

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

CIV-2009-485-2301

IN THE MATTER OF an appeal under section 59 of the Charities
Act 2005

IN RE EDUCATION NEW ZEALAND
TRUST
Appellant

Hearing: 3 June 2010

Counsel: R G Simpson & J G Bassett for appellant
T Warburton & D M Consedine for Charities Commission

Judgment: 29 June 2010

RESERVED JUDGMENT OF DOBSON J

Contents

Circumstances of the appeal, and of the Trust	[1]
The law.....	[12]
The Commission decision.....	[28]
Grounds of challenge	[32]
Discussion	[35]
Section 61B Charitable Trusts Act 1957.....	[49]
Adverse consequences for the Trust	[57]
Separate procedural objection.....	[60]
Costs.....	[64]

Circumstances of the appeal, and of the Trust

[1] This is an appeal on behalf of Education New Zealand Trust (the Trust) from a decision of the Charities Commission (the Commission) declining the Trust's application for registration as a charity. The appeal is brought under s 59(1) of the Charities Act 2005 (the Act) and proceeds by way of a hearing de novo. It is a form

of appeal in which the Court is obliged to form its own view of the merits¹ and, in determining the appeal, the High Court may confirm, modify or reverse the decision of the Commission and may exercise any of the powers that could have been exercised by the Commission.²

[2] Changes introduced by the Education Act 1989 enable public educational institutions in New Zealand to charge fees to students who are not New Zealand residents. Since then, state schools and tertiary institutions, as well as a range of private education providers, have developed programmes designed to cater for foreign students to study in New Zealand on a full fee-paying basis. Over time, the government encouraged co-ordinated promotional activities to attract international students to New Zealand and, as part of that, a company was incorporated as a subsidiary of the New Zealand Trade Development Board called New Zealand Education International Limited, to lead efforts to promote New Zealand as a study destination for foreign students. In 1998, it was perceived that another form of organisation might better undertake the promotional activities, and the Trust was formed as a charitable trust to continue the work that had been started by New Zealand Education International Limited.

[3] The background to the Trust's work and its aims and objectives were described in some detail in an affidavit completed on its behalf by Mr David Caygill, the present chairman of the board of trustees of the Trust. The Trust is not a conventional one in the sense that it was not created by a deed under which a settlor transferred property to trustees, to administer for the benefit of defined categories of beneficiaries. Instead, the governance of the Trust is regulated by a set of rules that have been approved at a special general meeting of the "members" of the Trust.³ The content of the rules reflects what one would reasonably expect of an industry-wide promotional organisation, designed to promote that industry in a generic way.

[4] There are currently seven members of the Trust, as follows:

¹ *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 (SC).

² Section 61 of the Act.

³ Current rules dated 22 September 2005.

- Independent Schools of New Zealand
- Independent Tertiary Institutions
- Institutes of Technology and Polytechnics in New Zealand
- The New Zealand Association of Private Education Providers
- The Association of Colleges of Education of New Zealand
- The New Zealand Vice-Chancellors' Committee
- The Secondary Principals' Association of New Zealand.

[5] Membership may also be open to other organisations that represent a significant number of providers of education and/or training in New Zealand and that pay the Export Education Levy imposed in terms of s 238H of the Education Act 1989 (or any substitute for the levy presently imposed in that form).

[6] Members may be liable to pay subscriptions under the rules, but that has thus far not been necessary as the Trust receives substantial grants from the government by way of a portion of all Export Education Levies that are imposed on the providers of educational services to overseas students. The extent of the levies is related to the level of fees paid by overseas students.

[7] The rules provide for a board of trustees to govern the Trust, consisting of up to 11 trustees plus, if one is appointed by the remaining trustees, an independent chairperson. In the event of more nominations than vacancies on the board of trustees, an election is conducted by way of a postal ballot of the members of an electoral college.

[8] The rules also provide for an electoral college of 100 members, with members of the Trust being entitled to appoint members of the electoral college in proportion to that member's share of the total of Export Education Levies payable to the government by that member.

[9] The purposes of the Trust (described under a heading “Charitable Purposes” in its rules) are as follows:

- (a) To promote, encourage and develop international education and training in New Zealand for the benefit of people in New Zealand and elsewhere including increasing the profile and usage of New Zealand educational institutions both in New Zealand and elsewhere;
- (b) To recommend to government ministers and agencies policies which will enhance New Zealand’s position in international education and training;
- (c) To create and maintain a business plan as the basis for co-operation between education providers and other relevant providers on national promotion;
- (d) To negotiate, with government agencies and others, arrangements to promote the quality of New Zealand education as an education destination for international students and the delivery of New Zealand educational products and services overseas;
- (e) To develop, encourage and advise on strategies, including research, which promote the internationalisation of curriculum and operation providers within the New Zealand education sector;
- (f) Generally to promote New Zealand education in the international environment.

[10] At the time of the application to the Commission, the Trust advised that some 20 per cent of the total levies paid by its members on fees charged to overseas students was generated by private (“for-profit”) education providers, with the balance coming from state-owned educational institutions. On the appeal, that statistic has been amended in that fractionally more than 30 per cent of the levies are in fact generated by for-profit education providers.

[11] On behalf of the Trust, Mr Simpson emphasised that all of the Trust’s promotional work is done on an entirely generic basis, and does not discriminate between any particular providers of educational services. Rather, its promotions emphasise the attributes of New Zealand as a positive environment in which to undertake study, and leaves it to prospective students individually to pursue enquiries with their own choice of education providers. The Trust has developed a “New Zealand educated” brand and an example of the material used by the Trust to explain its promotional tactics includes:

Preserving and building our share of this lucrative but increasingly competitive world market, required a set of distinctive, targeted conviction (sic) tools...

The stand out qualities of our educational offering had to be mirrored and succinctly captured in high impact presentation material.

The law

[12] The origins of the modern law on charities can be traced to what is often referred to as the Statute of Elizabeth of 1601.⁴ The modern classification of charitable purposes relies on the decision in *Commissioner for Special Purposes of Income Tax v Pemsel* which distilled four heads of charitable purpose out of the Statute of Elizabeth and previous common law.⁵ Those categories are the relief of poverty, educational purposes, the advancement of religion and other purposes beneficial to the community.

[13] The law applying to charities in New Zealand was reorganised in the Act. The Act does not alter the scope of charitable purposes. Section 5 in its relevant parts provides:

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.

(2) However,—

(a) the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood; and

...

(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

⁴ Otherwise known as The Statute of Charitable Uses 43 Eliz 1 c 4.

⁵ *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

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.

[14] Part 2 of the Act provides for a register of charitable entities. It starts with s 13 which is relevantly in the following terms:

13 Essential requirements

- (1) An entity qualifies for registration as a charitable entity if,—
 - (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and
 - (b) in the case of a society or an institution, the society or institution—
 - (i) is established and maintained exclusively for charitable purposes; and
 - (ii) is not carried on for the private pecuniary profit of any individual; and
 - (c) the entity has a name that complies with section 15; and
 - (d) all of the officers of the entity are qualified to be officers of a charitable entity under section 16.

[15] Section 17 of the Act provides for applications for registration as charitable entities and under s 18 the Commission is obliged to consider whether an entity qualifies for registration as a charitable entity as soon as practicable after receiving a properly completed application. Section 18(3) provides as follows:

18 Commission to consider application

...

- (3) In considering an application, the Commission must—
 - (a) have regard to—

- (i) the activities of the entity at the time at which the application was made; and
 - (ii) the proposed activities of the entity; and
 - (iii) any other information that it considers is relevant; and
- (b) observe the rules of natural justice; and
- (c) give the applicant—
- (i) notice of any matter that might result in its application being declined; and
 - (ii) a reasonable opportunity to make submissions to the Commission on the matter.

[16] Decided cases acknowledge a broad approach to what constitutes an educational purpose. The argument for the Trust on the appeal invited analogy with decisions in the United Kingdom and New Zealand on the charitable status of organisations involved in law reporting. In both jurisdictions, bodies undertake the responsibility of publishing law reports, and are organised in not for profit forms. In *Incorporated Council of Law Reporting for England and Wales v Attorney-General*, the Court of Appeal upheld the entitlement of a law reporting body to register as a charity.⁶ The Incorporated Council of Law Reporting for England and Wales was a company limited by guarantee and its primary object was:⁷

...the preparation and publication...at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England.

[17] The publication of law reports was characterised as an end in itself being a charitable contribution to enhancing education. It was immaterial that such publications provided lawyers with their tools of trade, thereby enhancing the ability of the legal profession to earn incomes. Sachs LJ observed:⁸

One must not confuse the results flowing from the achievement of a purpose with the purpose itself, any more than one should have regard to the motives of those who set that purpose in motion.

⁶ *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73.

⁷ At 84.

⁸ At 93F.

[18] Buckley LJ treated the primary object of the Council as recording reliably the development of Judge-made law and disseminating the knowledge of that law, which was treated as charitable notwithstanding the incidental or consequential assistance provided for lawyers in earning their living.⁹

[19] Proceedings on the same issue in New Zealand produced the same result. In *Commissioner of Inland Revenue v New Zealand Council of Law Reporting*, the Court of Appeal confirmed that the New Zealand Council of Law Reporting has an exclusively charitable purpose in publishing and selling law reports.¹⁰ Although essentially non-profit making, the terms of the 1938 statute establishing the Council of Law Reporting provided, in s 14, for the prospect of grants to the New Zealand Law Society or any district law society. The prospect of such payments was held not to disqualify the Council from enjoying charitable status because that was merely incidental.

[20] The Trust invited an analogy with these decisions on the basis that promoting education was one aspect of educational purposes and the resulting generation of fees for for-profit providers was merely incidental.

[21] The Trust also relied on the decision in *Educational Fees Protection Society Inc v Commissioner of Inland Revenue*.¹¹ That case considered the charitable status of an incorporated society, the first object of which was to maintain a fund enabling continuation of the payment of fees for children at private schools in the event of the death of a parent. There, it was accepted that the incorporated society was for the advancement of education. Gallen J found that concerns for the position of individual children were of great significance and that it was for the advancement of education to ensure that any children covered by the scheme who lost a parent would not have their education disrupted. The purpose was charitable on this ground, notwithstanding that the scheme had the features of a business arrangement, likened to a life insurance scheme.

⁹ At 103E, G, 104A.

¹⁰ *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682.

¹¹ *Educational Fees Protection Society Inc v Commissioner of Inland Revenue* [1992] 2 NZLR 115.

[22] Accordingly, the authorities suggest that any meaningful connection with the provision of education is likely to qualify a purpose as being for the advancement of education. One observation cited in the submissions on behalf of the Commission on the appeal that suggests boundaries to this purpose was that of Iacobucci J in *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* where it was observed:¹²

[T]he threshold criterion for an educational activity must be some legitimate, targeted attempt at educating others whether through formal or informal instruction, training, plans of self study, or otherwise.

[23] The next requirement is that the carrying out of the purposes of a charitable entity provides benefits that accrue to the public.

[24] It is well-settled that on the first three specific heads of charitable purpose, public benefit is assumed to arise unless the contrary is shown.¹³

[25] The analysis of whether benefits of a trust will accrue to the public is treated as involving a two-fold test. First, are the purposes of the trust such as to confer a benefit on the public or a section of the public? Secondly, do the class of persons eligible to benefit constitute the public or a sufficient section of it?¹⁴

[26] It may be that the further an entity's purpose is away from the core of educational purposes, that it becomes relatively easier to rebut the presumption that requisite public benefit arises. I adopt the observation of Gallen J from *Educational Fees*:¹⁵

The nature of the charitable purpose may itself be a factor in determining whether or not the requirement of public benefit has been met.

¹² *Vancouver Society of Immigrant and Visible Minority Women v Minister of National Revenue* (1999) 169 DLR (4th) 34 at 114, [171].

¹³ J Warburton *Tudor on Charities* (9th ed, Sweet & Maxwell, London, 2003) Ch 1-008 at 8, citing *National Anti-Vivisection Society v IRC* [1948] AC 31 at 65.

¹⁴ *Travis Trust v Charities Commission* (2009) 24 NZTC 23,273 at [54] and [55], citing Richardson J in *New Zealand Society of Accountants v Commissioner of Inland Revenue* [1986] 1 NZLR 147.

¹⁵ At 125.

In evaluating the presence of a requisite public benefit, Gallen J posed the question whether the Society was “substantially altruistic in character”.¹⁶

[27] In *Educational Fees*, the Court was more concerned as to whether the requisite public benefit was established, than whether the purpose was charitable. In the end, it was persuaded that it was.

The Commission decision

[28] The Commission was satisfied that the purpose of the Trust came within the second defined head of charitable purpose, for the advancement of education.¹⁷

In order to advance education, a purpose must provide some form of education and ensure that lea[r]ning is advanced. The Commission considers that promoting, encouraging, and developing international education and training in New Zealand is likely to result in education being provided and learning being advanced, therefore this purpose would amount to advancing education.

[29] The Commission also took the view that promoting international education and training in New Zealand would provide some benefits to the community and would therefore be charitable as “another matter beneficial to the community”.

[30] However, the Commission was not satisfied that there was the requisite public benefit.¹⁸

The primary benefits of promoting, encouraging and developing international education and training are likely to accrue to the educational institutions in New Zealand, which receive the resulting foreign students and the fees that such students pay. (There may be no particular benefits to the foreign students that arise from studying in New Zealand as opposed to studying in any other country.)

[31] The Commission focused upon the extent to which the promotional work of the Trust will generate income for private (for-profit) education providers and rejected the suggestion that benefits accruing to the private sector could be regarded as a merely incidental purpose. It took the view that it was not necessary to support

¹⁶ At 125.

¹⁷ Commission decision, paragraph 18.

¹⁸ Commission decision, paragraph 25.

the private education providers in order to carry out the charitable purpose of assisting not-for-profit educational institutions so that the non-charitable purpose of promoting the for-profit education providers is not ancillary to the charitable purpose of promoting the not-for-profit providers.

Grounds of challenge

[32] This approach is criticised on appeal on a number of grounds. The Trust contends that the Commission failed to acknowledge the presumption that public benefit is present where the purpose of the Trust is one of the three defined forms of charitable purpose, relevantly here for the advancement of education. This alleged failure to have regard to the presumption is argued to have resulted in the Commission requiring the Trust to make out the requisite measure of public benefit, when the Trust argues that the law entitles the Trust to assume it exists, unless the contrary proposition is relevantly raised.

[33] The Trust also argued that the Commission adopted too narrow an analysis of the nature of benefits arising from its activities in promoting educational courses in New Zealand to foreign students. Mr Simpson urged the view that the overseas students attracted to New Zealand as a result of the Trust's promotional activities are beneficiaries of those activities. He was particularly critical of the observation by the Commission that no particular benefits may accrue to foreign students as a result of studying in New Zealand rather than studying elsewhere. That was said to overlook the substantial benefit accruing to students who enjoyed the benefits of good quality education in a secure, stable but lively and adventurous environment.

[34] Mr Simpson also argued that the mode of generic promotion of New Zealand educational services meant that it was the sector as a whole that was promoted to overseas students, and that the benefits accruing to institutions in the for-profit part of the sector were certainly no more than incidental to the benefits to the majority of the sector, being the state-owned, not-for-profit institutions. As to the impression the Commission gained of the scope of the Trust's work, Mr Simpson was critical that the Commission had relied on "unsubstantiated dogma" to reach the view that the Trust did not target students from overseas countries where they would be exempt

from the obligation to pay full fees, such as Australian and Pacific Island students. He urged that the reality is that the Trust is similarly active in education fairs in such countries.

Discussion

[35] The aspect of the argument on appeal for the Trust that was most challenging was Mr Simpson's insistence that overseas students attracted to New Zealand by the Trust's promotions are beneficiaries of the work it does. That proposition was fundamental to his arguments that the Trust's purpose is at the very essence of what is for the advancement of education. Further, that the spin-off or knock-on benefits for the institutions with which the students enrol are merely incidental, so that the for-profit status of a minority of those institutions does not detract from the charitable character of the core purpose, being the promotion for the benefit of the students, of their coming to New Zealand to study.

[36] Despite numerous exchanges with Mr Simpson on this point in the course of his submissions, I am not persuaded that the status attributed to students as "beneficiaries" is an accurate characterisation of the purpose of the Trust. The students are not identified as beneficiaries of the Trust in the formal sense, and nor are they beneficiaries in the substantive sense. The Trust does not subsidise their education and nor does it exist to advance their interests. None of the trustees governing the Trust are appointed to advance beneficiaries' interests and none of the trustees are beholden to overseas students in New Zealand. Rather, all of the trustees represent and account to the institutions appointing them. Success in the promotional activities of the Trust is measured by the number of students secured to attend New Zealand institutions, and is not marked in any way by the relative success of the students' subsequent educational experience in New Zealand.

[37] The analogy of the Trust with an industry-wide promotional group would treat all of the institutions represented by the various members of the Trust as "the businesses", and the potential overseas students as the "customers" of those member "businesses". That analogy is not intended in any way to demean the social worth of education, but rather to illustrate that the relationship between attainment of the

Trust's purposes, and the students who sign on for courses at any of the institutions in New Zealand, is essentially an arm's length one, with the quality of the outcome for the student dependent on the quality of performance of the various education providers, rather than the generic promotion of educational courses in New Zealand. The Trust's involvement is likely to end before the student has made a choice as to which option within New Zealand he or she would take up. In the broadest sense, an analysis for the initial inquiry as to the purpose of the Trust appropriately treats this purpose as for the "advancement of education".

[38] The next consideration is the existence and extent of public benefit arising. In applying the two points from *Educational Fees* in [26] above as guiding principles in this assessment, an appropriate starting point is the terms of the Trust's formal purposes. Mr Simpson suggested that the primary purpose in clause 2.1(a) of the Trust's rules could be divided in half. The primary purpose was, he suggested, "...to promote, encourage and develop international education and training in New Zealand for the benefit of people in New Zealand and elsewhere...". The reference to benefiting people outside New Zealand contemplates conferring benefits on potential students and implicitly assumes that if education and training in New Zealand is promoted to such persons successfully, then that will ultimately be for their benefit. As I have noted, the Trust is not materially involved in monitoring the standards of education or training provided by the institutions it promotes, and that is left to others.

[39] Mr Simpson suggests that the balance of the primary purpose, namely "...including increasing the profile and usage of New Zealand educational institutions both in New Zealand and elsewhere" is more in the nature of a power than a purpose, but I am not persuaded that the definition of the primary purpose can be broken down in that way. In the context of what follows, this second part of clause 2.1(a) gives a focus to the more general promotional and development purpose, by including within such work the raising of profile and usage of the education providers. In terms of the first of the two pointers from Gallen J's reasoning noted in [26] above, this purpose has nothing to do with the content, or relative availability, of educational and training courses in New Zealand. In that sense, it is only at the periphery of advancement of education because it relates to

encouraging overseas students to take courses in New Zealand rather than somewhere else, but these purposes do not extend to attempting to influence the availability or the quality of such courses that are taken up.

[40] As to whether it is a purpose that is substantially altruistic in character, the answer depends on whether the providers of the services being promoted are undertaking them with a view to making a profit in a commercial context, or are not-for-profit institutions providing such courses as an aspect of discharge of the state's responsibility for educational services.

There is one caveat to the generally accepted distinction that provision of educational courses for profit is not altruistic, whereas provision of such services in a not-for-profit context is altruistic. Neither side's argument on appeal overtly acknowledged the financial advantages potentially available to not-for-profit institutions by providing courses to "full fee paying" overseas students. The submissions on behalf of the Commission acknowledged that the income generated by the enrolment of fee paying international students would be applied for the benefit of those institutions.¹⁹ I gained the impression that the Trust is ambivalent as to whether some at least of the "not-for-profit" providers of such courses in fact recover more than the actual costs of provision of the services to overseas students, in the "full fees" they charge. It certainly seems likely that secondary and tertiary institutions target full fee paying overseas students as a source of income that defrays part of the costs that would otherwise need to be recovered from notionally non-fee paying, or state-subsidised New Zealand resident students. To the extent that there is any cross subsidy of this sort in the "not-for-profit" sector, then a closer accounting analysis that treated the part of the services provided by those institutions for overseas students as a separate "profit centre" within their operations could lead to a redefinition of the extent to which promotion of such courses by the Trust is appropriately seen as altruistic in character. I do not consider that level of analysis is necessary, and for present purposes accept that the promotional success achieved by the Trust in respect of institutions receiving some 70 per cent of fees from overseas

¹⁹ Commission submissions, paragraph 60.

students are in the “not-for-profit” sector, rendering the promotion of such courses substantially altruistic. It follows that the requisite public benefit does exist, if that was the extent of the Trust’s activities.

[41] I am equally satisfied that generic promotion of courses run by for-profit education providers cannot be characterised as substantially altruistic. Even at a generic level, the promotion of such courses is an aspect of commercial businesses. Without casting any aspersions on the quality of the subsequent educational experience that those attracted to New Zealand are likely to enjoy, there is little to distinguish the motivation for and consequences of such promotion from, say, generic promotion overseas of New Zealand tourism operators. That certainly does not have an altruistic character and it is unrealistic to suggest that it could become altruistic because some, or even all, of the courses subsequently undertaken by the students to whom they were generically promoted might achieve successful educational outcomes.

[42] What then is the consequence of this mix of definable altruistic and non-altruistic characters in the purposes and outcomes of the work undertaken by the Trust? The test now specified in s 5(3) and (4) of the Act and previously articulated in numerous cases,²⁰ involves an assessment of whether the non-charitable purpose is more than ancillary in the sense that it is more than secondary, subordinate or incidental to, and not an independent purpose of, the Trust.

[43] I accept that in one sense, the Trust can claim that it is indifferent to the various forms of business organisation providing the educational services promoted by it. However, in other senses the Trust must be mindful that it in effect acts for a discrete constituency that operates for-profit institutions, being dependent on the successful recruitment of students to remain in business, and hopefully to make a profit. It is unrealistic to suggest that the trustees and those employed by the Trust are unmindful of the approximate proportions between revenues indirectly generated for the Trust, by the two distinct sectors. The reality is that a significant

²⁰ For example, *CIR v New Zealand Council of Law Reporting* [1981] 1 NZLR 682.

constituency is the for-profit providers. Whilst it may not be independent in the sense of being serviced separately or involving promotion of a different type, a 30 per cent constituency cannot realistically be characterised as ancillary, secondary, subordinate or incidental. In the end, that constituency is independent in the critical sense of how it operates the service being promoted by the Trust.

[44] Mr Simpson cited a number of cases in which a mixture of public and private benefits followed from the activities of the entity claiming charitable status.²¹ Some reasoned on the basis that the private benefit was an inevitable outcome or a by-product of realising a charitable purpose, others treated the private aspect as merely incidental. I agree with Mr Simpson's submission to the effect that these authorities do not reflect any objective criteria for determining which side of the line the existence of personal benefits will fall. As he submitted:

Both approaches are conclusory in nature without marking out a process of analysis to resolve the issue.

In essence, it is a situation-specific analysis of the relative relationship between public and private benefits.

[45] The Trust's case on the relative extent of public benefits is exemplified in the following submission:²²

The Trust seeks to advance education by concentrating on student assistance and it is merely as a sidewind that for profit institutions may find the activities beneficial to them. That flow on advantage does not create the impression that benefit to for profit institutions should be elevated to the level of an ancillary purpose of the Trust.

The only assistance to students who subsequently elect to come to New Zealand that

²¹ *Education Fees Protection Society Inc v Commissioner of Inland Revenue* [1992] 2 NZLR 115, *Incorporated Council of Law Reporting for England and Wales v Attorney-General* [1972] 1 Ch 73, *Commissioner of Inland Revenue v New Zealand Council of Law Reporting* [1981] 1 NZLR 682, *Barclay v De Lacy* [1996] 2 Qd R 112, *In re Mellody* [1918] 1 Ch 228, *In re Lopes* [1931] 2 Ch 130, *In re Cumming* [1951] NZLR 498, *Inland Revenue Commissioners v McMullen* [1981] AC 1, *Kearins v Kearins* [1957] SR (NSW) 286 and *London Hospital Medical College v Inland Revenue Commissioners* [1976] 1 WLR 613.

²² Trust's submissions, paragraph 164.

is provided by the Trust's activities is to raise awareness of the attributes of studying in New Zealand, at a generic level. In contrast, the assistance the Trust provides for all the institutions represented by its members is the promotion of the attributes of study in New Zealand, when those institutions are collectively competing for fee paying students. In every practical sense, the extent of success of that promotion is measured by the number of students persuaded to commit to study in New Zealand. Accordingly, the submission characterising the Trust's activities in the converse way is untenable.

[46] Consistently with other parts of its case, the Trust urges that the weighting of public as against private benefits accruing from its activities should reflect recognition of the benefit conferred on students. If the Trust's characterisation of benefit to the students coming to New Zealand was accepted, it would provide some justification for weighting the respective public and private benefits accruing on a basis differently from the respective percentages of fees earned by not-for-profit and for-profit education providers, that being a direct measure of the "success" of the Trust's promotional activities. For reasons I have already traversed, I do not accept that generic promotional activities impacting on the decision as to which country overseas students elect to go to can accurately be characterised as contributing to the success of the subsequent education or training they receive in New Zealand.

Section 61B Charitable Trusts Act 1957

[47] This section has been held to apply in two situations where a Trust purporting to be a charitable one is imperfect in the sense that there are, either as a matter of interpretation of the express purposes of the Trust, or by analysis of activities undertaken, a mixture of charitable and non-charitable purposes. The section introduces the prospect of "blue pencilling out" those parts of a Trust's purposes that are non-charitable. The terms of the section are as follows:

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

- (1) In this section the term imperfect trust provision means any trust under which some non-charitable and invalid as well as some charitable purpose or purposes is or are or could be deemed to be

included in any of the purposes to or for which an application of the trust property or any part thereof is by the trust directed or allowed; and includes any provision declaring the objects for which property is to be held or applied, and so describing those objects that, consistently with the terms of the provision, the property could be used exclusively for charitable purposes, but could nevertheless (if the law permitted and the property was not used as aforesaid) be used for purposes which are non-charitable and invalid.

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

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

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

[48] The Commission's decision considered the prospects for invoking s 61B to save those parts of the Trust that were held to be charitable.²³

[49] The written submissions on behalf of the Commission anticipated that the Trust would argue for recourse to s 61B to save the Trust in respect of its purposes to

²³ See paragraphs 33-38 of the Commission decision.

the extent they are recognised as charitable. However, the written submissions for the Trust did not raise that as a discrete point. In oral argument, Mr Simpson did suggest that a s 61B “blue pencil” could be used to strike out the second part of clause 2.1(a)²⁴ if it was the inclusion of the second part of that clause that prevented the Trust being interpreted as having sufficiently charitable purposes. However, I do not accept any genuine case for dividing the primary purpose of the Trust in that way. It would be a cynical narrowing of the wording that is not genuinely borne out by an analysis of the activities pursued in accordance with the whole of that purpose.

[50] That leaves the larger question of whether the deed can be modified in some more general way, to confine it to substantially charitable purposes. The application of s 61B was considered by the High Court in *Re Beckbessinger*.²⁵

[51] Citing the earlier decision in *Re Ashton*,²⁶ Tipping J commented that the section has two situations in mind:²⁷

The first is where there are clearly included in the gift as separate and distinct objects purposes which are charitable and purposes which are not charitable.

In those cases the non-charitable purposes can simply be struck out in terms of what is known as the blue pencil rule leaving the charitable purposes extant and valid. More difficulty is encountered where a fund is to be applied in terms which are general so as to include both charitable and non-charitable purposes. This situation is covered by the statute but the remedy will be not the use of the blue pencil but some appropriate modification of the testator's words. What is important is that the gift as a whole must have a clearly charitable purpose. It is the addition of, or the potential for the gift to include, an invalid non-charitable purpose which brings the section into play.

[52] The present is not within the first category of situations contemplated. Had the purposes of the Trust recognised separate promotion of not-for-profit, and for-profit, educational providers, then the “blue pencil” could have applied to exclude the non-charitable purpose. Here, the whole scope of the Trust’s purposes is addressed indiscriminately as between charitable and non-charitable purposes.

²⁴ Refer [38] above.

²⁵ *Re Beckbessinger* [1993] 2 NZLR 362.

²⁶ *Re Ashton* [1955] NZLR 192.

²⁷ At 373.

[53] In dealing with the second category of situation, Tipping J observed:²⁸

The Court cannot in my judgment say, with a gift which is so vague and general as to be invalid for uncertainty, that because the gift might have been applied for charitable purposes, s 61B can be used to save it. The testator must be shown to have had a substantially charitable mind but to have fallen foul of the law of uncertainty by including either actually or potentially a non-charitable element or purpose.

[54] Adapting that approach to the circumstances of the Trust's rules in the present case takes the analysis back to the same issue on the relativity of the charitable and non-charitable purposes, or alternatively evaluating how substantially altruistic in character the purposes and activities of the Trust are. It is abundantly clear that the for-profit sector of New Zealand educational institutions offering courses to overseas students is important to the Trust and its work. Generating sufficient interest with potential students for them to sign on with various of the for-profit New Zealand institutions is itself a substantial purpose of the Trust. I am satisfied that that relative importance must reduce the remaining aspect of the purposes of the Trust, namely promotion for not-for-profit institutions, to less than a substantially charitable purpose which would be required to trigger the jurisdiction of s 61B.

Adverse consequences for the Trust

[55] Submissions for the Trust raised a range of adverse consequences following from a refusal to recognise its charitable status. In addition to the financial consequences of losing taxation exemptions, the Trust risks consequential loss of benefits such as perpetual succession for the Trust's board and general body corporate privileges that are conferred by s 13 of the Charitable Trusts Act 1957.

[56] I am not unmindful of the public good aspect of the work undertaken by the Trust. That is reflected in the recognition that, if necessary, the Trust can also bring itself within the fourth category of charitable purpose, namely benefit to the community (ie before consideration of the subsequent public benefit test). However, the validity of the Trust's concerns cannot justify any recasting of the way the law

²⁸ At 376.

requires the tests I have considered are to be applied. With respect, it ought not to be beyond the wit of legal and accounting advisers to design bifurcated arrangements for generic promotion involving some form of joint venture between a validly charitable trust for those parts of the sector that are not-for-profit, and discrete contributions from the for-profit sector, to be presented in a unified form externally.

[57] Accordingly, for all these reasons, the appeal must fail.

Separate procedural objection

[58] After counsel for the Trust and the Commission in the present appeal had agreed on a procedure for its preparation, including the filing of further evidence on behalf of the appellant and the prospect for evidence in reply on behalf of the Commission, Ronald Young J delivered his decision in *Canterbury Development Corporation v Charities Commission*.²⁹ That judgment included the following observations about evidence in such appeals:

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

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

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

[59] Although it had no direct bearing on the present appeal, Mr Simpson filed supplementary submissions to urge that the approach suggested in the *Canterbury*

²⁹ *Canterbury Development Corporation v Charities Commission* HC Wellington CIV-2009-485-2133, 18 March 2010.

Development Corporation decision is wrong, and ought not to be followed. It was characterised as inconsistent with relevant authorities in New Zealand and Australia on the introduction of additional evidence in appeals from administrative bodies where the original decision-maker has not conducted any hearing. Further, it was said to ignore the limited procedures prescribed by the Act for the Commission when considering applications for charitable status. Factual material is only placed before the Commission by way of prescribed form, supplemented by additional information if specific requests are raised on behalf of the Commission. Mr Simpson is concerned at circumstances in which an applicant will only have an informed view of the factors counting against an application once the Commission has made its decision. In addition, the requirement for leave to adduce additional evidence was said not to give appropriate weight to the broad powers conferred on the Court by the Act.

[60] Mr Simpson cited decisions including *Commissioner of Stamps v Telegraph Investment Co Pty Ltd*,³⁰ in which the High Court of Australia recognised that decisions of administrative authorities may be of a character that should not confine the Court to materials that were before the authority, when the decision is challenged on appeal. Factors likely to suggest that additional evidence is appropriate are where there was no hearing at first instance, where the administrative body was not bound to apply the rules of evidence, where issues arise that are non-justiciable, or where the authority is not required to furnish reasons for its decision.

[61] In addressing these concerns, Mr Simpson raised the difficulties for modestly resourced and small charities, which might well arrive unwittingly at the point of rejection of an application, without appreciating the consequences of not having put to the Commission all possible materials that could advance its charitable status.

[62] In order to effectively address these separate concerns, it would be necessary to acknowledge that appeals from decisions of the Commission are either absolutely or presumptively entitled to an exemption from the provisions of r 20.16 of the High Court Rules. That provides:

³⁰ *Commissioner of Stamps v Telegraph Investment Co Pty Ltd* (1995) 133 ALR 130.

20.16 Further evidence

- (1) Without leave, a party to an appeal may adduce further evidence on a question of fact if the evidence is necessary to determine an interlocutory application that relates to the appeal.
- (2) In all other cases, a party to an appeal may adduce further evidence only with the leave of the court.
- (3) The court may grant leave only if there are special reasons for hearing the evidence. An example of a special reason is that the evidence relates to matters that have arisen after the date of the decision appealed against and that are or may be relevant to the determination of the appeal.
- (4) Further evidence under this rule must be given by affidavit, unless the court otherwise directs.

[63] For the Commission, Ms Warburton resisted any qualification to the position as directed in *Canterbury Development Corporation*. She submitted that it does no more than repeat the provisions of r 20.16, that appeals governed by that rule are routinely from administrative bodies that do not conduct hearings, and that the Commission's process involves giving notice to an applicant where the Commission reaches a provisional view that an application for registration is likely to be declined. In the present case, the terms of that communication included the following:³¹

You have the opportunity to submit to the Commission any facts or arguments you wish the Commission to take into account. The Commission will fully consider any submissions from you before it makes a final decision, which you will be notified of in writing.

You also have the option to:

- amend your application; or
- withdraw your application for registration.

I am not satisfied that any absolute, or even presumptive, exemption from the provisions of r 20.16 is warranted as a matter of course in appeals from decisions of the Commission. The sort of circumstances Mr Simpson cites as justifying a relaxation of the requirements of that rule can always be considered on an application for leave to adduce additional evidence, and there is no basis for concern

³¹ Affidavit of Trevor David Garrett, Exhibit 10.

that restrictions on the grant of leave would give rise to a breach of natural justice, or inadequacy of material to argue any given appeal. I am not persuaded that any procedure inconsistent with that directed in *Canterbury Development Corporation* is warranted.

Costs

[64] Mr Simpson sought costs in the event that the appeal was successful, but resisted the notion of any liability for costs, in the event that the Trust's appeal failed. On the positive side, he submitted that the Commission had waded in fully to the merits of the Trust's application and had therefore rendered itself vulnerable to costs. On the negative side, he urged that the risk of an adverse costs award would be a chilling disincentive to many small charities, to pursue what might be legitimate appeals.

[65] For the Commission, Ms Warburton submitted that its participation conformed with the expectation of the Courts in the absence of a contradictor.³² The Commission did not seek costs on this occasion but resisted any notion that there ought to be an absolute rule against awards of costs in favour of the Commission, depending on the circumstances in which it might contribute to an unsuccessful appeal.

[66] I accept the stance on behalf of the Commission as reasonable. There will be no order as to costs in the present appeal, but nor am I inclined to accept Mr Simpson's submission that there ought to be any invariable or absolute rule barring the Commission from seeking costs.

Dobson J

Solicitors:
Bell Gully, Auckland for appellant
Crown Law, Wellington for Charities Commission

³² See eg *Commerce Commission v Southern Cross Medical Care* [2004] 1 NZLR 491 (CA) at [17].