

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 2009-485-2133

BETWEEN CANTERBURY DEVELOPMENT
 CORPORATION
 Appellant

AND CHARITIES COMMISSION
 Respondent

CIV 2009-485-2135

AND BETWEEN CANTERBURY DEVELOPMENT
 CORPORATION TRUST
 Appellant

AND CHARITIES COMMISSION
 Respondent

CIV 2009-485-2136

AND BETWEEN CEDF TRUSTEE LIMITED AS
 TRUSTEE OF THE CANTERBURY
 ECONOMIC DEVELOPMENT FUND
 Appellant

AND CHARITIES COMMISSION
 Respondent

Hearing: 11 March 2010

Counsel: D E McLay for Appellants
 T Warburton and R I Berkley for Respondent

Judgment: 18 March 2010

JUDGMENT OF RONALD YOUNG J

Introduction

[1] Existing charities registered under the 1957 Charitable Trusts Act are required to apply for registration under the 2005 Act if they want to retain their tax exempt status under the Income Tax Act (2004 and 2007).

[2] In May 2008 the three appellants, the Canterbury Development Corporation (CDC), the Canterbury Development Corporation Trust (CDCT) and the Canterbury Economic Development Fund (CEDF), which had previously been registered as charities, applied for registration pursuant to s 17 of the Act.

[3] On 28 September 2009 the Charities Commission declined all the applications.

[4] This appeal is filed pursuant to s 59 of the Charities Act 2005 which provides:

59 Right of appeal

- (1) A person who is aggrieved by a decision of the Commission under this Act may appeal to the High Court.
- (2) An appeal under this section must be made by lodging a notice of appeal with the Registrar of the High Court in Wellington and with the Commission within—
 - (a) 20 working days after the date of the decision; or
 - (b) any further time that the High Court may allow on application made before or after the expiration of that period.
- (3) Every notice of appeal must specify—
 - (a) the decision or the part of the decision appealed from; and
 - (b) the grounds of appeal in sufficient detail to fully inform the High Court and the Commission of the issues in the appeal; and

(c) the relief sought.

[5] Section 61 identifies what this Court may do on such an appeal and provides:

61 Determination of appeal

- (1) In determining an appeal, the High Court may—
 - (a) confirm, modify, or reverse the decision of the Commission or any part of it;
 - (b) exercise any of the powers that could have been exercised by the Commission in relation to the matter to which the appeal relates.
- (2) Without limiting subsection (1), the High Court may make an order requiring an entity—
 - (a) to be registered in the register of charitable entities with effect from a specified date; or
 - (b) to be restored to the register of charitable entities with effect from a specified date; or
 - (c) to be removed from the register of charitable entities with effect from a specified date; or
 - (d) to remain registered in the register of charitable entities.
- (3) The specified date may be a date that is before or after the order is made.
- (4) The High Court may make any other order that it thinks fit.
- (5) An order may be subject to any terms or conditions that the High Court thinks fit.
- (6) Nothing in this section affects the right of any person to apply, in accordance with law, for judicial review.

[6] The appeal is therefore a rehearing *de novo* with this Court given wide powers. I have therefore approached this appeal considering the issues anew.

[7] The appellant says that in essence the three appeals raise the same point – “whether a community development purpose is a charitable purpose under New Zealand law”. I note though each of the three appellants has its own individual aspects to its appeal.

[8] The appellant's case is that the Commission's approach, that a community development purpose is only charitable where the relevant community is disadvantaged, is wrong.

[9] I therefore consider each of the three appeals separately although as will be evident from this judgment a number of findings have common application across the appeals. Mr William Luff, the chief executive of the CDC, filed an affidavit on behalf of all three bodies, and Mr Paul Munro an affidavit relating to CEDF's appeal. Mr Trevor Garrett, the chief executive of the Charities Commission, filed an affidavit on behalf of the Commission, which outlined the process for considering applications and attached relevant documents.

Canterbury Development Corporation

[10] The shares of CDC are owned wholly by the CDCT. The CDC receives a yearly grant from the Christchurch City Council and this together with money from a contract for services with New Zealand Trading Enterprise and other money from Government, funds its work. In 2009 its total income was \$5.2 million. The vast bulk of the money each year is spent on wages and salaries and administrative costs. There are two relevant divisions of the CDC.

[11] The Strategy and Services Team, which according to Mr Luff is responsible for the economic development strategy for Christchurch and Canterbury. The work of the team is to develop the strategy. This is paid for by the bulk grant from the Christchurch City Council.

[12] The other team is the Industry Development Team. This team supports businesses that need such support by a business advice service. The grant and other income is for salaries for the business advisers and administrative support.

[13] The CDC has a set of criteria to assess whether a business qualifies for assistance. Five criteria are applied according to Mr Luff. The question is whether the company or project is:

- a) *Meaningful.* That is, within a priority sector or an infrastructure project which is on the strategic agenda for Christchurch.
- b) *Material.* The company or project has the potential to add materially (minimum \$100 million sector or \$10 million individual).
- c) *Timely.* That this potential is likely to be realised in a reasonable timeframe (between three and five years).
- d) *Enduring.* Has the potential for sustainable competitive advantage.
- e) *Exportable.* It has export or import substitution potential.

[14] The constitution for CDC provides as relevant:

2.1 The capacity of the Company will at all times be limited to carrying on or undertaking any business or activity, the doing of any act, or the entering into of any transaction to the extent that the same are undertaken for the following exclusively charitable purposes within New Zealand, namely:

- (a) The relief of poverty;
- (b) The support, aid and assistance to any person seeking employment;
- (c) The maintenance of places of learning;
- (d) The encouragement of skill, industry and thrift;
- (e) Any other charitable purposes of a like nature which are beneficial to the community.

2.2 In furtherance of the charitable objects set out in clause 2.1 but not otherwise the Company may pursue the following purposes within New Zealand and with particular emphasis on the province of Canterbury as ancillary powers, duties and objects to those set out in clause 2.1:

- (a) The expansion of employment by the creation of employment for the unemployed, the retention of employment for those persons whose employment may be in jeopardy and the creation and expansion of job opportunities for all persons;
- (b) To collaborate with local authorities and other organisations and persons in developing and providing technical, financial, marketing and counselling services for all kinds of businesses;

- (c) To encourage, promote and facilitate the establishment, carrying on, expansion and development of all kinds of efficient businesses;
- (d) To liaise with and encourage cooperation and coordination amongst local authorities and other organisations and persons with the object of promoting and developing community welfare and the general well-being of the inhabitants of the Canterbury region;
- (e) For the furtherance of the said charities or charitable objects or purposes as set out to pay or apply the income and such of the capital as shall be available from the Company to and for the benefit of such one or more exclusive of the other or others of the said charitable objects and purposes as the Company shall from time to time determine and at such times and in such manner as the Company in its absolute and uncontrolled discretion thinks fit with full power to vary the charities or charitable objects or purposes within New Zealand or add to or delete from the same;
- (f) To do all such other things as are incidental or conducive to the attainment of the foregoing objects and powers of the Company.

[15] If at the end of the year the CDC has a financial surplus then this is reinvested in the Corporation.

Charities Act

[16] Section 4(1) defines charitable entity as:

4 Interpretation

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

charitable entity means a society, an institution, or the trustees of a trust that is or are registered as a charitable entity under this Act

[17] Section 13(1)(a) and (b) provides:

13 Essential requirements

- (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

[18] Section 5(1), (3) and (4) provide:

5 Meaning of charitable purpose and effect of ancillary non-charitable purpose

- (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.

...
- (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.

[19] Section 18(3) provides:

18 Commission to consider application

...

- (3) In considering an application, the Commission must—
 - (a) 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;
and
- (b) observe the rules of natural justice; and
- (c) give the applicant—
 - (i) notice of any matter that might result in its application being declined; and
 - (ii) a reasonable opportunity to make submissions to the Commission on the matter.

[20] The appellant's case is that the charitable purpose of the CDC is relief of poverty, the advancement of education and the beneficial effect to the community through the development of industry and commerce (s 5(1)).

[21] The appellant submits in interpreting trust deeds (here the CDC constitution) where there is an ambiguity or uncertainty a benevolent interpretation favouring a presumption of charity should be used (see *Inland Revenue Department v McMullen* [1981] AC 1 (HL) and *Laws of New Zealand Charities* at [13]).

[22] In reaching its decision the Commission identified its approach to the structure and wording of trust deeds when it said in relation to the CDC constitution:

The Commission does not consider that the introductory wording in clauses 2.1 and 2.2 provides conclusive evidence that the applicant's purposes are in fact charitable.

[23] The appellant accepts that this view is correct as far as it goes. But it submits that this view led the Commission to ignore the introductory words of cls 2.1 and 2.2 which stress the work of the CDC is for charitable purposes and in furtherance of charitable objects when the Commission came to interpret the constitution of CDC.

[24] The appellant says these purposes and objects provide an overlay for the proper interpretation of the constitution of CDC.

Relief of poverty

[25] I turn therefore to the first ground upon which the appellant says the trust is a charitable trust, relief of poverty (s 5(1)). It is common ground that relief of poverty does not require the relief of those who are destitute (*DV Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 (HC)).

[26] The relief of unemployed can be a charitable purpose within the relief of poverty ground (*IRC v Oldham Training and Enterprise Council* (1996) 69 TC 231 at 249).

[27] The appellant submits that “the generation of jobs is a purpose that is entirely within the meets and bounds of the relief of poverty, head of charity”. The appellant’s case is that the work of the CDC creates jobs and therefore benefits the unemployed in two ways:

- a) where there is a chain of employment the creation of a new job results in movement of employed persons thus leaving employment for the unemployed;
- b) the creation of skilled jobs creates the need for service jobs thus providing jobs for the unemployed.

[28] I do not consider the purpose of CDC is to assist the unemployed and thereby relieve poverty. I accept the unemployed could be one of the ultimate beneficiaries of its work. The aim of the CDC is to assist businesses to prosper (within the criteria of those whom it will help). This in turn, it believes, will contribute to Christchurch and Canterbury’s economic wellbeing. As a result jobs may be created and those who are unemployed may obtain some of those jobs.

[29] In considering whether the purpose of the CDC is the relief of the unemployed it is appropriate to consider both the terms of the constitution and the activities of CDC (s 18(3)). The only purpose which deals with unemployment is the

initial part of cl 2.2(a) ([14]). None of the activities of the CDC are directly focused on the creation of employment for the unemployed ([10]–[13])

[30] What is illustrated by this analysis is that the purpose of the CDC is not relief of poverty through providing those who are unemployed with jobs. It is to improve the general economic wellbeing of the area. In that sense, therefore, CDC's purpose cannot be the relief of poverty. The possibility of helping someone who is unemployed is too remote for it to qualify as the charitable purpose of relief of poverty.

[31] I agree with the Crown's observations that this claim, creating jobs through economic development, if it has any place, should be considered under the "any matter beneficial to the community" head of charity. I therefore reject the claim that relief of poverty is a charitable purpose of CDC.

Education purposes

[32] The advancement of education is a charitable purpose (s 5(1)). The CDC provides business training for those who identify such a need. Clause 2.2(b) of the constitution encourages CDC to provide a variety of services for businesses including financial, marketing, technical and counselling.

[33] I do not consider this service comes within the provision of the enhancement of education as intended by the Act. To be a charitable purpose it must provide this opportunity to a broad section of the public. This could hardly be said to be the case here given the narrow way in which CDC has defined eligibility ([13]). Nor in my view is supporting businesses by providing assistance to their proprietors, in such aspects as financial management or marketing, the support or advancement of education and learning. Neither the constitution nor the function of the CDC therefore provides a charitable purpose for the advancement of education.

Purposes Beneficial to the Community : Economic Development

[34] The appellant's case is that CDC's constitution comes within the fourth category of charitable purposes, given its promotion of economic development in Canterbury. This economic development, it is argued, is "beneficial to the community" (see *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] 1 CH 132, *IRC v White* (1980) 55 TC 651 and *Laws of New Zealand Charities* at 13:

... such other purposes may be charitable because they are prima facie beneficial to the public and there is no ground for holding them outside the spirit and intendment of the Preamble [of the Statute of Elizabeth].

[35] Once charitable purpose is established (here benefit to the community) to qualify for registration pursuant to the Act the applicant must also show public benefit. The appellant says CDC's constitution prima facie provides for benefit to the public thus it submits there is no ground to say that it is outside the "spirit and intendment" as being charitable.

[36] The appellant submits the objects of the CDC provide public benefit because their purpose is to enhance the economic wellbeing of the Canterbury area. The appellant stresses that the CDC constitution contains a prohibition on the private benefit to any individual unless incidental to the CDC's charitable objects.

[37] The appellant points out that the charitable objects clause in CDC's constitution is intended to permeate all of its activities. It submits the fact that individual businesses might benefit from the work of the CDC should not by itself discount the public benefit (see *Education Fees Protection Society Incorporated v CIR* [1992] 2 NZLR 115).

[38] It submits this is consistent with the Australian Federal Court's approach in *Tasmanian Electronic Commerce Centre Pty Limited v Commissioner of Taxation* [2005] FCA 439 at [56]:

Once it is accepted that assistance to business and industry can provide a public benefit of the kind which the law recognises as charitable a proposition which does not seem to be in dispute in the present case, I do not

see how the fact that individual businesses may benefit can be a disqualifying factor. On the contrary, if business in general is assisted, it seems inevitable that some firms at least will become profitable, or more profitable, as a result of this assistance.

[39] The appellant says, therefore, that the impact of the work of the CDC can generate jobs and advantage the overall economic condition of the region. These illustrate the public benefit arising from CDC's constitution and operation (operation is relevant pursuant to s 18(3)).

[40] It is common ground that the appellant must pass two tests before they can be registered under this head as a charity. I agree with the respondent's identification of the two stage test as:

Consisting firstly of falling within the spirit and intendment of the Statute of Elizabeth (often called the analogy test) and secondly meeting the public benefit requirement.

[41] As the *Laws of New Zealand Charities* observes (at [12]), the case law on charitable purposes has developed empirically and by analogy upon analogy.

[42] The first question in this case, therefore, is whether the CDC's constitution and function is sufficiently of that "spirit and intendment" to be charitable purpose. What must be kept in mind is that the charitable purpose of benefit to the community is a community benefit to assuage need. In cases such as *Re Tennant* [1996] 2 NZLR 633 and *Tasmanian Electronic Commerce Centre v Commissioner of Taxation* [2005] FCA 439 focus is on providing community benefit where an identified need is established. Save for advancement of religion all charitable purpose can be seen as meeting a need.

[43] In *Tennant* there was a small deprived rural community where the capacity to develop important services such as a school and public hall was provided, in *Tasmanian Electronic Commerce Centre* a state of Australia was (relatively) economically disadvantaged. No such claim of deprivation is made with respect to Canterbury or Christchurch.

[44] The objects and work of the CDC are commendable. Its intention is to help fledgling businesses. By itself this does not establish CDC as having the necessary focus on charitable intent. To return again to the purposes and operation of CDC, cls 2.2(b) and (c) are the focus of CDC's operation. These are essentially the provision of help to individual businesses in the hope they will grow. Not all businesses who ask for or indeed need help are offered it. Only those within a narrow band. This help may promote these individual businesses. It may make them more profitable. This promotion and profitability is not incidental to the work of CDC. It is at its core. This illustrates how the spirit and intendment of charitable purpose is not central to CDC's function and thereby cannot be charitable.

Public benefit

[45] Public benefit must be expressly shown where the claimed purpose of the trust is, as here, benefit to the community (*Oppenheim v Tobacco Securities Trust Co Limited* [1951] AC 297) adopted in New Zealand in *Molloy v CIR* [1981] 1 NZLR 688. While the benefit need not be for all of the public it must be for a significant part.

[46] Both counsel identified *Oldham TEC* as supporting their submissions in this regard. In *Oldham TEC* the first main object of the company was to promote vocational education, and the training and retraining of the public. These objects were educational and clearly charitable. The second main object was to promote industry, commerce and enterprise in all forms for the benefit of those in and around Oldham.

[47] The work of the Oldham Training and Enterprise Council actually involved providing services for businesses by giving advice, assessment of a company's strengths and weaknesses and providing business skills training. The latter included training and planning, financial management and identification of new markets for the companies.

[48] The summary of the Court's conclusion at the beginning of the judgment adequately identifies the important features. These identified why the Court

concluded the objects were not wholly and exclusively charitable and therefore that the Enterprise Council at Oldham was not a charity:

(1) the objects were to be ascertained from the Memorandum of Association alone but, to determine whether any object so ascertained was a charitable purpose, it might be necessary to have regard to evidence to discover the consequences of pursuing that object: what a body has done in pursuance of its objects may afford graphic evidence of the potential consequences of the pursuit of its objects;

(2) on any fair reading the second main object and its ancillary object, as originally stated, extended to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them, and the enterprise services, as actually provided, did exactly that; those objects, in so far as they conferred freedom to provide private benefits, regardless of the motive or the likely beneficial consequences for employment, disqualified Oldham TEC from having charitable status, the benefit to the community conferred by such activities being too remote; and that position was exactly the same in respect of the third object and its two ancillary objects under the amendments made in 1990;

...

[49] The activities of the Enterprise Council also provided for a cash allowance to those thinking of starting up a business. This was specifically aimed at people who had been unemployed for at least six weeks and were starting a business which would have the potential to employ other people. Further, the training was specifically targeted at assisting young people into work and retraining the unemployed.

[50] These later activities can be contrasted with CDC's. In *Oldham TEC* there was, in part, specific targeting of unemployed in the context of business development. Even so the Court concluded that the Enterprise Council was not charitable. There is no specific targeting of the unemployed by CDC in its objects and especially not in its activities. Its focus is, as I have observed, in assisting particular businesses in the hope that there would be general economic advantage and reduction of unemployment.

[51] In *Oldham TEC* the Court concluded the Enterprise Council was not charitable given the constitution and operation in part made recipients of assistance

more profitable. While this might improve employment prospects it was not at the core of its function.

[52] The Court said at 251:

Under the unamended objects clause, the second main object, namely promoting trade, commerce and enterprise, and the ancillary object, of providing support services and advice to and for new businesses, on any fair reading must extend to enabling Oldham TEC to promote the interests of individuals engaged in trade, commerce or enterprise and provide benefits and services to them. Paragraph 4.2 of the statement of agreed fact shows that Oldham TEC in the form of the provision of enterprise services does exactly this. Such efforts on the part of Oldham TEC may be intended to make the recipients more profitable and thereby, or otherwise, to improve employment prospects in Oldham. But the existence of these objects, in so far as they confer freedom to provide such private benefits, regardless of the motive or the likely beneficial consequences for employment, must disqualify Oldham TEC from having charitable status. The benefits to the community conferred by such activities are too remote. The position in respect of third main object clause and the third and fourth subsidiary object clauses of the amended objects clause is exactly the same.

[53] There are obvious factual similarities between this case and *Oldham TEC*. Both involve providing support services to businesses by giving advice including marketing, financial and management in the hope the community will be advantaged by improved economic activity.

[54] The trust deed and operation of *Oldham TEC* is much more focused on directly assisting the unemployed than CDC's. It has cash allowances for those starting businesses (who had to be unemployed) and the resulting business had to employ unemployed people. Some of the Oldham training was targeted specifically at assisting young people into work and retraining the unemployed. No such focus is present in the objects or activities of CDC. This illustrates that the Enterprise Council could be considered to have a considerably more powerful case in favour of a declaration as a charity than CDC as far as public benefit is concerned.

[55] The appellant submitted however that there was a pivotal distinguishing feature in *Oldham TEC*. The objects in *Oldham TEC* are not specifically expressed to be charitable in contrast with CDC. As to this, in *Oldham TEC*, the Judge said at 250:

I turn now to the objects of Oldham TEC. There are certain indicia of charity. Oldham TEC is an altruistic organisation, in the sense, that no profit or benefit can be conferred on its members, and its *raison d'être* is to assist others; its objects clauses place stress on its overall objective of benefiting the public or community in or around Oldham; and it is substantially publicly funded, financed by Government grants. Further, certain of its objects are indisputably charitable. The question raised is whether the remaining objects viewed in this context can and should be construed as subject to the implicit limitation "so far as charitable". There is, of course, no such express limitation. In my judgment, on a careful examination of the objects clauses no such limitation can be implied or is compatible with the range of benefits and of the eligible recipients of such benefits which it is the object of Oldham TEC to provide.

[56] The similarities between CDC's objects and *Oldham TEC's* are self evident. As both counsel accepted ([22], [23]) the mere fact that the constitution says that CDC's objects are charitable does not make CDC charitable although such a declaration is relevant in assessing whether they are. However, as with *Oldham TEC* in the end the objects and operation of the organisations either support a charitable purpose or they do not. I do not therefore consider that the appellant's distinguishing feature does distinguish *Oldham TEC* from CDC.

[57] As the respondent said:

[91] ... Although the entities do have clauses limiting private pecuniary profit and requiring the objects to be confined to charitable purposes, such limitations are simply not consistent with the stated objects of the organisations and the range of eligible recipients. For example, as noted above, the CDC constitution provides for the creation of job opportunities (cl 2.2(a)), services to businesses (cl 2.2(b)), and promotion of the development of businesses (cl 2.2(c)). As in *Oldham*, such objects are inconsistent with the "charitable purposes" limitation and cannot be achieved if the "private pecuniary profit" limitation is enforced. That is, services to businesses which may result in an increase in their profit generally go beyond the range of charitable purpose.

[58] The factual similarities between this case and *Oldham TEC* support the respondent's submission that CDC is not charitable, the public benefit test not having been met.

[59] The appellant submits, however, that the approach of the Australian Federal Court in *Tasmanian Electronic Commerce Centre* supports its submissions. The appellant says that this case illustrates that the mere fact that the companies who are

assisted by the provision of business training may make a profit should not determine that the object is not charitable ([38]).

[60] This case, however, does not assist the appellant. The important point in this case is that CDC's assistance to business is not collateral to its purposes but central to it. The purpose of CDC's assistance to businesses is, as the constitution identifies, and the operation confirms, to make the businesses more profitable. CDC believes this assistance will, in turn, result in benefit to the Canterbury community. The central focus however remains on increasing the profitability of businesses not public benefit.

[61] Further, in *Tasmania Electronic Commerce Centre* public benefit was established because the purpose of encouraging electronic commerce was to boost Tasmania's (relatively) deprived economy and thereby confer public benefit. No such economic deprivation is claimed for Canterbury. The position may be different in an identifiably economically deprived area in New Zealand.

[62] In *Commissioner of Taxation v The Triton Foundation* [2005] FCA 1319 the Foundation's principal object was the "promotion of a culture of innovation and entrepreneurship in Australia ... by visibly assisting innovators to commercialise their ideas". Thus the Foundation gave advice to such innovators on marketing, business planning and intellectual property issues for free.

[63] The Court concluded that the promotion of one aspect of commerce was capable of being charitable and the Foundation's purposes and objects were beneficial to the Australian public.

[64] The Court concluded:

[27] Triton's constituent documents, when read as a whole, show that its main and overarching object was to promote a culture of innovation and entrepreneurship for the ultimate benefit of Australian society. The preamble to the constitution of Triton, a company limited by guarantee, referred to the company's Mission Statement – "To promote a culture of innovation and entrepreneurship, particularly among our young, by visibly helping Australian innovators commercialise their ideas". Clause 2(a) of Triton's constitution stated:

...

[37] ... The assistance given to inventors, though of direct benefit to them, was concomitant or ancillary to its principal object. This assistance, which was intended to enable Triton to “showcase” inventors and their inventions, complemented Triton’s other activities, also directed to promoting and publicizing an innovative and entrepreneurial commercial approach in Australia. Triton offered its services for the benefit of the public or a sector of the public, as opposed to individual members of the community. The authorities confirm that, in these circumstances, the fact those individuals (here inventors) may benefit from Triton’s activities do not detract from its charitable status: see [22]–[23] above.

[38] On the facts that the Tribunal found, and having regard to Triton’s constitution, activities and history, Triton’s essential object was a charitable one, within Lord Macnaghten’s fourth classification. It was not suggested that there was anything about its control that should lead to a contrary conclusion. On the facts found by it, the Tribunal did not err in finding that Triton was therefore a charitable institution for the purpose of item 1.1 of the table to s 50-5 of the Act. I emphasise that the question for the Court is whether, on the facts found by the Tribunal, Triton was a charitable institution for the purposes of the relevant provisions of the Act. As Lockhart J noted in *Crunulla* at ATC 4225; FCR 96 (see [20] above), the Act directs inquiry to a particular time, and consideration must always be given not only to the purpose for which the society was established but also the purpose for which it was being conducted at the time relevant to the inquiry mandated by the Act. If Triton were significantly to change its operations by, for example, charging market rates for most of its services, then it might be liable to lose its charitable status for another period of inquiry under the Act.

[65] In *Triton* the Court was satisfied that the overarching object of the Foundation was a public benefit object, the promotion of a culture of innovation and entrepreneurship in Australia. To some degree the Court’s assessment in *Triton* is a question of perspective. The Court saw the “overarching object was to promote” innovation and entrepreneurship in Australia. It did that by supporting innovations to commercialise these products. The alternative perspective was that the Foundation primarily helped innovators commercialise their ideas. As a result the Foundation hoped this commercialisation would promote innovation and thereby benefit Australian society.

[66] In *CDC*, however, the pursuit of the objects is focused on the development of individual businesses ([14]). The provision of support to those businesses is done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region. This can be contrasted with the broad public benefit identified in *Triton*.

[67] Any public benefit therefore from CDC's purpose and operation's is in my view too remote to establish CDC as a charity. Public benefit is not the primary purpose of CDC's objects or operation. Its primary purpose is the assistance of individual businesses. The creation of jobs for the unemployed, as opposed to jobs for those who are employed and not in need, is the hoped for, but remote and uncertain, result of the way in which CDC approaches its task. The relief of unemployment is certainly not a direct object or purpose of CDC's function. The public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from CDC's work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of CDC. Public benefit is not at the core of CDC's operation.

[68] Further the purposes in cl 2.2(a) (in part)–(f) are primarily non charitable. There is nothing to suggest these purposes are ancillary to any other objects or purposes. They have the same apparent significance as other purposes. They therefore appear to infringe s 5(3) and (4) thereby preventing registration (see also [72]).

[69] For those reasons I am satisfied therefore that the Commission was correct to reject CDC's application for registration of a charity. After considering the other two entities I will return to s 61B of the Charitable Trusts Act 1957.

Canterbury Development Corporation Trust

[70] The CDCT owns the shares in CDC. It receives no funds and undertakes no function other than as a dormant shareholder. The trust deed states:

- 4.1 The objects for which the Trust is established are as follows:
 - (a) The relief of poverty;
 - (b) The support, aid and assistance to any person seeking employment;
 - (c) The maintenance of places of learning;
 - (d) The encouragement of skill, industry, and thrift;

- (e) Any other charitable purposes of a like nature which are beneficial to the community;
- (f) The expansion of employment by the creation of employment for the unemployed, the retention of employment for those persons whose employment is or may be in jeopardy and the creation and expansion of job opportunities for all persons;
- (g) To collaborate with local authorities and other organisations and persons in developing and providing technical, financial, marketing and counselling services for all kinds of businesses;
- (h) To encourage, promote and facilitate the establishment carrying on, expansion and development of all kinds of efficient businesses;
- (i) To liaise with and encourage cooperation and coordination amongst local authorities and other organisations and persons for the object of promoting and developing community welfare and the general well-being of the inhabitants of the Canterbury region;
- (j) To hold shares in Canterbury Development Corporation or any other company or which is established for similar objects (sic)

4.2 The Board shall have the power to carry out the objects in such a manner and in such ways as from time to time it shall see fit at its complete and uncontrolled discretion and shall not be bound to see to the application for any moneys or property paid or applied for such purpose.

[71] Somewhat confusingly the Declaration of Trust (as opposed to the trust deed itself) identifies cl 4.1(a) to (e) as its objects and cl 4.1(f) to (j) as its purposes in fulfilling the objects.

[72] The appellant accepts that the deed of trust and the objects of CDCT are essentially the same as those of CDC. The difference between the two organisations arises from what each organisation does. CDCT's charitable status must be judged solely on the relevant clauses in its trust deed and declaration of trust for it performs no function against which it may be judged (s 18(3)).

[73] As with the CDC the CDCT's list of objects and purposes contains both charitable and non-charitable objects. Five of the objects (cl 4.1(a) to (e) inclusive) are probably all charitable. The exception might be para (b) which describes

supporting and assisting those seeking employment. It is the aid of an *unemployed* person seeking employment that makes an object charitable.

[74] Clause 4.1(f) is a mixture of charitable and non charitable. The creation of work for the unemployed and perhaps retention of employment for those at risk are charitable. However, the expansion of job opportunities for all is not. Objects in cl 4.1(g) to (j) are not charitable. The activities in paras (g) to (j) are clearly not ancillary to any charitable object or purpose elsewhere in the clause. They have equal status to the other objects/purposes. They are not identified as ancillary nor would it be logical to read them in that way. These objects, therefore, infringe s 5(3) and (4) of the Charities Act. Given their equal status there is no reason why the activities in cl 4.1(g)–(j) cannot be carried out irrespective of any charitable content. CDCT could not therefore be registered as a charitable entity.

Canterbury Economic Development Fund

[75] The CEDF was constituted by a deed of trust on 10 April 2003. The Christchurch City Council has funded the trust with amounts varying from \$376,000 to \$2.865 million over the last seven years. Other income is generated by the fund.

[76] The appellant says the CEDF operates as a venture capital investor for very early stage businesses. Mr Luff in his affidavit said that originally there were some grants to new businesses and some investments. Now all are investments with profits returned to the fund for further investment.

[77] The deed of trust provides that the trustee is the CDC. The objects/purposes are said to be:

4.1 The settlor declares that the Trust is a trust for charitable purposes for the benefit of the present and future inhabitants of the Canterbury region and directs that the Trust Fund may be applied and used exclusively by the Trustee for the following general purposes within New Zealand (“the Objects”), namely:

- (a) To promote sustainable employment opportunities in the Canterbury region; and

- (b) to generate economic transformation and sustainable economic benefits for the Canterbury region.
- 4.2 In considering an application, the Trustee will have regard to:
- (a) appropriate strategic development plans for the Canterbury region;
 - (b) whether other sources of funding or support are available, including assistance provided through industry or regional development policies and programmes of local authorities or central government;
 - (c) the objectives, roles and activities of any other organisations engaged in economic development activities in the Canterbury region; and
 - (d) any other matters that it believes are relevant.
- 4.3 The Objects of the Trust are and shall be charitable and shall not include or extend to any matter or thing which is or shall be held or determined to be non-charitable. Any private benefit which is conferred on any individual or individuals must be incidental to the pursuit by the Trust of the Objects. The powers and purposes of the Trustees shall be restricted accordingly and limited to New Zealand.

[78] Mr Luff stressed that the criteria used by CEDF in deciding whether to make a grant or investment must be seen in context of the objects of CEDF. The criteria are:

10. In order to be considered for a Distribution a project and an Applicant must
- 10.1 have the potential to result in an increase in jobs and wealth for Canterbury people; and
 - 10.2 be based in Canterbury or have major benefits that will accrue to Canterbury; and
 - 10.3 meet at least one of the following criteria:
 - (a) generate exports from Canterbury to other parts of New Zealand or to overseas;
 - (b) substitute for imports;
 - (c) provide services not currently available from Canterbury;
 - (d) attract new investors and/or investment to Canterbury;
 - (e) improve workforce capability;
 - (f) create an infrastructure item of value to Canterbury;
 - (g) create new businesses in Canterbury;

- (h) make new capital available for Canterbury businesses;
- (i) create a more competitive economic environment;
- (j) invent or supply innovation.

[79] The appellant's case is that the CEDF is charitable because it provides for the relief of poverty and for the promotion of economic development thereby coming within the first and fourth heads of charity (s 5(1)).

[80] CEDF in particular provides financial assistance by making grants of up to \$50,000, making loans to applicants, and subscribing for shares in an applicant; and a mix of loans and equity investments.

[81] CEDF uses two primary rules in the evaluation of applications. They are: that the key project or the applicant can achieve "the creation of a \$5 to \$10 million in enterprise value during the three to five year term of the investment by CEDF" and the "creation of 50 jobs".

Relief of poverty

[82] I see no significant difference between CDC and CEDF in this regard. Clause 4.1(a) of the CEDF trust deed relates to providing employment opportunities. While the relief of unemployment can be a charitable purpose, by relieving poverty, the object of cl 4.1(a) is not the relief of unemployment.

[83] None of the objects in cl 4.1(b) or cl 4.2 are the relief of poverty. They can be considered under the fourth head of charitable purposes described by the appellant as the promotion of economic development. But they are not the relief of poverty.

Promotion of economic development

[84] It is difficult to distinguish between the objects, purpose and operation of the CDC and CEDF as they relate to the promotion of economic development. While the express operations differ, with CDC providing advice and support to businesses, and CEDF start up money, both have the same focus. They assist new or existing

businesses within strict criteria and thereby hope the businesses will prosper and in turn increase Canterbury's economic wellbeing and create new jobs. I have already rejected this rationale as a basis for declaring the objects charitable with respect to CDC.

[85] Counsel for the appellant submitted CEDF's situation was really equivalent to the facts in *Tennant*. There the settlor of a trust in the 1920's provided land for a school, church, public hall and a creamery in the small rural village of Gordonton near Hamilton.

[86] As to this Hammond J said:

Obviously each case will turn on its own facts. I would not be prepared to say that there may not be cases which would fall on the other side of the line because of private profit making of some kind. But here the settlor was attempting to achieve for a small new rural community what would then have been central to the life of that community: a cluster complex of a school, public hall, church and creamery. In my view he was endeavouring to confer an economic and social benefit on that particular community for the public weal. To see the creamery in isolation from what was really an overall purpose of benefit to this locality – the complex – would be both unrealistic, and in my view wrong in principle.

But even if I were to be wrong in that approach I think, on a narrower footing, that this particular purpose was for the promotion of industry (dairying) in that particular locality. This settlement was made in the 1920s in the post-war expansion of dairying in the Waikato. Such an industry cannot come into being without a source of manufacture. Effectively this settlor was donating land to the overall good of the locality to help "kick start" as it were, in an economic sense, dairying in a very fertile area. And with such an enterprise would necessarily have come the associated public benefits of furthering of employment; the training of young men and women in that sort of business; together with the social centre that such institutions were in the life of this country in that era.

I can understand and appreciate the very proper caution of the Solicitor-General in this instance. A Court must necessarily be very careful to see that charities which obtain such distinct revenue and other advantages do not shade into conferring private benefits. But in the end, as his office did, I take the view that purpose (d) was a charitable purpose in law.

[87] The first rationale for the Judge's conclusion in *Tennant* does not help the appellant. This was a gift of land directly focused on the public good and therefore charitable. However this was only so if the gift was seen as a whole, that is, to

benefit education, religion, general public welfare and the general economics of the area (through the creamery).

[88] As to the second rationale in *Tennant* relating to an assessment of the creamery on its own I differ from Hammond J's analysis. By itself I cannot see how a kick start for a particular business can be charitable. As with CEDF, while the hope is laudable, to kick start an industry to the economic benefit of a region, and ultimately perhaps through this to relieve unemployment, the provision of help to a fledgling business is not for public economic benefit nor does it have charitable intent. I consider in *Tennant* if the creamery is looked at on its own, then it provides a private benefit conferred on a private industry which ultimately it is hoped might benefit a community. This is not a charitable purpose. The only basis on which this could be seen as charitable is based on the needs assessment undertaken, for example, in *Tasmanian Electronic Commerce Centre*. If this is the rationale for the creamery on its own then *Tennant* is distinguishable from this case. Here there is no claim of need in the Canterbury region.

[89] In *Tennant*, with respect to the land gifted for the creamery, and in this case, the owners of the businesses assisted by CEDF, hoped to use the help to develop individual businesses. Ultimately there may be some public benefit from such an investment but its primary focus is not public benefit but private benefit. Such hoped for benefit is really no different than the benefit produced by any commercial enterprise. They typically provide jobs and generally contribute to the economic wellbeing of the society they operate in. But they are not charities any more than, in my view, the CEDF is.

[90] It is of some interest to consider the position of the United Kingdom Charity Commission. It has an extensive publication dealing with what it will accept and what it will not accept as a charity. Under the "Charities Relieving Unemployment" section and that part dealing with public benefit it discusses what are and what are not acceptable activities where the "charity" provides grants or equipment or other payments to new businesses.

[91] The capital grant or equipment or payment to a new business, where the business is started by someone who is unemployed, and not by someone who has quit employment to start their own business, can be charitable. Secondly, where the payment is to an existing commercial business it must be to take on additional staff from unemployed persons before it can be considered charitable. This illustrates the type of direct focus on the unemployed which might be required to relieve poverty and thereby ensure the organisation is charitable. Also with the promotion of economic development, the focus must be directly on the promotion of public development as the primary object. It will only be where the assistance to individual businesses is truly ancillary to this main purpose that the object will be charitable.

[92] For essentially therefore the same reasons as CDC I reject the appellant's case that the CEDF is entitled to be registered as a charity under the Act. I consider the Commission was correct therefore.

Section 61B non charitable purposes and an invalid trust

[93] Section 61B provides:

61B Inclusion of non-charitable and invalid purposes not to invalidate a trust

- (1) In this section the term **imperfect trust provision** means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.
- (2) No trust shall be held to be invalid by reason that the trust property is to be held or applied in accordance with an imperfect trust provision.
- (3) Every trust under which property is to be held or applied in accordance with an imperfect trust provision shall be construed and given effect to in the same manner in all respects as if—

- (a) The trust property could be used exclusively for charitable purposes; and
 - (b) No holding or application of the trust property or any part thereof to or for any such non-charitable and invalid purpose had been or could be deemed to have been so directed or allowed.
- (4) This section shall apply to every trust under which property is to be held or applied in accordance with an imperfect trust provision, whether the trust is declared before or after the commencement of this section:

Provided that this section shall not apply to any trust declared by the will of any testator dying before, or to any other trust declared before, the 26th day of October 1935 (being the date of the passing of the Trustee Amendment Act 1935), if before the 1st day of January 1957 (being the date of the commencement of the Trustee Act 1956)—

- (a) The trust has been declared to be invalid by any order or judgment made or given in any legal proceedings; or
- (b) Property subject to the imperfect trust provision or income therefrom has been paid or conveyed to, or applied for the benefit of, or set apart for, the persons entitled by reason of the invalidity of the trust.

[94] This is, as the Commission identified, the “blue pencil” provision potentially allowing deletion of certain provisions in a trust. If the conditions in s 61B apply then the non charitable purposes can be “blue pencilled” leaving only the charitable purposes.

[95] Several issues arise with respect to s 61B and the appellant’s in this case. The first point made by the Commissioner is that s 61B cannot apply to CDC which is a company and not a trust. The Commission says that the plain words of s 61B illustrate the section applies only to charitable trusts and not otherwise. The appellant’s case is that the nature of a charitable company necessarily involves the existence of a trust affecting the activities of the charitable company.

[96] It is difficult to see why s 61B would be limited only to a charity carried on expressly by a trust rather than by any other entity. The Act clearly contemplates that a charitable purpose can be carried on by a trust or a company or some other institution (see s 13(1)(a) and (b) and s 4(1) definition of charitable entity). While

the word “trust” is used in s 61B I consider Parliament used “trust” in a general sense of being a charitable entity (at least in part) given the context of s 61B.

[97] Any other interpretation would be irrational. If the Commission is correct a trust in part charitable and in part not charitable would be able to seek the invocation of s 61B. A society or institution with exactly the same charitable and non charitable purposes would not. There is no logic to explain the difference. The purpose of s 61B is to allow, in appropriate cases, deletion of non charitable purposes to save a charitable trust. It matters not in those circumstances whether this is through the direct vehicle of a trust or through the indirect vehicle of a society or institution or other body.

[98] I am satisfied therefore that the appellant was correct when he submitted that s 61B applies irrespective of the type of “charitable” organisation involved.

[99] All three organisations here have charitable and non charitable purposes. However, in my view this is not a case for the use of a “blue pencil”. CDC and CEDF are complex businesses with sophisticated structures and focus. It is simply not possible for a Court to delete significant portions of each organisation’s purposes and be confident that there could be a coherent structure and function left.

[100] Counsel submitted I should give the CDC and CEDF the chance to amend its purposes and functions to see if it could bring itself within the definition of a charitable entity sufficient for registration. This would only be appropriate where a simple amendment(s) could be undertaken which could be shown to have little effect on the organisational structure. This is not the case here.

[101] The other reason to reject such a possibility is that it would skew the legislative process for approval of charitable entities. The legislation provides that the first body to consider the question is the Commission with the right of appeal *de novo* to the High Court. This Court would be very reluctant to give away the expertise of the Commission as the first adjudicative body. This would be required if the appellant’s suggestion was accepted given it would be for this Court to approve or reject the “new” amended deeds or constitutions.

[102] As to CDCT the appellant says it would be a simple matter to delete its “offending” provisions given the complications of the other organisations which, in contrast to CDCT, are operative bodies. As I have identified ([73] and [74]) a significant portion of the CDCT’s objects and purposes is non charitable. The non charitable portions are primarily the operative clauses carrying out the objects of the trust. Without the operative clauses the deed is little more than a recitation of the standard charitable objects with little or no instruction as to how the trust will operate to give effect to the objects. Given that conclusion I do not consider the proposed deletions come within the intent of s 61B. These deletions would mark a fundamental change to the functioning or operative part of CDCT and would leave it without direction or focus.

[103] I refuse therefore to invoke s 61B to cure the problems that I have identified in any of the three organisations here.

Procedural aspects

[104] In this appeal the appellant and respondent both filed affidavits dealing with factual matters relevant to the applications. Further, the adjudicative body, the Commission, was named as a respondent in these proceedings.

[105] This is an appeal from a decision of the Commission. As such the relevant factual material before the Commission, when it made its decision, would typically be brought before this Court by an agreed bundle of documents. If either party wished to provide further factual material to the Court then this would ordinarily be by way of an application for leave to bring the evidence with the necessary justification (r 20.16(2)–(3) of the High Court Rules).

[106] It is clear from the material in the affidavits filed by the appellant that significant relevant factual material, which was provided to this Court, was not provided to the Commission. Although in this case with the agreement of the respondent I accepted this material, this approach should not become habitual in appeals pursuant to s 59.

[107] The applicant for registration as a charity must ensure all relevant factual material is placed before the Commission prior to the Commission making its determination. On an appeal this material should form part of the bundle of documents provided to the High Court. Then leave would be required for any further evidence to be available for the appeal. The ordinary rules governing such evidence on appeals would then apply.

[108] An adjudicative body should not generally be named as a party to an appeal (r 20.17: *Moonen v Broadcasting Standards Authority* (1995) 8 PRNZ 335. They are not a party to the proceedings. Given that proposition the proceedings may be better entitled as, *In Re (name of the appellant)*.

[109] The second difficulty in an appeal pursuant to s 59 is the question – who is to be the opposer in such an appeal? There is only one party, the applicant for an order that they be registered as a charity. It is therefore difficult to see how anyone other than the Commission in most cases can be anything other than the opposer.

[110] In this case the arrangement was that the Commission would appear and put the contrary argument to that of the appellant. However this is dressed up effectively the Commission becomes the opposer. While less than ideal there seems little option for anyone other than the Commission to be the opposer in a s 59 appeal.

[111] I therefore invite future appellants to ensure the entitling is as I have suggested, with service of the proceedings on the Commission who, in turn, in most cases is likely to be stuck with the role of opposer.

Costs

[112] Neither party sought costs irrespective of the result in these proceedings. No order as to costs was made.

Prohibition on public search

[113] I make an order prohibiting the public search and copying of 249 of the annexures to Mr Luff's affidavit. The material on 249 is commercially sensitive and of no direct relevance to these proceedings.

Summary

[114] All three appeals are therefore dismissed.

Ronald Young J

Solicitors:

D E McLay, Barrister, Wellington, email: d.mclay@barristers.com

T Warburton, Crown Law, PO Box 2858, Wellington, email: tania.warburton@crownlaw.govt.nz