

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

**CIV-2013-485-000955
[2015] NZHC 1493**

IN THE MATTER of an appeal under s 59 of the Charities
Act 2005 from a decision of the Charities
Board dated 15 April 2013

RE FAMILY FIRST NEW ZEALAND
Appellant

Hearing: 22 June 2015

Counsel: P D McKenzie QC for Appellant
P J Gunn and M J McKillop for Charities Board

Judgment: 30 June 2015

JUDGMENT OF COLLINS J

Summary of judgment

[1] I am allowing an appeal brought by Family First New Zealand (Family First) against a decision of the Charities Board in which it determined Family First was no longer eligible to be registered as a charitable entity.

[2] In allowing the appeal I am directing the Charities Board reconsider Family First's case, in light of the judgment of the Supreme Court in *Re Greenpeace of New Zealand Inc (Greenpeace)*¹ and this judgment.

Context

[3] The Family First trust deed was created on 26 March 2006. The trust deed sets out six purposes and aims of Family First, namely:²

¹ *Re Greenpeace of New Zealand Inc* [2014] NZSC 105, [2015] 1 NZLR 169.

² Deed of Trust of Family First Lobby, 26 March 2006 at [4]. Family First changed its name to

- A. To promote and advance research and policy supporting marriage and family as foundational to a strong and enduring society
- B. To educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible
- C. To participate in social analysis
- D. To produce and publish relevant and stimulating material in newspapers, magazines, and other media
- E. To be a voice for the family in the media
- F. To carry out such other charitable purposes within New Zealand as the Trust shall determine.

[4] On 6 April 2006, Family First was incorporated under the Charitable Trusts Act 1957. Family First was approved as a charitable entity by the Charities Commission and registered under the Charities Act 2005 (the Charities Act) on 18 May 2007.

[5] On 21 February 2008, the Charities Commission made an inquiry of Family First about the extent to which its activities involved advocacy. Family First responded on 25 February 2008, saying:³

... [I]t has never been and is not our intention to directly lobby MP's in our ongoing work. Our focus is on education, research and encouraging public debate.

[6] On 25 June 2009, the Charities Commission advised Family First that it was conducting a review of its operations to ensure it still qualified for registration as a charitable entity.

[7] On 16 March 2010, the Charities Commission advised Family First its review had been completed and that the Charities Commission had concluded:⁴

... [Family First] continues to be qualified for registration as a charitable entity.

Family First New Zealand in November 2006.

³ Family First New Zealand, Letter to Charities Commission, 25 February 2008.

⁴ Charities Commission, Letter to Family First New Zealand, 16 March 2010.

[8] On 24 February 2012, the Charities Amendment Act 2012 came into force. That amendment created the Charities Board, disestablished the Charities Commission and transferred the functions of the Charities Commission to the Department of Internal Affairs (the Department) and the Charities Board.

[9] On 11 September 2012, the Department advised Family First it intended recommending to the Charities Board that Family First be removed from the charities register under s 32(1)(a) of the Charities Act. I set out that provision in paragraph [27] of this judgment.

[10] The Department advised Family First that its recommendation was based on its view that Family First's purposes involved advocating and promoting a political viewpoint. The Department said this was not a charitable purpose.

[11] On 14 November 2012, Family First sent the Department a detailed response to the proposal that Family First be deregistered as a charitable entity.

[12] On 15 April 2013, the Charities Board resolved to deregister Family First from the register of charities. The reasons for the Charities Board decision were sent to Family First on 26 April 2013 (the Charities Board decision).⁵

[13] Family First filed its notice of appeal in the High Court on 27 May 2013. On 17 June 2013, the High Court made an interim order under s 60 of the Charities Act that Family First remain on the register of charitable entities pending the outcome of the appeal.

[14] The parties agreed that Family First's appeal be deferred until after the Supreme Court delivered its judgment in *Greenpeace*, which was delivered on 6 August 2014.⁶

⁵ Charities Board, *Deregistration decision: Family First New Zealand (CC42358)* Decision No: D2013-1, 15 April 2013.

⁶ *Re Greenpeace of New Zealand Inc*, above n 1.

Legal framework

General principles

[15] Section 13 of the Charities Act sets out the essential requirements for registration as a charitable entity. Under s 13(1)(a) of the Charities Act, a trust qualifies for registration if it “is of a kind in relation to which an amount of income is derived ... for charitable purposes.”

[16] In the case of Family First, almost all of its income is derived from donations. The level of donations received by Family First has steadily increased from \$213,200 in the 2008 financial year to \$371,138 in the 2013 financial year.

[17] The term “charitable purpose” owes its genesis to the list of purposes found in the preamble to the Statute of Charitable Uses Act 1601 (the Statute of Elizabeth I).⁷

[18] The speech of Lord Macnaghten in the *Commissioners for Special Purposes of Income Tax v Pemsel* is generally considered to be the source of the modern classification of charitable trusts into four principal categories, namely, trusts for the relief of poverty, for the advancement of education, for the advancement of religion and for other purposes beneficial to the community.⁸

[19] In New Zealand, statutory definitions of “charitable purpose” could be found in s 2 of the Charitable Trusts Extension Act 1886, s 14 of the Religious, Charitable, and Educational Trusts Act 1908 and ss 2 and 38 of the Charitable Trusts Act 1957.

[20] The definition of “charitable purpose” found in s 5(1) of the Charities Act reflects the classification of trusts attributable to Lord Macnaghten. Section 5(1) provides:

⁷ Statute of Charitable Uses Act 1601, 43 Eliz I, c 4.

⁸ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

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.

...

[21] To be charitable, the entity's purpose must be for the public benefit.⁹ Where any one of the first three categories of charity are established it is assumed, unless there is evidence to the contrary, that the charity is for that public benefit.¹⁰ Where the fourth category of charitable purpose is relied upon, public benefit must be expressly established. Any private benefit derived from an entity's activities must be a means of achieving an ultimate public benefit.¹¹

[22] A non-charitable purpose will not preclude registration if that non-charitable purpose is merely ancillary to a charitable purpose. Section 5(3) and (4) of the Charities Act provide:

- (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.

⁹ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Dingle v Turner* [1972] AC 601; *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147 (CA); *Latimer v Commissioner of Inland Revenue* [2002] 3 NZLR 195 (CA).

¹⁰ *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 (HL) at 42; cf Susan Barker "The Presumption of Charitability Post Greenpeace" (2015) NZLJ 116, in which it is suggested the Supreme Court in *Greenpeace* cast doubt on the presumption of charitability in New Zealand law.

¹¹ *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue* [1992] 1 NZLR 570 (HC).

[23] Section 18(3)(a)(i) and (ii) of the Charities Act provide that an entity's activities must be taken into consideration when deciding whether the entity qualifies for registration under the Charities Act.

[24] An entity's activities are not to be conflated with the entity's purposes.¹² However, examining an entity's activities may assist in assessing:

- (1) the meaning of a stated purpose where the stated purpose is capable of bearing more than one meaning;¹³
- (2) whether the entity is undertaking an unstated non-charitable purpose;¹⁴
- (3) whether the entity's purposes provide a benefit to the public;¹⁵ and
- (4) whether a non-charitable purpose falls within the saving provisions of s 5(3) of the Charities Act.¹⁶

[25] The charitable status of an entity is determined by construing its objects and powers in context and as a whole, rather than individually.¹⁷

Deregistration

[26] Section 50 of the Charities Act permits the Charities Board to examine and inquire into a charitable entity:

... if it considers it reasonably necessary for the purposes of carrying out its functions and exercising its powers under the [Charities] Act.

¹² *McGovern v Attorney-General* [1982] Ch 321; *Latimer v Commissioner of Inland Revenue* [2004] 3 NZLR 157 (PC) at [36].

¹³ *Institution of Professional Engineers New Zealand Inc v Commissioner of Inland Revenue*, above n 11, at 575.

¹⁴ *Inland Revenue Commissioner v City of Glasgow Police Athletic Association* [1953] AC 380.

¹⁵ *Re Greenpeace of New Zealand Inc*, above n 1, at [29], [32], [44]-[58], [67] and [84]-[92].

¹⁶ *Molloy v Commissioner of Inland Revenue* [1981] 1 NZLR 688 (CA) at 693.

¹⁷ *Attorney-General v Ross* [1985] 3 All ER 334 (Ch D) at 341; G E Dal Pont *Law of Charities* (LexisNexis, Butterworths, Australia, 2010) at [13.17].

[27] Section 32(1)(a) of the Charities Act provides:

32 Grounds for removal from register

- (1) The [Charities] Board may direct that an entity be removed from the register if—
 - (a) the entity is not, or is no longer, qualified for registration as a charitable entity;

...

[28] If an objection to deregistration is received, the Charities Board must not deregister the entity unless the Charities Board is satisfied that it is in the public interest to proceed with removing the entity from the register of charities.¹⁸

Greenpeace

[29] As will become apparent in my analysis of the Charities Board decision, the Charities Board was heavily influenced in its understanding Family First was engaged in political advocacy when it decided to remove Family First from the register of charities. The Charities Board reached its decision before the Supreme Court delivered its judgment in *Greenpeace*.

[30] Greenpeace’s objectives included:

- (1) “the promotion of conservation, peace [and] nuclear disarmament”; and
- (2) the promotion of “legislation, policies, rules, regulations and plans which further the objects of the Society ... and support their enforcement or implementation through political or judicial processes as necessary”.

[31] Greenpeace was refused registration as a charity on the grounds that the two objectives I have set out in paragraph [30] were deemed to be political and hence not charitable. The Court of Appeal considered the advocacy carried out by Greenpeace could be beyond a level of being “ancillary” to its charitable purposes and referred the issue back to the Department and the Charities Board for further consideration. Greenpeace appealed the Court of Appeal’s decision and challenged the Court of

¹⁸ Charities Act 2006, s 35(1)(a).

Appeal's approach to political advocacy and another issue not relevant to Family First.¹⁹

[32] For present purposes, the key conclusions of the Supreme Court can be distilled to the following five points.

[33] First, all members of the Supreme Court held that to qualify as charitable, a purpose had not only to be for the public benefit, but also be a "charitable purpose" as determined by analogy with objects already held to be charitable. This point was made in the following way by the Chief Justice:²⁰

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". The method of analogy to objects already held to be charitable is also the safer policy since charitable status has significant fiscal consequences. Since the common law methodology is assumed in New Zealand by the Charities Act, we consider that it would not be appropriate for this Court to abandon the analogical approach in favour of the view that benefit to the public presumptively establishes the purpose as charitable.

(footnotes omitted)

[34] Second, the majority held s 5(3) of the Charities Act was directed towards excluding political activity that could not itself be characterised as a charitable purpose. This point was made by the Chief Justice in the following way:²¹

Section 5(3) is of general application to all ancillary purposes, with "advocacy" being given only as an illustration. The subsection is not expressed as an exclusion of advocacy from charitable purposes in all cases where it is more than ancillary, such as would enact a general political purpose exclusion. There is nothing in the structure and language of the provision or its legislative history to justify the words in parenthesis being treated as excluding any non-ancillary purpose, including advocacy or political activity which would otherwise properly be regarded as charitable ...

[35] Third, the majority of the Supreme Court held political purposes and charitable purposes were not mutually exclusive. Whether advocacy or promotion of a cause was a charitable purpose depended on consideration of the end advocated,

¹⁹ The second issue asked whether an entity that had criminal convictions could be registered as a charity.

²⁰ *Re Greenpeace of New Zealand Inc*, above n 1, at [30].

²¹ At [57].

the means promoted to achieve that end and the manner in which the cause was promoted in order to assess whether the purpose could be said to be a public benefit within the spirit and intendment of the Statute of Elizabeth I. The Chief Justice explained:²²

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 statute of Elizabeth I ...

[36] Fourth, the majority of the Supreme Court held that it was not a criterion for registration as a charity that the advocacy undertaken or views expressed by the entity were generally acceptable and not “controversial”. The Chief Justice explained:²³

We are unable to agree with the Court of Appeal suggestion that views generally acceptable may be charitable, while those which are highly controversial are not ...

[37] Fifth, all members of the Court agreed the Court had no adequate means of judging the public benefit of the promotion of nuclear disarmament and the elimination of all weapons of mass destruction. The Chief Justice explained that whether the promotion of Greenpeace’s ideas “is beneficial is a matter of opinion in which public benefit is not self-evident and which seems unlikely to be capable of demonstration by evidence”.

The Charities Board decision

[38] The Charities Board decision is comprehensive and carefully reasoned. The Charities Board explained its decision to deregister Family First was based upon the following grounds.

[39] First, the Charities Board reasoned Family First’s main purpose was to promote points of view about family life. The Charities Board concluded that this was a non-charitable political purpose that did not have a public benefit. I will

²² *Re Greenpeace of New Zealand Inc*, above n 1, at [72].

²³ At [75].

examine this aspect of the Charities Board decision under the heading “political purpose”.

[40] Second, the Charities Board explained that Family First has an independent purpose to procure government action consonant with Family First’s points of view. The Charities Board said this purpose was also a non-charitable political purpose that was not ancillary to any valid charitable purpose. Although this aspect of the Charities Board decision was set out as a separate ground for its decision, it is convenient to also deal with this aspect of the Charities Board decision under the heading of “political purpose”.

[41] Third, the Charities Board reasoned that Family First’s purpose of promoting points of view about family life was not a charitable purpose to advance religion or education.

[42] Family First has not challenged the Charities Board analysis that it failed to qualify as having a religious charitable purpose. Family First does, however, contest the Charities Board conclusion that Family First does not advance education. I will refer to this aspect of the Charities Board decision under the heading “education purpose”.

[43] Fourth, the Charities Board reasoned Family First did not qualify as a charity because its purposes did not come within “any other matter beneficial to the community” in the definition of charitable purpose in s 5(1) of the Charities Act.

Political purpose

[44] The Charities Board explained its understanding that case law and the Charities Act draw a distinction between “political” and “charitable” purposes. The Charities Board said even if a “political purpose” appears to fall within an established head of charity, it does not qualify as a charitable purpose because it can never be regarded as being for the public benefit in a manner that the law regards as charitable.

[45] Three categories of “political purpose” were said by the Charities Board to be excluded from the scope of charities on the basis of having “political purposes”:

- (1) The furtherance of the interests of a political party or representative.
- (2) The promotion of a point of view, the public benefit of which is not self-evident as a matter of law.
- (3) The procurement of government action, including legislation.²⁴

The Charities Board focused first upon the second category of “political purpose” it identified. Later in its decision the Charities Board focused upon the third category of “political purpose” referred to in subparagraph (3) above.

Second category of political purpose

[46] Referring to the Court of Appeal’s judgments in *Molloy v Commissioner of Inland Revenue*²⁵ and *Greenpeace*,²⁶ the Charities Board said the touchstone for the second category of “political purpose” involved the promotion of a view in respect of which the public benefit is not so “self-evident as a matter of law” that the requirements of public benefit is achieved.

[47] The Charities Board said there were three reasons why Family First’s activities came within the second category of “political purpose” I have referred to in paragraph [45(2)] of this judgment.

[48] First, the Charities Board examined Family First’s website and noted that in its promotional material Family First made a number of comments about its understanding of the meaning of the concept “family”. For example, Family First’s website explains that “... a ‘natural family’, not the individual, is the fundamental social unit”. Family First explains a “natural family” is:²⁷

²⁴ The Charities Board listed its categories of political purpose in a different sequence to that which I have set out.

²⁵ *Molloy v Commissioner of Inland Revenue*, above n 16.

²⁶ *Re Greenpeace New Zealand Inc.*, above n 1.

²⁷ Family First New Zealand “FAQ: Family First NZ” <<https://www.familyfirst.org.nz/about-us/frequently-asked-questions>>; referred to in Charities Board *Deregistration decision: Family*

... the union of a man and a woman through marriage for the purposes of sharing love and joy, raising children, providing their moral education, building a vital home economy, offering security in times of trouble, and binding the generations.

[49] The Charities Board reasoned Family First’s perspective on the meaning and role of families could be fairly described as an opinion or value judgement on what is best for families and civil society.

[50] Second, the Charities Board reasoned Family First’s perspective about the concept of a family did not have a self-evident benefit to the public. In this sense, the Charities Board said Family First’s view about the role of families was “controversial”.

[51] The Charities Board said the “controversial nature of [Family First’s] advocacy for the ‘natural family’ was apparent from the list of policies [Family First] has developed and promotes to political parties and politicians”.²⁸

[52] The Charities Board rejected Family First’s argument that Family First’s point of view accorded with New Zealand’s international and domestic law recognising the rights of the child and support for families. The Charities Board said neither New Zealand’s international law obligations nor New Zealand’s domestic law favour the “natural family” as defined by Family First, over other forms of family, and that it could not agree that Family First’s advocacy against an individual rights perspective on social issues is clearly beneficial as a matter of law in New Zealand.

[53] Third, the Charities Board concluded the purpose of Family First was to promote its point of view relating to the place of the “natural family” in civil society. The Charities Board pointed to four reasons why it concluded that Family First advocates and campaigns for the wider acceptance of its opinions about the meaning and place of the “natural family” in civil society among public and government actors:

First New Zealand, above n 5, at [44].

²⁸ Charities Board, *Deregistration decision: Family First New Zealand*, above n 5, at [47].

- (1) The Charities Board relied on the purpose in Family First's trust deed, which refers to its role to "promote and advance research and policy supporting marriage and family as fundamental to a strong and enduring society".²⁹
- (2) Family First promotes itself as being an advocate to speak up for and defend its concept of the family.
- (3) Family First undertakes a wide range of activities to publicise its point of view about the family in modern society.
- (4) In the Charities Board's view, Family First's activities to promote its point of view did not qualify as dissemination of the results of educational research or provide any other charitable benefit for the community.

Third category of political purpose

[54] The final limb of the Charities Board political purposes analysis focused upon the third category of "political purpose" I have referred to in paragraph [45(3)] of this judgment.

[55] The Charities Board reasoned that there is a distinction between "propaganda for private actions by individuals and corporations to advance charitable purposes on the one hand, and public or governmental actions on the other".³⁰

[56] The Charities Board explained that:³¹

... [A] propaganda purpose will fall within the [third] category of political purpose if it "attempts to sway a government or a member of the government ... or a member of the Parliament [where those] organisations or individuals are politically in a position to take action in response to the pressures to which they are subjected".

²⁹ Charities Board, *Deregistration decision: Family First New Zealand*, above n 5, at [50].

³⁰ At [93].

³¹ At [93]; citing *Action by Christians for Abolition of Torture v Canada* [2002] 225 DLR (4th) 99 at [66].

[57] The Charities Board identified two reasons why it considered Family First's actions constituted political purposes to procure government action:

- (1) Family First's stated purposes which allow it to "promote policy supporting marriage and family", to "debate issues relating to and affecting the family" and to undertake its role as "a voice for the family in the media".³²
- (2) Family First's activities confirmed it set out to secure government action consistent with its point of view.

Education purpose

[58] The Charities Board examined Family First's activities in relation to:

- (1) publishing and disseminating opinions and information on its website and through media releases;
- (2) commissioning polls on issues;
- (3) hosting the New Zealand Forum on the Family;
- (4) providing links to publications regarding research on various topics;
- (5) providing information about administrative and Court actions involving child welfare and discipline; and
- (6) commissioning research on various topics.

[59] The Charities Board identified four reasons for concluding Family First's activities did not demonstrate it was established to advance education:

³² Refer paragraph [3] above.

- (1) Family First's activities in conducting polls involved it canvassing support for the political outcomes advocated by Family First and did not advance research.
- (2) Viewed holistically, Family First's publications were predominantly opinion pieces that tended to promote Family First's point of view.
- (3) The research papers commissioned by Family First did not advance an education purpose.
- (4) The New Zealand Forum on the Family did not have an exclusively education purpose.

Purposes beneficial to the community

[60] The Charities Board considered whether Family First was established for purposes that are charitable under the fourth head of charity in the definition of "charitable purpose" in s 5(1) of the Charities Act by reference to two headings:

- (1) Improving the moral and spiritual welfare of the community; and
- (2) Promoting good citizenship.

Moral and spiritual welfare

[61] The Charities Board reasoned Family First's purposes could not be classified as improving the moral welfare of the community because its activities were not analogous to organisations that had been held to promote the moral welfare of the community. The Charities Board drew particular attention to cases concerned with the promotion of temperance³³ and kindness to animals.³⁴

[62] The Charities Board also reasoned that promoting points of view cannot qualify as charitable for the promotion of moral and spiritual welfare of the

³³ *Re Scowcroft* [1898] 2 Ch 638; *Re Hood* [1931] 1 Ch 240; *Knowles v Commissioner of Stamp Duties* [1945] NZLR 522 (SC).

³⁴ *Molloy v Commissioner of Inland Revenue*, above n 16, at 696; *National Anti-Vivisection Society v Inland Revenue Commissioners*, above n 10.

community if it is a political purpose within the test applied by the Court of Appeal in *Molloy* and *Greenpeace*.

Promotion of good citizenship

[63] Relying on the Court of Appeal’s judgment in *Greenpeace*,³⁵ the Charities Board reasoned that generating public debate on a particular issue does not in itself qualify as a charitable purpose.

[64] The Charities Board acknowledged that promoting good citizenship for the public benefit may be a charitable purpose. However, Family First’s activities did not qualify under this head because its contribution to public debate simply reflected a specific viewpoint and did not advance education or reflect rigorous standards of objective analysis and factual research.³⁶

Conclusions reached by Charities Board

[65] The Charities Board said it was satisfied Family First’s main purpose was to promote its point of view about families. It said that this activity was not a charitable purpose and that this role was “so pervasive and predominant it [could] not realistically be considered ancillary to any valid charitable purpose”.³⁷

[66] The Charities Board also concluded Family First’s:³⁸

... purpose to procure governmental actions consistent with its point of view is an independent political purpose that is not within the savings provision ... of section 5(3) of the [Charities] Act.

The Charities Board said Family First’s actions in seeking political outcomes were “at the forefront of its overall endeavour”.³⁹

³⁵ *Re Greenpeace of New Zealand Inc*, above n 1.

³⁶ Citing *Full Fact v The Charity Commission for England and Wales* CA2011/1001, 3 December 2010.

³⁷ Charities Board, *Deregistration decision: Family First New Zealand*, above n 5, at [99].

³⁸ At [100].

³⁹ At [100].

[67] The Charities Board concluded Family First did not have an exclusively charitable purpose and therefore did not meet the requirements for registration as a charitable entity.⁴⁰

[68] Finally, the Charities Board explained that it was in the public interest to remove Family First from the register of charitable entities in order to maintain public trust and confidence in the charity sector.⁴¹

Grounds of appeal

[69] In its amended notice of appeal, Family First identified eight separate grounds of appeal. There is a degree of interconnection between many of the grounds of appeal. The grounds of appeal can be conveniently distilled to the following four points.

[70] First, the Charities Board erred when it concluded Family First's role and advocacy for its views relating to the family is a political and not a charitable purpose. I will deal with this ground of appeal under the heading of "political purpose".

[71] Second, the Charities Board erred in deciding Family First's purposes do not include a purpose that was beneficial to the public within the fourth category of charities. I will deal with this ground of appeal under the heading "benefit to the public".

[72] Third, the Charities Board erred in deciding Family First's purposes do not include the charitable purpose of advancing education. I will deal with this ground of appeal under the heading "education purpose".

[73] Fourth, the Charities Board breached Family First's legitimate expectation that it would remain registered as a charitable entity absent material changes to its activities. I will deal with this ground of appeal under the heading "substantive legitimate expectation".

⁴⁰ Charities Board, *Deregistration decision: Family First New Zealand*, above n 5, at [101].

⁴¹ At [103].

[74] The Charities Board recognised the Supreme Court’s judgment in *Greenpeace*⁴² introduced changes to the law concerning the charitable status of entities that have a political purpose. However, the Charities Board believed it could not reconsider its decision concerning Family First unless Family First’s appeal was allowed and the Charities Board directed to reconsider its decision.

[75] In the absence of a contradictor, the Charities Board appeared and adopted an appropriately adversarial stance in which it submitted that its decision would not have been different if it had the benefit of the Supreme Court’s judgment in *Greenpeace* at the time it decided to deregister Family First.

Analysis

Political purpose

[76] As I have explained in paragraphs [44] to [57] the Charities Board concluded Family First had two purposes which it categorised as “political”:

- (1) First, Family First promotes points of view about family life. The Charities Board reasoned that as this purpose did not have a self-evident public benefit, it was political and therefore not a charitable purpose.
- (2) Second, Family First procures government action consistent with its point of view. The Charities Board reasoned that because this purpose was directed towards procuring changes to legislation and government policies it was political and therefore not charitable.

[77] The first political purpose identified by the Charities Board concerned Family First’s efforts to affect social attitudes, the second political purpose concerned its activities which were directed towards achieving government action.

⁴² *Re Greenpeace New Zealand Inc.*, above n 1.

[78] In *Greenpeace*⁴³ the majority of the Supreme Court said there was no basis for a distinction between general promotion of social attitudes and advocacy directed at government activities, and that political and charitable purposes were not mutually exclusive.

[79] The Supreme Court explained that whether advocacy of a particular purpose was charitable or not depended on the end advocated, the means used to achieve that end and the manner in which the cause was promoted in order to determine whether the purpose was a public benefit within the spirit and intendment of the Statute of Elizabeth I.

[80] In his helpful submissions Mr Gunn, counsel for the Charities Board, said the Charities Board followed the formula set out by the majority of the Supreme Court when it concluded Family First's political purposes were not for the public benefit.

[81] In particular, Mr Gunn submitted:

- (1) the Charities Board examined the ends advocated by Family First and correctly concluded Family First was advocating for general acceptance of its conception of the family; and
- (2) the Charities Board examined the means and the manner adopted by Family First in promoting its cause.

[82] Mr Gunn suggested the Charities Board's analysis correctly led to the conclusion that Family First's advocacy was aimed at procuring government actions and changing public opinion, and that Family First had failed to establish that its political purpose was a benefit to the public and therefore charitable within the spirit and intendment of the Statute of Elizabeth I.

[83] Mr Gunn was correct when he identified aspects of the Supreme Court's approach in the Charities Board's decision. However, the Charities Board proceeded on the basis that Family First's political purposes could not be classified as a

⁴³ *Re Greenpeace of New Zealand Inc*, above n 1.

charitable purpose. This approach dominated and affected many features of the decision of the Charities Board, including its reasoning that Family First's purposes fell within the Charities Board's second category of political purpose, in part, because Family First's views were "controversial". The Charities Board was in no doubt that Family First's purposes were political and that its role as advocate for its conception of the family was "pervasive and predominant".

[84] The Charities Board's fundamental position that Family First's political objectives could never be charitable cannot be reconciled with the approach taken by the majority of the Supreme Court in *Greenpeace*.⁴⁴ The Charities Board's decision was based upon a fundamental legal proposition that has subsequently been found to be incorrect. The Charities Board's view that political purposes could not be charitable underpinned its decision. In view of the Supreme Court's explanation that political purposes are not irreconcilable with charitable purposes, it is appropriate for the Charities Board to reconsider the position of Family First in light of the Supreme Court's judgment.

[85] In addition, the Charities Board's analysis that Family First's advocacy role is "controversial" and therefore not self-evidently of benefit to the public will need to be reconsidered in light of the approach taken by the majority of the Supreme Court in *Greenpeace*. I have explained the relevant portion of the Supreme Court's judgment in paragraph [36] of this judgment.

Benefit to the public

[86] In determining whether Family First's role is of benefit to the public, the Charities Board should refer to analogous cases. In doing so, however, it is essential the Charities Board not undertake its analogical assessment by seeking to carefully match Family First's purposes with organisations that have achieved recognition as charitable entities. Doing so would risk undermining the Supreme Court's recognition, for the first time, that political purposes are not excluded from being classified as charitable.

⁴⁴ *Re Greenpeace of New Zealand Inc*, above n 1.

[87] In this respect, I believe there is force to the submissions of Mr McKenzie QC, counsel for Family First. He argued that Family First's purposes of advocating its conception of the traditional family is analogous to organisations that have advocated for the "mental and moral improvement" of society.

[88] In recognising the strength of Mr McKenzie's submission, I am not suggesting the Charities Board must accept Family First's purposes are for the benefit of the public when it reconsiders Family First's case.

[89] I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.⁴⁵

Education purpose

[90] The Charities Board concluded Family First advanced its polemic points of view under the guise of research and that it was not genuinely involved in the advancement of education.

[91] To be a charitable education activity, the entity must, in addition to conferring a public benefit, promote learning which may be undertaken through a variety of means such as training programmes, conferences or by carrying out or disseminating research that improves knowledge about a particular issue.⁴⁶

[92] Mr Gunn submitted that the Charities Board correctly concluded Family First's purposes did not include the advancement of education because its activities

⁴⁵ Charities Act 2005, sch, cls 17 and 18.

⁴⁶ *Re Hopkins Will Trusts* [1965] 1 Ch 669 at 680; *In re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) at 1576.

involved indoctrination or dissemination of propaganda. Mr Gunn submitted that with one exception, Family First's reports had a "tenacious or polemic character".

[93] Mr Gunn properly acknowledged however, that a report Family First commissioned from the New Zealand Institute of Economic Research (NZIER) was a legitimate piece of research. That report, called "The Value of Family: Fiscal Benefits of Marriage and Reducing Family Breakdown in New Zealand" contained significant research which Mr Gunn acknowledged had not been undertaken previously. The NZIER report was not referred to by the Charities Board in its decision.

[94] When the Charities Board reconsiders Family First's case it will need to carefully examine the NZIER report and determine whether that report is sufficient to qualify Family First's activities as including the advancement of education for the public benefit.

Substantive legitimate expectation

[95] Mr McKenzie acknowledged he faced an uphill task in arguing Family First had a substantive legitimate expectation that it would not be deregistered as a charitable entity unless there were material changes in circumstances from when the Charities Commission concluded Family First remained eligible to be registered as a charitable entity.

[96] Part of Mr McKenzie's acknowledgement related to the fact there has been a degree of reluctance in New Zealand to recognise the concept of substantive legitimate expectation.⁴⁷

[97] There is, however, authority for the proposition that "the categories of legitimate expectation are not closed for the purposes of administrative law".⁴⁸

⁴⁷ *GXL Royalties Ltd v Minister of Energy* [2010] NZCA 185, [2010] NZAR 518 at [45]; *Back Country Helicopters Ltd v Minister of Conservation* [2013] NZHC 982, [2013] NZAR 1474 at [184].

⁴⁸ *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 679.

[98] The doctrine of substantive legitimate expectation has gained traction in the United Kingdom, where it is recognised as an effective supervisory remedy where public bodies and officials fail to act fairly and consistently with the public.⁴⁹

[99] I have previously suggested that if the doctrine of substantive legitimate expectation were to be accepted in New Zealand, it might found a claim where five factors were present.⁵⁰ These criteria were extracted from the judgment of Cranston J in *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs*.⁵¹ The five factors I identified are where:

- (1) a public authority has given a clear and unambiguous undertaking;⁵²
- (2) the undertaking was reasonably understood to mean what the applicant claims;⁵³
- (3) the decision maker knew of the representation and chose to act contrary to it;⁵⁴
- (4) the applicant has suffered some detriment by relying on the representation;⁵⁵ and
- (5) the decision-maker's conduct cannot be objectively justified as being in the public interest and a proportionate response to the circumstances of the case.⁵⁶

⁴⁹ *R v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 at [68].

⁵⁰ *Oosterveen v Ministry of Business, Innovation and Employment* [2014] NZHC 1709, [2014] NZAR 1091 at [50].

⁵¹ *United Kingdom Association of Fish Producer Organisations v Secretary of State for Environment, Food and Rural Affairs* [2013] EWHC 1959 (Admin) at [92].

⁵² *Paponette v Attorney-General of Trinidad & Tobago* [2010] UKPC 32, [2012] 1 AC 1 at [30].

⁵³ *R (Davies) v Revenue and Customs Commissioner* [2011] UKSC 47, [2011] 1 WLR 2625; *R (Patel) v General Medical Council* [2013] EWCA Civ 327, [2013] 1 WLR 2801 at [47]-[48].

⁵⁴ *Paponette v Attorney-General of Trinidad & Tobago*, above n 52, at [46].

⁵⁵ *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at [60]; *R (Patel) v General Medical Council*, above n 53, at [47]-[48].

⁵⁶ *R (NADARAJAH) v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[100] In my assessment, neither the Charities Commission nor the Charities Board gave Family First a clear and unambiguous undertaking that Family First would remain eligible for registration as a charitable entity, provided no material changes occurred from the time the Charities Commission determined Family First should remain on the register of charities. At the most, the Charities Commission may have represented that at the time it made its decision, and based on the information available to the Charities Commission, Family First remained eligible at that time for registration as a charity. That representation falls well short of the type of clear and unequivocal representation that would be required to found an action based upon substantive legitimate expectation, if such an action were available in New Zealand.

Conclusion

[101] The appeal is allowed.

[102] The Charities Board is to reconsider its decision to deregister Family First. In reconsidering its decision the Charities Board must give effect to the judgment of the Supreme Court in *Greenpeace*⁵⁷ and this judgment.

[103] The Charities Board appeared as contradictor in order to assist the Court and not as a party. In these circumstances, I make no order as to costs.⁵⁸

D B Collins J

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⁵⁷ *Re Greenpeace of New Zealand Inc*, above n 1.

⁵⁸ *Alliance Party v Electoral Commission* [2010] NZCA 4, [2010] NZAR 222 at [46].