that the Trust has taken a particular view of the public media, and its core purpose is to advocate for the way in which the New Zealand public should best be served by the public media with that view in mind.

[72] Second, the High Court Judge's conclusion that the Trust was not a charity because its means included "supporting improved access to funding, operating conditions and platforms of distribution for public media".⁶³ The Judge said this purpose of the Trust was not charitable because it showed the Trust held a position which favoured the advancement of public media at the expense of private media organisations. We have set out at [64] the part of the High Court judgment the Trust points to in relation to this aspect of its appeal.

[73] Although it is not entirely clear, there is some merit in the Trust's concern that the High Court Judge may have conflated the task of determining the Trust's purposes with analysing the means by which the Trust carries out its purposes. As we have explained at [5] however, it is not necessary for us to engage with all of the criticisms made about the High Court judgment. Instead, we shall reach our own conclusions about the nature of the Trust's purposes by examining its stated purposes and its activities.

⁶³ At [75].

The definition of public media

[74] “Public media” is broadly defined in cl 2.4 of the trust deed. Before us, Mr Nilsson suggested that public media could be defined as media that accords with “public media principles”. The principles referred to are:⁶⁴

Serving everybody’s interests as citizens [and] not only as consumers

High quality content across a full range of genres (including local productions) that inform, educate and entertain us

Universal accessibility across different platforms and free to all New Zealanders

Cater[ing] to the interest of minorities as well as the majority, including [Māori], regions, and young people

[Being] independent of government and insulated from commercial pressures

[Recognising the] robust fourth estate[’s] role to hold those in power to account

[75] Mr Nilsson has consistently submitted that the definition of “public media” includes commercial media. The High Court Judge suggested this meant that public media means all media and that while this was “helpful in interpreting the purpose provisions of the trust deed in a way that does not suggest a bias for any particular model of media ownership” it also “[made] it very unclear what exactly the Trust is promoting.”⁶⁵

[76] We are satisfied the natural and ordinary meaning of the definition of “public media” in cl 2.4 of the trust deed is directed towards media that is owned by public entities and not commercial organisations. The references in the definition of public media to “non-profit, publicly owned ... non-commercial media” are the antithesis of privately owned commercially driven media organisations. This meaning of “public media” is consistent with the campaigns that preceded the creation of the Trust which focused upon the advancement of publicly owned media platforms.

⁶⁴ Better Public Media Trust “What do we mean by ‘public media’?” (2023) Better Public Media Trust <<https://betterpublicmedia.org.nz/our-reasons/public-media-principles>>.

⁶⁵ High Court judgment, above n 2, at [36].

[77] As we shall explain however, our interpretation of the definition of “public media” is not fatal to the Trust’s case.

Stated purposes

[78] The Trust’s stated purposes in cls 3.1 to 3.6 of the trust deed are also relevant.

[79] Clauses 3.1–3.3 and 3.5–3.6 are not in issue. They are reproduced at [7]. The thrust of those clauses is to promote public media in New Zealand, specifically in relation to education around media and representing the interests of media audiences. In submissions before us, the Trust clarified that this would include advocacy relating to the quality and accessibility of media content, and ensuring that media served peoples’ interests as citizens not just as consumers.

[80] Clause 3.4 states that the Trust will “support improved access to funding, operating conditions and platforms of distribution for use by public media providers”. As we have noted at [64], it was this clause that led Cull J into concluding the Trust did not have a charitable purpose because, in her assessment, this clause demonstrated the Trust’s purpose was to advocate for publicly owned media platforms because “commercial media providers are incapable of protecting the role of public media”.⁶⁶

[81] Unlike the High Court Judge, we are not convinced that cl 3.4 is fatal to the Trust’s case that its purposes are beneficial to the community. Clause 3.4 simply confirms that the Trust wishes to advance the case for public media including through supporting public funding models which achieve that end.

[82] The Trust’s purposes cannot be achieved in a vacuum. Resources are obviously critical to the Trust’s goals. The Trust’s role in advocating for publicly funded media does not in itself mean that the Trust lacks a charitable purpose.

[83] Similarly, the fact that the Trust’s purposes may conflict with other opinions and interests does not disqualify it from being registered as a charity. The advancement of public media may come at the cost of competing interests, although

⁶⁶ At [72].

there is no evidence that demonstrates this concern is factually valid. Even if other interests are disadvantaged through the advancement of public media, this consequence should not necessarily preclude an advocacy trust from qualifying under the fourth head of charitable purposes.

Assessing the Trust's purposes through its activities

[84] The evidence of Mr Thomas and Dr Thompson shows the Trust's advocacy aims to promote democratic values, as well as cultural and social cohesion through enhancing public media. These goals involve empowering public media to improve public understanding and debate over government policies, the enhancement of cultural values through the content of programmes that are broadcast or published and the expansion of social cohesion, particularly for minority communities, through educating the public and counterbalancing misleading and polarising media activity.

[85] The Attorney-General acknowledges that the Trust's stated purposes and its supporting evidence suggests the Trust undertakes "advocacy its members believe may lead to more media content which 'treats citizens as citizens' being produced and seen, in the belief that this is necessary or beneficial to democracy and society generally".

[86] While recognising the overall laudable objectives of the Trust, counsel for the Attorney-General was concerned that the Trust's purposes were dependent on the subjective views of the trustees as to what its purposes are. This reflects Cull J's concern that "[the Trust's] activities largely involve the assertion of its views".⁶⁷

[87] We do not share this concern because it is possible to ascertain with some precision the Trust's purposes from its trust deed and its activities.

[88] Where an entity's purposes are intangible the Court's role is to assess whether the entity's activities demonstrate sufficient public benefit to be recognised as charitable. "[A]ny benefits must be weighed against any detrimental effects".⁶⁸

⁶⁷ At [86(a)].

⁶⁸ *Family First* (SC), above n 8, at [138] per Winkelmann CJ, William Young, Glazebrook and O'Regan JJ, citing *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 67 per Lord Simonds (footnote omitted).

[89] When we weigh the Trust's purposes, as stated in its trust deed and by reference to its activities, it is apparent the Trust's objectives are to enhance democratic and social values through the advancement of public media. In this respect, the Trust's purposes are similar to those examined by the High Court in *Re Draco Foundation (NZ) Charitable Trust*.⁶⁹ The High Court dismissed Draco's claim that it qualified as a charity. Nevertheless, the Court acknowledged that Draco's purposes to protect and promote democracy and natural justice were capable of being charitable purposes.⁷⁰

[90] The benefits advocated by the Trust may arguably be at the cost of other entities, such as privately owned media platforms, although it is not immediately apparent that is necessarily the case. What is clear, is that the Trust's purposes are capable of being beneficial to the community. This reflects the conclusion reached by the High Court Judge. It is a conclusion that was not seriously contested by the Attorney-General.

The means and manner by which the Trust achieves its purposes

[91] We have had the benefit of extensive evidence and information about the means and manner by which the Trust advocates for public media.

[92] As we have explained, the Trust achieves its purposes through a range of activities including the conducting of independent research, the commissioning of public lectures, providing expert commentary and promoting the concept of public media in secondary schools through an annual competition.

[93] It is apparent from the evidence and information placed before us that the Trust undertakes its advocacy function in a balanced and measured manner. By way of illustration, when campaigning against the government's proposed merger of Television New Zealand Ltd and Radio New Zealand, the Trust provided both the responsible Minister and the opposition spokeswoman for Broadcasting and Media with an open platform to express their opposing views about the merits and drawbacks to the proposed merger. The broadcasts from the respective political representatives

⁶⁹ *Re Draco Foundation (NZ) Charitable Trust* (2011) 25 NZTC 20-032 (HC).

⁷⁰ At [22].

were then supplemented by an open discussion about the proposed merger in which a range of experts and commentators participated. After observing a recording of the respective presentations, it is apparent the Trust's role in the broadcast was apolitical in the sense that the Trust did not purport to advocate for positions adopted by either of the main political parties. Rather, the Trust strived to ensure opposing viewpoints were ventilated.

[94] Useful comparisons can be drawn between the way the Trust undertakes its functions and the observations of Williams J in *Family First* (SC). It is apparent from the evidence that we have referred to that the Trust:

- (a) does not engage in “[o]ne-sided promotion of personally held views”.⁷¹
- (b) nor does the Trust disseminate “information that only reflects the disseminator’s view”.⁷²

[95] Rather, the way the Trust carries out its activities promotes the “cohesiveness of our pluralistic community” because it recognises other perspectives and it respects “individual dignity” by fairly informing recipients of alternative views to those advocated by the Trust.⁷³

[96] Responsibly, the Attorney-General has not attempted to argue that the Trust acts in anything other than a respectful and professional way. The Trust airs opposing viewpoints and encourages informed discussion about the merits of public media.

[97] The means and manner by which the Trust achieves its advocacy purpose suggest that the Trust's purposes are capable of being beneficial to the community.

Analogies between the Trust and approved advocacy charities

[98] In *Re Greenpeace* (SC), the Supreme Court recognised that advocacy for the protection of the environment was capable of being charitable.⁷⁴ Subsequently, the

⁷¹ *Family First* (SC), above n 8, at [175] per Williams J.

⁷² At [175] per Williams J.

⁷³ At [175] per Williams J.

⁷⁴ *Re Greenpeace* (SC), above n 6.

High Court held that Greenpeace’s activities in “advocating for measures to mitigate climate change, for sustainable fishing for the protection of the environment and for improving the quality of New Zealand’s freshwater” is a charitable public benefit.⁷⁵

[99] While there are obvious differences between the activities of Greenpeace and the Trust, both organisations are driven by altruistic goals. In the case of Greenpeace, its members focus on improving the physical environment. The Trust, on the other hand, focuses on improving the media environment. The Trust aims to ensure that our democratic principles and institutions are enhanced through citizens being better informed about significant issues through public media platforms. Importantly, the Trust also aims to enhance social cohesion by promoting the voices of minority communities through public media.

[100] There can be no suggestion that Greenpeace’s advocacy role is more or less important than that carried out by the Trust. Both are important in a free and healthy democracy.

[101] Greenpeace is not the only approved charity that can be usefully compared with the Trust. In *Latimer v Commissioner of Inland Revenue*, it was held that a trust that applied its income to advance Māori claimants before the Waitangi Tribunal was charitable because its activities were directed towards racial harmony and social cohesion.⁷⁶ This is analogous to one of the Trust’s purposes, which is to promote social cohesion through educating the public and counterbalancing misleading and polarising media activity.

[102] Similarly, as we noted at [89], the Trust’s purposes are similar to those examined by the High Court in *Re Draco Foundation (NZ) Charitable Trust* in which the Court acknowledged protecting and promoting democracy and natural justice in New Zealand was capable of being a charitable purpose.⁷⁷ The Trust’s overarching purpose is clearly linked to the protection and promotion of democracy in New Zealand.

⁷⁵ *Greenpeace* (HC 2020), above n 32, at [176].

⁷⁶ *Latimer v Commissioner of Inland Revenue*, above n 12.

⁷⁷ *Re Draco Foundation*, above n 69, at [22].

[103] When we compare the Trust's purposes with recognised advocacy charities, and in particular Greenpeace, there are clear analogies that can be drawn between the recognised charitable purposes in those cases, and the purposes of the Trust.

[104] In contrast, the means and manner by which the Trust promotes its purposes can be contrasted with the staunch and discriminatory advocacy of Family First. Our assessment of the evidence leads to the conclusion that the Trust genuinely endeavours to present a range of viewpoints and to assist in informing viewers and readers of the issues associated with public media. The Trust's activities are more aligned with being educational rather than adversarial, although we are not suggesting that the Trust's purposes qualify under the education head of charity.

[105] For completeness we make clear that while we have noted the distinction in s 13 of the Act between trusts and societies or institutions, we would have reached the same conclusion if the Trust were a society or institution.

[106] We are satisfied that the Trust meets the criteria for registration under the fourth head of charitable purposes set out in s 5(1) of the Act.

Result

[107] The application for leave to adduce further evidence is granted.

[108] The appeal is allowed.

[109] The Better Public Media Trust should now be registered as a charity under the Charities Act 2005 with effect from the date of its application.

[110] Counsel for the appellant advised that he was acting pro bono and therefore did not seek costs in the event that the appeal succeeded. We therefore make no order as to costs, but it is entitled to an order that its reasonable disbursements be paid by the Attorney-General.

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