

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

**CIV-2010-485-1818**

IN THE MATTER OF      An appeal under the Charities Act 2005

BETWEEN                      QUEENSTOWN LAKES COMMUNITY  
   HOUSING TRUST  
   Appellant

Hearing:            17 March 2011

Counsel:            D E McLay for Appellant  
                                 P J Gunn with R I Berkeley for Charities Commission

Judgment:        24 June 2011

I direct the Registrar to endorse this judgment with a delivery time of 4pm on the 24<sup>th</sup> day of June 2011.

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**RESERVED JUDGMENT OF MACKENZIE J**

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## **Introduction**

[1] This is an appeal under s 59 of the Charities Act 2005 (the Act) by Queenstown Lakes Community Housing Trust (the Trust) against a decision by the Charities Commission (the Commission) under s 32 of the Act removing the Trust from the Register of Charities on the grounds that it is not qualified for registration as a charitable entity.

[2] The Trust was registered in January 2008. It was accepted by the Commission as eligible for registration under s 13(1)(a) of the Act in that it was a trust of the kind in relation to which an amount of income is derived for charitable purposes. Following a review which took place through 2010, the Commission, by a decision given on 18 August 2010, removed the Trust from the register, with effect from 15 September 2010.

[3] This appeal was filed on 15 September 2010. By an interlocutory order made initially on 4 October 2010, the Trust was restored to the register pending the hearing of this appeal. That interim restoration has been extended to the date of delivery of this judgment.

## **The Trust**

[4] The Trust is governed by a Trust Deed dated 15 January 2007. The settlor was Mr G M Todd, a Queenstown solicitor. There is a Board of Trustees, between four and six in number, on which there must always be one trustee appointed by the Queenstown Lakes District Council (the Council). Other trustees are appointed for a three year term, by majority resolution of the continuing members of the Board. The Trust is a perpetual one, though it may be wound up by resolution of three fourths of the trustees, including the trustee appointed by the Council. On winding up any funds are to be applied exclusively for charitable purposes. The objects of the Trust are set out in cl 3 of the Trust Deed which provides:

- 3.1 The primary objects and purposes for which the Trust is established are:

- 3.1.1 Either alone or with or through any other entity or entities to promote and/or provide housing (whether freehold, leasehold, licence, option or some other form of ownership or rental) for households that contributed or will contribute to the social, cultural, economic and environmental well-being of those living within the District of the Queenstown Lakes Council (the “District”) at a cost within their means.

In this clause “Households” may include a single individual or a family, which may comprise a legally married or de-facto partnered couple, and their children (aged 18 or under) who are under legal guardianship of the individual or couple and other dependents who normally occupy the same primary residence. It is acknowledged that households may also include elderly parent(s) or adult children, and the inclusion or exclusion of these members income when calculating whether housing is at a “cost within their means” will be reviewed on a case-by-case basis.

- 3.1.2 The housing to be provided pursuant to Clause 3.1.1 shall be in accordance with the Queenstown Lakes Community Housing Policy as published from time to time.
- 3.1.3 To maintain and develop consultation with the Queenstown business community, Queenstown Lakes District Council and the greater community on the needs for housing to be provided pursuant to Clause 3.1.1 and as to how those needs may be met.
- 3.1.4 To establish, implement, manage, facilitate and sponsor systems for the purposes of seeking, raising, accepting, receiving, accumulating, investing and administering funds for the purpose of the Trust generally whether by the Trust directly or through companies, trusts or other entities owned, controlled or contracted by the Trust.
- 3.1.5 To carry on any other charitable objects which may seem to the Trustees capable of being appropriately carried on in connection with the above objects or calculated directly or indirectly to advance the objects of the Trust or any of them.
- 3.1.6 To apply for registration of the Trust under the Charities Act 2005. Pending registration the Trustees shall comply with the Trust Deed and all relevant law.

[5] I interpolate that the Trust has proposed some amendments to cl 3, in its endeavours to have the Commission review its position. As will become apparent, my reasoning does not turn on a close consideration of the wording of the objects clause. I therefore do not discuss those proposed changes, as they would not significantly affect my conclusion.

[6] The Trust was an initiative arising out of a community study undertaken by the Council into the impact of housing affordability on the community. The Council has confirmed, by a letter dated 22 April 2010 from the Mayor, Mr Geddes, to the Commission, that the activities of the Trust have the unqualified support and backing of the Council. The Council considered that housing affordability was a factor affecting the ability to attract and retain key workers vital to the functioning and operation of the community. The formation of the Trust was one of 32 recommendations arising from the study which were adopted by the Council in 2006.

[7] In the Trust's 2009 Annual Report the Chairman of the Trust described the purpose of the Trust in these terms:

The Trust is a *beyond profit* organisation with a simple purpose – to ensure that residents committed to the district and in regular employment have access to housing of no greater cost than elsewhere in the country. Our success in achieving this goal contributes to a more inclusive and balanced community, assists employers to attract and retain staff and supports the local economy by ensuring householders are not spending excess disposable income on their housing obligations.

[8] The Chairman's report further noted that the cost of housing in New Zealand is high when compared to international bench marks and that in the Queenstown Lakes district housing prices are well above the national median, so that the cost of housing absorbs higher levels of household income. The effect of this, as the Trust perceives it, is described in the following statement on the Trust's website:

While there is a steady stream of people willing to move to the district, after 12-18 months, an unusually high percentage of these recent migrants (often estimated at over 50%) decide to move away. The reasons for their move are often cited as high living costs, with the largest of those being the cost of housing.

The intent of the Trust is to provide housing for low to moderate income households who contribute to the social, economic and environmental well-being of the District, but are genuinely struggling to commit to the area because of the affordability issue.

...

Comfortable, affordable living space promotes the well-being of both the community and the individual. Affordable housing attracts skilled and energetic adults as well as young families with children to become part of the community. The Trust believes it is essential we maintain a strong and

stable workforce along with a vibrant and diverse community and thus is continually working towards finding solutions to the affordable housing issue.

[9] To date, the main mechanism by which the Trust has sought to achieve its purposes is through its shared ownership programme. Under that programme, a house is purchased on terms whereby the Trust and the successful applicant (to whom I refer for convenience as the owner) each own a defined percentage share. The level of the owner's percentage interest is determined by what the owner can afford. If, for example, the owner is assessed as being able to afford 70 per cent of the purchase price, then the owner must contribute, by way of a deposit and mortgage finance, an amount equal to 70 per cent of the purchase price. The Trust will fund the remaining 30 per cent, and the property will be owned as to 70 per cent by the owner and as to 30 per cent by the Trust. The owner must service the mortgage and meet all other costs of ownership such as rates, insurance, and maintenance. If the owner wishes to sell, then the Trust can purchase the owner's 70 per cent interest at valuation, or the property will be sold on the open market. Any capital appreciation or depreciation will be shared 70/30.

[10] To be eligible to participate in the shared ownership programme, applicants must meet the following basic criteria as well as a number of more detailed criteria:

- The property must be used exclusively as the household's primary residence, i.e. it is not to be used as a second home or holiday house.
- Applicant's combined household income must not exceed a certain level – this amount will be determined by the size of the household. Maximums will vary from \$86,000 for a single person household to \$122,000 for a 4-person household.
- Applicants must raise a minimum 5% deposit (of the entire property price) themselves.
- Within each household at least one member is and will remain a permanent New Zealand resident or citizen.
- Within each household at least one member must be employed in full time employment in the Queenstown Lakes district (minimum 30 hours per week average).

[11] As well as the shared ownership programme, the Trust has, through a subsidiary company, undertaken a development by building a number of

architecturally designed homes in the Lake Hayes Estate. Five homes have apparently been completed in stage one. Stage two, of which construction commenced early in 2011, will involve 22 homes. The homes are to be sold through the shared ownership programme to eligible residents.

[12] The Trust was, in October 2010, approved by Housing New Zealand for funding for a rent saver programme designed to complement the shared ownership programme. Under that programme, selected applicants would rent properties owned by the Trust on terms which would enable the tenant to accumulate savings to contribute towards a deposit, to enable purchase under the shared ownership programme.

[13] The Trust's funds are derived partly from grants from Housing New Zealand and partly from contributions of land, building or funds, from private local developers. The Council apparently has provisions applying to developers in its district under which contributions for the purpose of affordable community housing are paid by developers. Those contributions are directed by the Council to the Trust. The details of these arrangements are not before me. The amounts involved, as appearing from the Trust's financial statements, amounted to some \$2.2m in 2008 and \$3.5m in 2009. Those contributions constituted the major part of the Trust's equity of \$2.1m as at 31 March 2008 and \$5.7m as at 31 March 2009. The total assets of the Trust were \$2.2m in 2008 and \$6.8m in 2009. As at 31 March 2009, the Trust's share of land and buildings owned under the shared ownership programme amounted to \$2.8m, and the total value of the Lake Hayes development was \$3m. Those two items, together with cash and deposits of \$1m, make up the total assets of \$6.8m. The liabilities of \$1.1m in 2009 were mostly an interest free loan from Housing New Zealand which is to be forgiven over 10 years. That loan has a facility limit of \$2m.

[14] The figures quoted are from the 2009 financial statements, which were before the Commission at the time of its consideration of the deregistration. The comparable figures from the 2010 financial statements indicate that no developer contributions were received in that year. Income in the 2010 year comprised sales income of \$1.3m, a \$200,000 loan amortisation from Housing New Zealand, and

some other relatively minor sources of income. The total equity of the Trust remained substantially unchanged at \$5.73m. Total assets were \$7.6m, made up of land and buildings of \$4.5m, development property of \$2.5m and cash assets of \$600,000. The liabilities of \$1.9m were mainly the Housing New Zealand loan.

### **The Commission's decision**

[15] The Commission's investigation of the Trust's eligibility for registration was prompted by questions raised by an unsuccessful applicant for registration with apparently similar purposes. In the initial investigation, the Commission's analyst noted that the Trust had originally been accepted for registration on the basis that its purposes were found to be charitable under the relief of poverty head, as they aimed to provide affordable housing in a market which is otherwise too expensive for many people. The analyst examined the objects in cl 3 and expressed the view that those purposes were not charitable under the relief of poverty head, as they did not contain an intention to relieve any identifiable need. The analyst further could see no analogy to any of the stated purposes in the preamble to the Charitable Uses Act 1601 (the Statute of Elizabeth 1).

[16] The analyst's view that the Trust does not meet the requirements for registration triggered a formal notice dated 15 December 2009 of the Commission's intention to remove the Trust from the register. There was then a substantial exchange between the Commission and the Trust throughout the early part of 2010. Following that investigation, a detailed report was prepared for the Commission. That report recommended removal from the register. At a meeting of the Registration and Monitoring Committee on 27 July 2010, the Committee agreed to recommend to the Board that the Trust be removed from the register and that decision was adopted by the relevant sub-committee of the Board on 18 August 2010, with effect from 15 September 2010. The Trust was advised by letter dated 18 August 2010, to which was attached a full reasoned decision.

[17] In that decision, the Commission noted both the objects of the Trust as set out above, and proposed amendments which had been suggested by the Trust in the course of the investigation process. The Commission then considered whether the

Trust qualified as charitable under the head of charity relating to relief of poverty. It said:

27. In order to be charitable under this head, a purpose must be directed at people who are poor, in need, aged, or suffering genuine hardship and it must provide relief. "Poverty" is interpreted broadly in law and a person does not have to be destitute to qualify as "poor". People who are in need, aged, or who are suffering genuine financial hardship from a temporary or long-term change in their circumstances are likely to qualify for assistance. Generally, this will include anyone who does not have access to the normal things of life that most people take from granted. To provide "relief", the people who would benefit should have an identifiable need arising from their condition that requires alleviating and these people should have difficulty in alleviating that need from their own resources.

[18] The Commission referred to the Trust's objects and activities. It said that the only activity presently carried out by the Trust is the shared ownership programme. It examined the eligibility criteria and the details provided by the Trust of those who had qualified. It said:

36. The Trust has provided details of the beneficiaries of the SOP. The details show that of the 32 beneficiaries to date:
  - Three are individuals, living alone with no spouse or dependants, and another six are couples with no dependants;
  - Ten of the beneficiaries have household incomes of \$80,000 or more;
  - Eleven beneficiaries have made deposits of \$80,000 or more. Five of these greater than \$100,000 and the highest is \$205,000;
  - Two beneficiaries have both income and deposit over \$80,000;
  - Three beneficiaries have household incomes of \$40,000 or less. A further six beneficiaries are below the National Median Income of \$64,000;
  - The Trust has made four exceptions to the requirements for a 5% deposit. Two of these were households with incomes of \$90,000 or more, one for a household with \$76,000 and one with \$63,000.
37. The Commission considers that the beneficiary details show that the Trust is providing assistance to many people who may struggle with the costs associated with buying and owning a house with a large mortgage, but many of these people would be able to meet their housing needs through renting or purchasing a house in an alternative location.

38. The Commission considers that the SOP is an initiative that clearly helps people to buy a type of house in an area that they could not otherwise afford. While this may be a positive programme that will provide individuals with a valuable asset, it falls short of being charitable under the relief of poverty. This is because the Commission is not satisfied that the programme is aimed at people who are suffering genuine financial hardship or people who do not have access to the normal things of life that most people take for granted.
39. The Commission accepts the Trust's submission that poverty is not to be equated with destitution and can include those of moderate means (*D V Bryant Trust Board v Hamilton City Council*). However, the Commission considers that most of those people assisted appear to have at least moderate means and do not suffer a need that requires relief through the assistance of the Trust.

[19] The Commission then went on to consider whether the Trust might qualify under the head of "other matters beneficial to the community". It said:

47. In order for a purpose to qualify as "any other matters beneficial to the community", the purpose must be beneficial to the community and be within the spirit and intendment of the purpose set out in the Preamble to the Charitable Uses Act 1601 (The Statute of Elizabeth), which are as follows:
- Relief of aged, impotent, and poor people
  - Maintenance of sick and maimed soldiers and mariners
  - Schools of learning
  - Free schools and scholars in universities
  - Repair of bridges, ports, havens, causeways, churches, sea banks, and highways
  - Education and preferment of orphans
  - Relief, stock or maintenance of houses of correction
  - Marriage of poor maids
  - Supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed
  - Relief or redemption of prisoners or captives and
  - Aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

[20] It noted that not all purposes that benefit the community will be charitable and that the purposes must benefit the community in a way that the law regards as charitable. After discussing a number of relevant authorities the Commission concluded:

65. The Commission considers that the Queenstown Lakes area is not a new community or disadvantaged in comparison to the rest of the country. Any need arising from the higher cost of housing is not addressed by the activities of the Trust, as the activities are not aimed at those in need of assistance.
66. In conclusion, the Commission considers that the SOP does not appear to be within the spirit and intendment of the Preamble to the Statutes of Elizabeth. The Commission has therefore concluded that the activities of the Trust are not charitable under “other matters beneficial to the community”.

[21] The Commission then discussed the question of public benefit and said:

67. The public benefit criterion necessarily requires that any private benefits arising from the Trust’s activities must only be a means of achieving an ultimate public benefit and therefore be ancillary or incidental to it. It will not be a public benefit if the private benefits are an end in themselves. In addition, proof that public benefit will necessarily flow from each of the stated purposes is required, not merely a belief that it will or may occur.

[22] The Commission then discussed the Trust’s submissions. In doing so, it noted the Trust’s intimation that the SOP is not the only activity which the Trust will carry out and that it will in future develop other programmes to provide housing through different methods. The Commission noted that further evidence of the extent of such activities would be required to determine whether these would be considered charitable, but that the possible addition of other programmes in the future will not save the Trust. The Commission then noted the letter from the Mayor to which I have referred earlier, noting that the housing affordability issue in Queenstown was affecting the area’s ability to attract and retain key workers, and said that that letter did not provide any evidence that the activities of the Trust are charitable.

[23] The Commission addressed s 61B of the Charitable Trusts Act 1957 and expressed the view that because the Trust’s purposes are not substantially charitable that section could not operate to validate the Trust. The Commission then expressly

noted the requirement that it must not proceed with removal unless satisfied that it is in the public interest to do so. The Commission expressed the view that public trust and confidence in registered charitable entities would not be maintained if entities which did not meet the essential requirements for registration remained on the register and so considered that removal was in the public interest, as it would maintain public trust and confidence in the charitable sector.

### **Preliminary matters**

[24] In addition to the material which was before the Commission, the Trust sought leave to adduce additional evidence on this appeal, in the form of three affidavits, of Messrs Jackson and Brent, and Ms Scott. As this is an appeal governed by Part 20 of the High Court Rules, leave is required under High Court Rule 20.16. At the hearing, I granted leave and indicated that my reasons for doing so would be given in this judgment.

[25] An appeal under the Act differs in form from most appeals governed by Part 20. The Commission is not determining a dispute between parties. There is no formal hearing at which evidence is presented. These distinguishing features are in my view relevant to the rigour with which High Court Rule 20.16 is to be applied. It is clearly desirable that all material which the charity may consider relevant to its case should be put before the Commission and considered by it. Ronald Young J adverted to this in *Canterbury Development Corporation v Charities Commission*.<sup>1</sup> He noted that an approach of adducing further significant relevant factual material should not become habitual. I echo those sentiments. I would add that I consider that the special nature of an appeal under the Act justifies some relaxation of the usual tests of cogency, credibility and freshness. I consider that the appropriate focus is on whether the Court will be assisted by the evidence, and whether the Commission will have an adequate opportunity to respond to the new material in its submissions. I formed the view that in this case, both of those points favoured admission. I have been mindful of the requirement that the Court may grant leave only if there are special reasons for hearing the evidence. On my assessment, that

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<sup>1</sup> *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 at [104]-[107].

requirement is met in this case by the considerations I have mentioned. I accordingly granted leave.

[26] I mention for completeness that counsel for the Trust objected to some statistical material which counsel for the Commission sought to introduce in the joint bundle of authorities. I took the view that that material too should be available for consideration, but have found it of little assistance.

### **Charitable purposes – General principles**

[27] The essential question, in determining whether the Trust qualifies for registration under the Act, is whether, in terms of s 13(1)(a), “the Trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes”. The term “charitable purpose” is defined in s 5 of the Act which provides:

- (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.

[28] The terms of s 5 make it clear that the term “charitable” is used not in its ordinary dictionary meaning but in the particular technical meaning that the law has ascribed to that word. The usual starting point for a consideration of that technical

meaning is the preamble to the Charitable Uses Act 1601, often referred to as the Statute of Elizabeth 1. That preamble, with its list of charitable purposes, came to form the basis for decisions of the Courts as to what was or was not charitable, so that a technical meaning, wider than the ordinary usage of the word, has evolved. The scope of that technical meaning was discussed by the House of Lords in *Commissioners for Special Purposes of Income Tax v Pemsel* (*Pemsel's case*).<sup>2</sup> In his speech, Lord Macnaghten enumerated the four fold classification of charitable purposes which has since been applied in determining whether a particular purpose is or is not charitable, and which is reflected in s 5. He said:<sup>3</sup>

... How far then, it may be asked, does the popular meaning of the word "charity" correspond with its legal meaning? "Charity" in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads. The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

.....

That formulation is substantially derived from the classification contended for by counsel (Mr Romilly, later Sir Samuel Romilly) in *Morice v Durham (Bishop of)* almost a century earlier.<sup>4</sup>

[29] The fact that the modern law of charities has its origins in the preamble to the Statute of Elizabeth 1, and that its current formulation is that in *Pemsel's case*, does not mean that the law of charities is fixed in the seventeenth or nineteenth centuries. The list of purposes in the Statute of Elizabeth 1 is not a definitive list. The test which has been applied is whether a particular purpose can fairly be said to be within the spirit and intendment of the preamble.

[30] A further requirement for a charity to be recognised as such is that, as well as falling within one or more of these heads, the benefit provided must be of a public character. The purposes of the charity must confer a benefit upon the public or a section of the public.

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<sup>2</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

<sup>3</sup> At 583.

<sup>4</sup> *Morice v Durham (Bishop of)* (1805) 10 Ves 522 at 532; 32 ER 947 at 951.

[31] There are, in essence, two aspects of the present case (each of which has a separate focus) which call for consideration in deciding whether the Trust's purposes are charitable. The first is whether this is a trust for the relief of poverty. That requires consideration of the participants and persons eligible for participation in the shared ownership programme, and in any other programmes which the Trust may adopt. Their needs, and their ability to meet those needs, is the primary focus of the inquiry in respect of this first head of charity. The second is whether this is a trust for some other purpose beneficial to the community. That requires consideration of the objectives of the trust in the provision of housing assistance. The effects which this assistance has on the wider community is the primary focus of the inquiry in respect of this fourth head of charity. If the benefit to the community meets the requirements of this head of charity, the Trust may qualify as a charity even if, in achieving that benefit, individual benefits are obtained by persons who do not qualify as in need to an extent which brings the Trust under the relief of poverty head.

### **The relief of poverty**

#### *(a) The requirements of this head*

[32] The first head referred to in *Pemsel's* case is the closest of the four heads to the ordinary, non-technical meaning of charity. The relevant Oxford English Dictionary definitions of charity contain references to 'the poor'. Trusts for the relief of poverty are, generally speaking, an exception to the general rule that to be charitable a trust must be for the benefit of the community or a section of it. Trusts for the relief of poverty may be charitable even though they are limited in their application to a defined category of individuals, and are not trusts for the benefit of the public or a section of the public. The close association between this head of charity in the legal sense and the ordinary meaning of charity in general usage may go some way towards explaining the principle that, in cases falling within this head, the requirement of public benefit is not essential or is at least greatly modified.<sup>5</sup>

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<sup>5</sup> Hubert Picarda *The Law and Practice Relating to Charities* (2<sup>nd</sup> ed, Butterworths, London, 1995) at 34.

(b) *Submissions*

[33] Mr McLay submits for the Trust that the interpretation of poverty is fluid and not fixed, that poverty does not necessitate destitution, and that the term ‘poverty’ applies when there is ‘relative poverty’ and where there is a need. The essence of the Trust’s contention that this case falls within the relief of poverty head is set out in the following extract from the Trust’s response, dated 27 April 2010, to the Commission’s notice of intention to remove:

25. In her letter to the Trustees Penelope Carroll states that high housing costs are the single largest cause of poverty in New Zealand. She continues that an affordable home is considered to be at or below a multiple of 3.5 times the annual income. The graphs from Queenstown Lakes District Council data indicate that in the Queenstown Lakes district, the median house price was \$571,951 and the median household annual income was \$74,900 in 2009. Thus the median house price is over 7.5 times the median annual income. This trend of median multiples has not been below 3.5 since 1985. The unique situation in the Queenstown Lakes district places affordable housing beyond the reach of low income earners as well as many middle income earners.
26. The incidence of home ownership in the Queenstown Lakes district is well below the national level. The 2006 Census demonstrated that in the Queenstown Lakes district, only 38% of inhabitants owned or partly owned the dwelling they occupied. Across New Zealand as a whole, 54.5% of people owned or partly owned the dwelling they occupied.
27. The renters’ survey also found that 32 percent of renters were renting because they could not afford to purchase a property. Twelve percent of renters said they were unable to obtain finance, while 26 percent said they were unable to save a deposit.
28. Higher housing costs result in less household funds which can be allocated to defray food, heating and medical care costs. Many Queenstown rental properties are poorly insulated and without effective heating. Consequently, these properties are extremely cold during the harsh Queenstown winter. A strong correlation exists between a lack of affordable housing and poorer health and education outcomes. Thus, it could be considered that overall poverty is closely linked to the cost of housing. As such, a structural lack of affordability creates “poverty” in the context of the Queenstown Lakes district and therefore a need for housing assistance charities for low to middle income earners.
29. To date:
  - (a) Of all the families assisted by the Trust, three out of five families would have had to apply in excess of 50% of their

income in and towards housing costs had they not received Trust assistance to defray expenditure; and

- (b) Half of the families assisted earn less than the local area median income, with some having a household income as low as \$34,000 per annum.
30. A table is attached indicating the debt servicing ratio for all Trust beneficiaries without Trust assistance for a standard entry level home in the Queenstown Lakes district. Debt Servicing Ratio (“DSR”) is an internationally accepted measure of affordability and 30% is considered to be the upper limit of affordability. This measure has been adopted by Canada (Canada Mortgage and Housing Corporation), the Australian and Urban Research Institute, and the well credentialed research organisation DTZ in New Zealand.
31. The table indicates all but three of the assisted families would have had a debt servicing ratio of 41% or more without Trust assistance. All families would have had a DSR above the upper limit of affordability without Trust assistance. The average DSR over the 32 households would have been 53% without Trust assistance. Thus all of the assisted families would be unable to find an affordable home providing security of tenure in the Queenstown Lakes district without Trust assistance.
32. The Trustees submit that these statistics indicate that the Trust’s activities are primarily directed at the relief of poverty as it is understood relative to the Queenstown Lakes context.

[34] As to need, the Trust submits that housing is not a luxury, but a basic human necessity and central to the right to an adequate standard of living, expressly recognised in article 25 of the Universal Declaration of Human Rights. The Trust relies upon three features of the housing market in the district. First, that demand is high and prices are higher than the national median. Second, that rental properties are often holiday homes not available for renting year round and third, that the higher need for insulation due to climate conditions makes building costs more expensive.

[35] I have set out, at [18], the essence of the Commission’s reasoning to support its decision on that question. In their submissions in support of that decision, counsel for the Commission accepted that providing housing to the poor is

charitable<sup>6</sup> and that assisting the poor to buy housing through shared ownership or other direct financial aid can be charitable.<sup>7</sup> They further submit:

41. It is also well established that poverty need not imply destitution. In *Re Coutts v Coulthurst*, Evershed MR described poverty as meaning persons who have to “go short in the ordinary acceptance of that term”. In *Trustees of the Mary Clark Home*, Channell J found that poverty did not mean only the very poorest but was more or less relative and that he could not lay down a fixed rule. In *Re Centrepoint Community Growth Trust*, Cartwright J found that poverty need not be “grinding need or utter destitution”, but could equate to a “lack of affordable accommodation”.

42. However, the fact that poverty is not the same thing as utter destitution, does not mean that merely having financial needs or being at a financial disadvantage constitutes poverty. The most relevant case is *Re Gillespie* which concerned a trust to provide purchase money on a home or farm for those “in genuine need of financial assistance”. Little J found that this did not equate to poverty:

... it may be said with truth that all persons who are poor are in need of financial assistance but the converse is not true that all persons in need of financial assistance are poor or poor in the relevant sense. A person may for instance by reason of some emergency be in need of financial assistance but at the same time it could not be said of them that his state was one of ‘poverty’”. The language accordingly would embrace cases other than those of poverty ...

43. The Judge found that a scheme for providing financial assistance to purchase homes and farms can only be charitable if it is limited to beneficiaries that are in poverty. It was not enough that the testatrix had the poor in mind, she needed to have them exclusively in mind:

The language goes beyond relief of poverty in a charitable sense and accordingly the gift will fail as a charity ...

44. There is no single fixed criterion of what constitutes poverty for the purposes of charity. This is fitting, since charity law must be flexible to address new categories of need, as they emerge. But it is also clear that the very nature of charities law places some limits on what can reasonably be considered “poverty”.

45. The Commission submits that the definition of poverty cannot sensibly extend to people whose income is in excess of the median income, and who meet no other criterion of poverty. The Commission submits that there is nothing in the case law that suggests such an outcome.

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<sup>6</sup> *Common Equity Housing Ltd v The Commissioner of Inland Revenue* (1996) 33 ATR 77.

<sup>7</sup> *Garfield Poverty Trust (1990)* [1995] 3 Decision of the Charity Commissioners 7; *Habitat for Humanity Great Britain (1994)* [1995] 4 Decisions of the Charity Commissioners 13.

[36] Counsel for the Commission further submit that the median income for a test of poverty should be the median income for New Zealand, and that it is not sensible policy to allow wealthy areas to defend their own level of poverty as being higher than poor areas. The Commission submits that the three features of housing in the Queenstown Lakes district relied on by the Trust do not create a charitable need, as the Trust's submissions show there is affordable housing within commuting distance at Cromwell and Kingston.

(c) *Discussion*

[37] In this case, the way in which participants in the shared ownership programme are selected is such that those eligible constitute a section of the public. The public benefit limb of the test is met, to the extent that it may be applicable. The essential question on this head is whether those eligible to participate are selected on the basis of a need which falls within the scope of the term 'poverty'.

[38] There are considerations particular to the relief of poverty head which weigh against an expansive approach when considering what is poverty. As I have noted, the overarching requirement, that a trust, to be charitable, must be of a public character, has limited application to the relief of poverty head. The 'poor relations' and 'poor employees' cases, such as *Re Scarisbrick*,<sup>8</sup> and *Dingle v Turner*,<sup>9</sup> demonstrate that trusts for poor persons within a restricted category, not meeting the usual requirement that the benefits be available to a wider section of the community, may be held charitable. A public benefit is inherent where there is a contribution towards meeting a responsibility on the part of society as a whole to assist the poor. That social responsibility is implicitly recognised in the ordinary meaning of the word 'charity' to which I have referred. As Lord Herschell said in *Pemsel's* case:<sup>10</sup>

I think, then, that the popular conception of a charitable purpose covers the relief of any form of necessity, destitution or helplessness which excites the compassion or sympathy of men, and so appeals to their benevolence for relief.

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<sup>8</sup> *Re Scarisbrick* [1951] Ch 622.

<sup>9</sup> *Dingle v Turner* [1972] AC 601.

<sup>10</sup> *Pemsel's* case, above n 2, at 572.

[39] Assistance to the poor is, on that analysis, a public good in itself. An inherent public good of that nature will not be present if too liberal a view is taken of what may constitute poverty. Ordinary members of society would not recognise a general social responsibility to assist persons who may be as well or better off than themselves.

[40] There cannot be, and the case law does not support, any “bright line” definition of poverty. There is no single fixed criterion of what constitutes poverty for the purposes of charity, and the law must be flexible to address new categories of need as they emerge. The question is a fact specific one, in which the decision maker is to be guided by the general propositions which the case law establishes. In that fact specific inquiry, reference to the median income may be a useful aid, but it is not a test in itself.

[41] I consider that those who are eligible to participate in the shared ownership programme are not, even in the relative sense, poor. Many people who would fall within the Trust’s eligibility criteria might take offence at the suggestion that they are in poverty. Their inability (if it be such) to meet their housing needs relates to a particular form of housing, in a particular location. While housing is a basic need, and right, home ownership is not. Many people who are not objectively ‘poor’ may have difficulty providing a deposit on a house or servicing a mortgage. Renting would generally be recognised as an alternative which, if affordable to the person concerned, would mean that that person was not in need to the extent of poverty. Nor is housing in a particular location a basic need, if there are reasonably available alternatives.

[42] The particular feature which is raised in support of the relief of poverty head in this case is that the Queenstown district is expensive, and, if housing assistance is not provided, people who are within the Trust’s eligibility criteria may be unable, or unwilling, to settle in the district. I do not consider that this is sufficient to bring the case within the ‘relief of poverty’ head. Provided that those who are eligible have a realistic alternative to the purchase of a house in the Queenstown Lakes district, they will not fulfil the criterion of need. The Commission refers to the availability of cheaper accommodation in Cromwell and Kingston. From the perspective of the

needs of the eligible participants, such alternatives are an appropriate consideration. The Commission's submission that poverty is not to be assessed on a regional basis has considerable force in this case.

[43] The Trust's argument is that, from the perspective of the community, such alternatives disadvantage the local community, in that, as the Mayor said in his letter of 22 April 2010 to the Commission:

The Trust was an outcome of a community study into the impact that housing affordability was having on this community – district wide. It was affecting our ability to attract and retain key workers vital to the functioning and operation of the community.

[44] Mr McLay refers, in this context, to the mention in the preamble to the Statute of Elizabeth 1 of the supportation aid and help of young tradesmen and handicraftsmen, persons who might fall within the description of key workers. He points out that many successful applicants would fall within those categories.

[45] On the 'relief of poverty' head, I consider that these considerations carry little if any weight. The consequences for the community are not a relevant factor in assessing whether the assistance provided by the Trust is addressing the needs of individuals, in a way which amounts to the relief of poverty. These considerations fall to be considered under the fourth head of charity. I return to them later in that context.

[46] For these reasons, I consider that the Commission was right to conclude that the Trust's purposes are not charitable under the relief of poverty head.

### **Other purposes beneficial to the community**

#### *(a) The requirements of this head*

[47] The fourth head of charity is that described in s 5 of the Act as "any other matter beneficial to the community". That is the language used by Parliament to describe the fourth decision of charity described by Lord Macnaghten as "trusts for

other purposes beneficial to the community, not falling under any of the preceding heads.<sup>11</sup>

[48] Not every purpose beneficial to the community will be charitable under this head. Lord Simonds, in *Williams Trustees v Inland Revenue Commissioners*, noted two propositions which must be borne in mind.<sup>12</sup> The first is that the purpose must be within the spirit and intendment of the preamble to the Statute to Elizabeth 1. The second is that Lord Macnaghten's fourfold classification in *Pemsel's* case must be read subject to the qualification that it does not mean that every object of public general utility must necessarily be a charity. He concluded that the purpose must be both for the benefit of the community and beneficial in a way which the law regards as charitable. The somewhat circular requirement that to be charitable, a purpose must be beneficial in a way which the law regards as charitable, reflects and restates the requirement that the purpose must be within the spirit and intendment of the preamble.

(b) *Submissions*

[49] Mr McLay for the Trust submits that the community has an interest in the well-being of the underprivileged. He refers to the decision of this Court in *Re Tennant*,<sup>13</sup> and to the comment on that by this Court in *Canterbury Development Corporation v Charities Commission*.<sup>14</sup> He notes that the fourth head may require extrapolation from existing charitable purposes, and that excessive development is constrained by the public benefit requirement. He submits that the fourth head is not static and that the progressive adaptation of the law of charities to meet modern conditions should not be restricted. He submits that in this case there is a sufficiently broad class of persons who can benefit from the increase in housing in the region from the activities of the trust, and from participation in its programmes. He submits that there is a public benefit and that any benefit accruing to individuals is ancillary to the operations of the shared ownership programme. He also submits that the charitable intentions inherent in the Trust Deed are clear, and that the courts usually

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<sup>11</sup> *Pemsel's* case, above n 2, at 583.

<sup>12</sup> *Williams Trustees v Inland Revenue Commissioners* [1947] AC 447 at 455.

<sup>13</sup> *Re Tennant* [1996] 2 NZLR 633.

<sup>14</sup> *Canterbury Development Corporation*, above n 1.

strive to construe such deeds in a manner that is not adverse to finding charitable purposes.

[50] Counsel for the Commission submits that to fall within the fourth head a trust must have a purpose that is fundamentally recognisable as a charity, and it is not enough that a scheme is generally a good idea, or even that it is entered into for altruistic reasons. It must fall within the spirit and intendment of the Statute of Elizabeth 1. The benefit provided must also be to the public, rather than to individuals. Counsel for the Commission submit that there must be an identified need and a plan that seeks to address that need directly. Counsel submit that the Trust's programmes do not answer any need at the structural or societal level. Counsel also submit that the public benefit test is not met, in that participants in the Trust's programmes receive a private benefit.

(c) *Discussion*

[51] In examining the purposes of the Trust under this head, the focus is, as I have earlier noted, on the benefits which the provision of that assistance may bring to the wider community in the Queenstown Lakes district. The perceived benefits are summed up in the passages set out at [7] and [8]. The questions to be addressed are:

- (a) Do these perceived benefits fall within the scope of "any other matter beneficial to the community"? and
- (b) Are those benefits achieved in such a way as to be beneficial in a way that the law regards as charitable?

[52] A somewhat analogous New Zealand case is *Re Tennant*.<sup>15</sup> There, the settlor, a substantial land developer, had in 1924 settled some four acres of land on trust for the use and benefit of purchasers of surrounding lots and of the inhabitants of the surrounding district generally, for the purposes set out. These were that one quarter of the land was to be used as the site for each of: a church, a public hall, a school, and a creamery. For the creamery site, the trustees were to permit any persons or

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<sup>15</sup> *Re Tennant*, above n 13.

company wishing to erect a creamery to do so, and then transfer the land to the creamery owner after completion. The intended development never proceeded, and none of the four sites were used for that intended purpose. The trustees sought to sell the land and apply the proceeds for charitable purposes. The issue before the Court was whether the initial trust was for a charitable purpose. The first three sites clearly qualified. The essential issue was whether the site for the creamery was held for a charitable purpose. Hammond J held that it was. He noted English authority for the proposition that the promotion of an industry may be a charitable purpose. He then considered whether the purpose of the creamery was to benefit the public. He said:<sup>16</sup>

... 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. ...

[53] The principal rationale for that decision was that the intention for the creamery site was to benefit the locality. Gifts in general terms for the benefit of a specified locality have been held charitable. The cases are discussed in the leading English texts, *Tudor*<sup>17</sup> and *Picarda*.<sup>18</sup> The discussion in *Tudor*<sup>19</sup> of *Peggs v Lamb*<sup>20</sup> is helpful in the present context. That shows that the proposition that gifts for the benefit of a specified locality are charitable applies only to gifts expressed in general terms. Where a purpose of the gift for the benefit of a locality is expressed, the

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<sup>16</sup> At 640.

<sup>17</sup> Jean Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) at 2-090–2-092.

<sup>18</sup> “*Picarda*”, above n 5.

<sup>19</sup> “*Tudor*”, above n 17, at 2-092.

<sup>20</sup> *Peggs v Lamb* [1994] Ch 172.

qualification of the gift as charitable depends upon whether that purpose is charitable or not.<sup>21</sup> A gift for a specified purpose which benefits a locality will not be charitable unless that specified purpose is charitable.

[54] In this case, I consider that the Trust is for a specific purpose, so that the focus must be on whether that purpose is itself charitable. This case is not one which can be regarded as charitable as being for the general benefit of a particular locality.

[55] In his first rationale in *Re Tennant*,<sup>22</sup> it seems that Hammond J, in holding that the gift was for the benefit of the locality, had regard to the overall purpose of the gift as a whole. He did not limit his consideration to the creamery in isolation. His alternative approach involves a consideration of whether, viewed in isolation, the purpose of the gift of the creamery land was itself charitable as promoting the dairy industry in that locality. On that approach, the case has some similarity to *Inland Revenue Commissioners v Yorkshire Agriculture Society*.<sup>23</sup> There, the promotion of agriculture was held to be a charitable purpose. Lord Hanworth MR said:<sup>24</sup>

... It seems to me that the right interpretation to be given to the object of this old Society is that the Society has been formed for the purpose of the improvement of agriculture as a whole, and not for any confined purpose of benefiting only the particular members of the Society or those resident in the locality to which its name attached it, and for a purpose which may bring advancement and improvement to the benefit of the community at large. ...

Now, in my judgment, for the reasons I have given, the Society was originally established and has been continued during its long existence as a Society intended to benefit and promote the advancement of agriculture, and looking at the main purpose, it has been made out that agriculture can be, and in this case is, a charitable purpose. ...

[56] Hammond J's two approaches were analysed by Ronald Young J in *Canterbury Development Corporation v Charities Commission*. After setting out the passage I have cited at [52], he said:<sup>25</sup>

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

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<sup>21</sup> At 195.

<sup>22</sup> *Re Tennant*, above n 13.

<sup>23</sup> *Inland Revenue Commissioners v Yorkshire Agriculture Society* [1928] 1 KB 611 (CA).

<sup>24</sup> At 623 and 625.

<sup>25</sup> *Canterbury Development Corporation*, above n 1, at [87]-[88].

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

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 the 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.

[57] I find myself in respectful agreement with Ronald Young J in his analysis of this second rationale. I agree with the proposition that a gift which provides a private benefit conferred on a private business which ultimately it is hoped might benefit a community is not a charitable purpose. While the promotion of an industry within which a private business is engaged may potentially be a charitable purpose, the manner of promotion is also relevant to whether it is a charitable purpose.

[58] *Canterbury Development Corporation v Charities Commission* involved three entities, the Canterbury Development Corporation (CDC), its holding entity Canterbury Development Corporation Trust (CDCT) and Canterbury Economic Development Fund (CEDF). All three had been registered as charities under the Charitable Trusts Act 1957, but had been declined registration under the 2005 Act.

[59] CDC, which had an income of \$5.2m in 2009 from a grant from the Christchurch City Council, a contract for services with New Zealand Trade and Enterprise, and some government funding, had two divisions, one responsible for developing an economic development strategy for Christchurch and Canterbury, and the other for supporting businesses in need of support by providing a business advice service. CEDF, which was funded by Christchurch City Council, operated as a venture capital for very early stage businesses in Canterbury.

[60] Ronald Young J considered whether, in both cases, these purposes might qualify as charitable through promoting the economic development of Canterbury, under the fourth head of charity. He held that they did not. Of CDC, he said:<sup>26</sup>

The objects and work of the CDC are commendable. Its intention is to help fledgling businesses. By itself this does not establish the CDC as having the necessary focus on charitable intent. To return again to the purposes and operation of the CDC, cl 2.2(b) and (c) are the focus of the 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 the CDC. It is at its core. This illustrates how the spirit and intendment of charitable purpose is not central to the CDC's function and thereby cannot be charitable.

[61] He then analysed the question whether there was a public benefit shown by CDC, and concluded:<sup>27</sup>

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.

In the 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 well-being of the Canterbury region. This can be contrasted with the broad public benefit identified in *Triton*.

Any public benefit therefore from the CDC's purpose and operation is in my view too remote to establish the CDC as a charity. Public benefit is not the primary purpose of the 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 the CDC approaches its task. The relief of unemployment is certainly not a direct object or purpose of the CDC's function. The public benefit is hoped for but ancillary. In the same way the general economic lift for the Canterbury region from the CDC's work is the hoped for result of helping individual businesses. It is remote from the purpose and operation of the CDC. Public benefit is not at the core of the CDC's operation.

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<sup>26</sup> At [44].

<sup>27</sup> At [65]-[67].

[62] Of CEDF, he said:<sup>28</sup>

It is difficult to distinguish between the objects, purpose and operation of the CDC and the CEDF as they relate to the promotion of economic development. While the express operations differ, with the CDC providing advice and support to businesses, and the 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 well-being and create new jobs. I have already rejected this rationale as a basis for declaring the objects charitable with respect to the CDC.

[63] To be contrasted with that case are two Australian decisions, *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation*<sup>29</sup> and *Commissioner of Taxation v Triton Foundation*.<sup>30</sup>

[64] In *Tasmanian Electronic* the Australian Federal Government had established a regional telecommunications infrastructure fund to provide funding for regional, rural, and remote communities to identify their communications needs and to develop projects to meet these needs. The Tasmanian Government and the University of Tasmania sought funding for an electronic commerce centre, TECC, to assist Tasmanian industries to establish themselves in the international electronic marketplace, to research and develop information systems and business infrastructure to enable small and medium sized enterprises to enhance and transform business practices, and to accelerate the adoption of electronic commerce by Tasmanian industry.

[65] The Federal Court of Australia held that TECC was charitable. Heerey J said:<sup>31</sup>

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 that assistance. There would be no point in the exercise if this were not the case. It would be an odd result if an institution

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<sup>28</sup> At [84].

<sup>29</sup> *Tasmanian Electronic Commerce Centre Pty Ltd v Commissioner of Taxation* [2005] FCA 439; (2005) 147 FCR362.

<sup>30</sup> *Commissioner of Taxation v Triton Foundation* [2005] FCA 1319; (2005) 142 FCR 371.

<sup>31</sup> *Tasmanian Electronic*, above n 29, at 389.

established to benefit business could only qualify as a charity if the recipients of its benefits made losses or did no more than break even.

Presumably some farmers in Yorkshire were able to make, or increase, profits as a consequence of the work of the Yorkshire Agricultural Society, but there was no suggestion that this militated against classification of the Society as a charity. Indeed it was common ground that the promotion of agriculture generally would be charitable (see counsel's argument at 617 and per Lord Hanworth at 623); the issue in the case was whether the fact that members of the Society received benefits would lead to a different result. In the present case it was not put that the members of TECC, the Tasmanian Government and the University, receive any benefit.

It seems to me self-evident that benefits to Tasmania's economy resulting in long-term economic advantage to Tasmania will be a benefit to the Tasmanian public, and indeed to the wider national public. In a capitalist economy like Australia, a prosperous and productive private sector generates profits and creates employment which in turn raises incomes which individuals can either spend, creating demand, or save, creating capital for further investment. Either way, people can make a better life for themselves and their families. In a prosperous economy, more money can be raised by taxes to improve education, health and other essential public services. ...

[66] In *Triton*, a company formed as a result of a Commonwealth Government initiative to promote a culture of entrepreneurship for the ultimate benefit of Australian society provided services, free of charge, to investors. The Federal Court of Australia held that it was charitable. Kenny J said:<sup>32</sup>

Bearing in mind: 1. Triton's history, in particular, that it was created following upon an initiative sponsored by the Federal Government; 2. That Triton is in receipt of State Government funding; and 3. that Triton is involved in State School education and a national award program, its principal object and activities can fairly be regarded as beneficial to the public as a whole. In its proper context, the meaning of the words "the promotion of a culture of innovation and entrepreneurship" is plain enough. The words signify the promotion of an appreciation of the worth, especially for commerce, of novel ideas or things and of those people who undertake their commercial exploitation, in order that other people may be encouraged to develop and invest in novel ideas or things having commercial utility.

I accept, as indeed the Commissioner apparently conceded, that this object, which plainly involves the promotion of an aspect of commerce, is capable of being a charitable object; and indeed it is within the spirit and intendment of the preamble to the Statute of Elizabeth. The authorities discussed at [22] and [23], including *Oldham*; *Crystal Palace* and *Clerkenwell*, *Barclay* and *Tasmanian Electronic*, support this conclusion. I do not consider that *Tasmanian Electronic* should be put to one side as the Commissioner contended.

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<sup>32</sup> *Triton*, above n 30, at [31]-[33].

I reject the Commissioner's submission that, for present purposes, Triton's objects were too vague and imprecise and the benefit to the community too remote to qualify for "charitable" status. Triton's objects and activities are designed, broadly speaking, to promote commercial activity of a particular kind, which Governments at State and Commonwealth levels apparently regard as beneficial, in various ways, to the inhabitants of their States and Australia. They are, moreover, of a kind that the law recognises as charitable.

[67] In both of these cases the proposition that assistance to business and industry can provide a public benefit which the law recognises as charitable was accepted. That proposition is clearly correct. The leading authorities are *Inland Revenue Commissioners v Yorkshire Agriculture Society*<sup>33</sup> and *Crystal Palace Trustees v Minister of Town and Country Planning*.<sup>34</sup> However, it is not the case that every assistance to business and industry which does provide a public benefit will be charitable. The question is whether the particular form in which that assistance is provided falls within the fourth head of charity. The fact that the assistance is provided by means of assistance to individual businesses may preclude a finding of charity. Thus in *Yorkshire Agriculture Society*, a purpose of the promotion of agriculture generally as opposed to benefitting those engaged in agriculture, was held charitable. Accordingly, I do not consider that the first sentence in the citation from *Tasmanian Electronic* is to be taken as authority for the proposition that the fact that assistance to business and industry is provided in a way by which individual businesses benefit can never be a disqualifying factor. The way in which the assistance is provided is an essential aspect of the inquiry into whether the purpose is charitable or not. In both *Triton* and *Tasmanian Electronic*, the assistance to individual businesses was provided in the form of advice and assistance with specific aspects of the business. In *Canterbury Development Corporation*, the pursuit of the objects was focused on the development of individual businesses, done in the hope and belief that their economic success would be reflected in the economic wellbeing of the Canterbury region. That distinction between these authorities is crucial.<sup>35</sup>

[68] Those three cases are concerned with the promotion of business as a potentially charitable purpose under the fourth head. The present case is not. I have however felt it appropriate to discuss those cases because they demonstrate a wider

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<sup>33</sup> *Yorkshire Agriculture Society*, above n 23.

<sup>34</sup> *Crystal Palace Trustees v Minister of Town and Country Planning* [1951] Ch 132.

<sup>35</sup> *Canterbury Development Corporation*, above n 1, at [65]-[67]. *Supra* at [56] and [61].

proposition which is relevant to this case. Those cases show that, in a case involving assistance to business and industry which does confer a public benefit, the existence of that public benefit will not be sufficient to render the provision of assistance generally charitable *per se*. It will generally not be charitable if the assistance is provided to individual businesses in such a way that the benefit to the industry is derived through the individual businesses. That principle applies more widely. Any other form of public benefit which is capable of being charitable will not generally be charitable if the public benefit is achieved by means of assistance provided to individuals.

[69] The nature of the public benefit claimed under the fourth head in this case is the betterment of the community, which is said to arise from the retention in the district of useful members of society, in the way described in the passages cited at [7] and [8]. The promotion of urban and rural regeneration for public benefit, at least in areas of social and economic deprivation has been recognised as a charitable purpose. The Charity Commissioners in England have issued detailed guidance, to which I was referred. The provision of affordable housing has similarly been recognised by them as potentially charitable. Mr McLay also referred to the analogy, in terms of the category of persons whose presence will benefit the community, to the reference in the Preamble to the aid and help of young tradesmen and handicraftsmen.

[70] I consider that, in principle, and bearing in mind that the categories of beneficial purposes under the fourth head are not closed, purposes which are directed to the composition and social cohesion of a particular community are capable of falling within the fourth head, by analogy with gifts for the benefit of a locality, and with the promotion of urban and rural regeneration. I consider that, addressing the question posed in [51](a) from the perspective of the nature of the public benefit, the claimed benefits are capable of falling within the fourth head.

[71] The next question, in [51](b), is whether the means by which that claimed benefit is achieved is a charitable means. In the present case the intended benefit to the community is that workers and other persons whose presence in the community is important for the overall welfare of the community will be able to live in the

district. That public benefit is indirect. The means by which that public benefit is achieved involves conferring a private benefit (assistance in meeting housing costs) on private individuals (persons selected from applicants meeting the Trust's criteria).

[72] In addressing the question of the means by which the claimed public benefit is achieved, some comparison with analogous situations, accepted under the fourth head, is useful. The promotion of urban and rural regeneration for public benefit in areas of social and economic deprivation has, as I have noted, been recognised as a charitable purpose by the Charity Commissioners in England. The Charity Commissioners noted that regeneration organisations might do some or all of a number of things, including providing housing for those in need and help to improve housing in an area of deprivation where poor housing is a problem. The criteria which the Commissioners use to assess such an organisation include that it has effective criteria to determine whether or not an area is in need of regeneration, and that the public benefit from its activities outweighs any private benefit.

[73] In the case of affordable home ownership the Charity Commissioners in England have issued guidance which recognises that it is a requirement of charitable status that applicants be in need. My attention was drawn to the figures given in the Commissioners' guidance for regional house prices and household incomes. Mr McLay submits that there are wide regional variations, and that the levels of incomes are not indicative of poverty in the strict sense. I have earlier rejected the submission that the Trust's activities are charitable under the first head of charity, as involving the relief of poverty. That rejection does not of itself mean that housing affordability in the Queenstown Lakes district is not a relevant consideration in determining whether the provision of housing assistance, with the motive of community betterment to which I have referred, may be charitable. However, in considering the means by which the desired objective, namely retention of useful members of society within the district, is achieved, the individual benefits which are provided in achieving that objective weigh against the conclusion that the Trust's purposes are charitable under the fourth head.

[74] Similar considerations apply to the reliance on the supportation aid and help of young tradesmen and handicraftsmen as a basis for charitable status. That

category in the preamble is subject to the general requirement that there be a public benefit. The provision of assistance to individuals falling within that description will not be charitable without such a public benefit.

[75] I accept that the Council, in supporting the formation of the Trust, and in facilitating its funding, was motivated by a desire to address the impact of housing affordability on the community in its district, through its effect on the ability of the community to attract and retain key workers vital to the functioning and operation of the community. But motive is not, in this context, the same as purpose. The Trust's principal purpose is to provide housing to selected householders. That purpose involves the provision of a private benefit to the householders who are assisted. The fact that those householders are selected because they do or will contribute to the social, cultural, economic and environmental wellbeing of those living within the Council's district does not in my view confer on the community a sufficiently tangible and clearly defined benefit so as to bring within the fourth head of charity the means by which the claimed public benefit is sought to be achieved.

[76] In my view, the individual benefits provided are such as to preclude a finding that the Trust is charitable under the fourth head. I consider that the Commission was right to conclude that the Trust's purposes are not charitable under the fourth head.

### **Consequences of a decision as to charitable status**

[77] I conclude by venturing some remarks on the two main consequences of the decision whether an entity is entitled to registration as a charity. These were adverted to by Lord Cross of Chelsea in *Dingle v Turner*.<sup>36</sup> The first is that, as a general rule and with limited quite particular exceptions, a 'purpose' trust will not be valid unless the purpose is charitable, so as to enjoy the immunity from the rules against perpetuity and uncertainty which would otherwise apply to render such trusts invalid. Lord Cross observed that if this was all, there would be no reason for the Courts not to look favourably on the claim of any 'purpose' trust to be considered as a charity. But he noted that that was not all. Charities enjoy taxation advantages.

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<sup>36</sup> *Dingle v Turner*, above n 9, at 624-625.

He noted that it was unfortunate that the recognition of any trust as charitable should automatically attract fiscal privileges, since the question whether there is a public benefit sufficient to constitute a charity and the question whether there is a public benefit sufficient to justify taxation privileges are really two quite different purposes.

[78] I have been mindful of these two consequences of the decision as to charitable status, but I have not taken them into account in reaching my decision. The legal form under which the Trust operates should not influence the decision as to whether its purposes are charitable even though that will probably have to be altered in the light of the conclusion that the Trust is not a charitable trust. As to taxation consequences, it is to be noted that three of their Lordships expressly disassociated themselves from that part of Lord Cross' speech. They doubted the relevance of taxation consequences in deciding whether a trust is charitable. For my part, I observe that Parliament has, in s 5 of the Act, seen fit to adopt the common law definition of charitable purpose. To the extent that Parliament has elsewhere legislated so that taxation consequences are determined by reference to charitable status, those consequences must follow the application of the common law principles which govern charitable status. The taxation consequences should not play a part in the application of those common law principles.

## **Result**

[79] For the foregoing reasons, the appeal is dismissed.

[80] Counsel for the Trust requested that, in that event, the interim order restoring the Trust to the register should be continued for 21 days after delivery of judgment, to enable an appeal to be considered. I consider that is appropriate. There will be a stay in the operation of this judgment, and an extension of the interlocutory order originally made 4 Oct 2010, until 15 July 2011. If an application for leave to appeal is lodged within that time, this extension will continue until the determination of that application.

[81] Costs are reserved. The parties may submit memoranda if they are unable to agree.

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**“A D MacKenzie J”**