IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-1017
[2014] NZHC 1297

UNDER	the Charities Act 2005
IN THE MATTER OF	the date to which a successful application for registration may be backdated under section 20(2)(b) of the Charities Act 2005
BETWEEN	THE NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND INCORPORATED Appellant
AND	THE CHARITIES REGISTRATION BOARD Respondent

CIV-2013-485-10805

UNDER	the Tax Administration Act 1994
IN THE MATTER OF	section CW 41 of the Income Tax Act 2007
BETWEEN	THE NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND INCORPORATED Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 3 June 2014

Appearances: S Barker for appellant and plaintiff The National Council of Women of New Zealand Inc
H Carrad for respondent The Charities Registration Board
R Roff for defendant The Commissioner of Inland Revenue

Judgment: 10 June 2014

JUDGMENT OF CLIFFORD J

Introduction

[1] The appellant and plaintiff, The National Council of Women of New Zealand Incorporated (NCWNZ), is a charitable organisation established in 1896. Kate Sheppard was its first president.

[2] On 4 June 2009, following the enactment of the Charities Act 2005, NCWNZ was registered as a charitable entity by the Charities Commission as of 30 June 2008 (the Registration Decision).

[3] On 22 July 2010, the Charities Commission revoked the Registration Decision with effect from 19 August 2010 (the Deregistration Decision).

[4] On 10 September 2012 NCWNZ applied to the respondent, the Charities Registration Board (the Charities Board), the successor to the Charities Commission, for reregistration as a charitable entity. The NCWNZ requested that it be reregistered as of 19 August 2010, including so as to avoid any potential exposure to income tax during the period of its deregistration.

[5] On 15 April 2013, the Charities Board granted the NCWNZ's reregistration application, but with effect from 10 September 2012, not 19 August 2010 (the Reregistration Decision).

[6] The Commissioner of Inland Revenue (the Commissioner) has assessed NCWNZ for income tax for the period that – following the Deregistration Decision – NCWNZ was not registered as a charitable entity, namely 19 August 2010 to 10 September 2012 (the Deregistration Period).

[7] In CIV-2014-485-1017 (the Effective Date Appeal) NCWNZ appeals the Reregistration Decision under s 59 of the Charities Act, to the extent of the effective date of that decision being 10 September 2012 and not 19 August 2010.

[8] In CIV-2013-485-10805 (the Tax Challenge) NCWNZ challenges the Commissioner's income tax assessment of it for the Deregistration Period.[1]

[9] These are interlocutory applications by NCWNZ:

(a) to introduce further evidence in the Effective Date Appeal;

(b) to serve the Effective Date Appeal on the Attorney-General; and

(c) to consolidate the Effective Date Appeal and the Tax Challenge.

[10] At the same time, the Charities Board applies to amend the intitulement of the Effective Date Appeal.

[11] As decision-maker the Charities Board appears, in the limited role provided by r 20.17 of the High Court Rules, in the Effective Date Appeal. The Charities Board, acting in that role, opposes each of NCWNZ's interlocutory applications.

[12] The Commissioner opposes the consolidation of the Tax Challenge with the Effective Date Appeal and takes no position on NCWNZ's other interlocutory applications or the Charities Board's application.

[13] I consider each of those applications in turn, but before doing so place them in the broader context of the Effective Date Appeal, the Tax Challenge and the relevant statutory provisions.

Context

[14] Prior to the enactment of the Charities Act, the Commissioner granted charitable status for tax purposes. There was no other regulation of charitable entities as such. The Charities Act now provides for the regulation of charities generally, including for the registration of societies, institutions and trusts as charitable entities. Section 13 of the Charities Act sets out the essential requirements an entity must meet to qualify for registration. Section CW41 of the Income Tax Act

[1] The challenge relates to the tax years ending 31 March 2011 and 2012.

2007 exempts from income tax income derived by a charitable entity provided that entity is a tax charity. A tax charity is a charitable entity registered as such under the Charities Act.

[15] To address, no doubt, the number of applications that would need to be processed as at the date the Charities Act came into force, and for ongoing administrative purposes:

(a) Section 20 of the Charities Act provides for the backdated registration of an entity as a charitable entity, in the following terms:

> **20 Board may backdate registration of entity as charitable entity**
>
> (1) The Board may, if it thinks fit, direct the chief executive to register a notice in the register of charitable entities that specifies that an entity must be treated as having become registered as a charitable entity at a time (the effective registration time) that is before the time at which the entity actually became registered as a charitable entity.
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> (2) However, the effective registration time must not,—
>
> (a) in the case of a trust, society, or an institution referred to in section 73(1) of the Estate and Gift Duties Act 1968 created or established by a gift after the commencement of this section, be earlier than the time that the gift was made; and
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> (b) in any other case, be earlier than the time that the chief executive received a properly completed application for registration of the entity as a charitable entity.
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> (3) Before the Board exercises its powers under subsection (1), the Board must be satisfied that the entity was qualified for registration as a charitable entity at all times during the period between the effective registration time and the time at which the entity actually became registered as a charitable entity.
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> (4) If the Board exercises its powers under subsection (1) in relation to an entity, the entity must be treated as having become registered as a charitable entity at the effective registration time for the purposes of this Act, the Income Tax Act 2007, and the Estate and Gift Duties Act 1968.

(b) Subsection (5)(b) of s CW41 of the Income Tax Act extends the definition of a tax charity in the following terms:

> (5) In this section and sections CW42 and CW43, tax charity means–
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> …
>
> (b) a trustee or trustee of a trust, a society, or an institution (the entity), that–
>
> (i) has started, before 1 July 2008, to take reasonable steps in the process of preparing an application for registering the entity as a charitable entity under the Charities Act 2005; and
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> (ii) intends to complete the process of preparing an application described in subparagraph (1); and
>
> (iii) has not been notified by the Commissioner that the entity is not a tax charity:

[16] As noted, the Registration Decision was made effective as of 30 June 2008, so that NCWNZ was a registered charitable entity from 1 July 2008, the date upon which the new regime became effective.

[17] Sometime later, the Charities Commission further investigated NCWNZ. The Charities Commission's concern was that NCWNZ was not established and maintained exclusively for charitable purposes because of political advocacy undertaken by NCWNZ. The Charities Commission concluded that NCWNZ had, as a main purpose, advocating for changes in law, policy or decisions of central government, which was not charitable. NCWNZ was therefore deregistered on the basis that it did not have exclusively charitable purposes.

[18] NCWNZ did not appeal the Deregistration Decision. Rather, after a number of engagements with the Charities Commission, NCWNZ applied for reregistration as a charitable entity and, as noted, was ultimately successful. The Charities Board did not, however, direct registration of NCWNZ as of the Deregistration Date, but rather the date of its reregistration application, namely 10 September 2012. The Charities Board took the view that in terms of s 20(2)(b) of the Charities Act it could

only backdate NCWNZ's reregistration to the date of NCWNZ's reregistration application.

[19] During the Deregistration Period NCWNZ had become liable for income tax, had filed tax returns, and had been assessed for and paid income tax with respect to the 2011 and 2012 tax years. It currently is in dispute with the Commissioner.

[20] In the Effective Date Appeal, NCWNZ says the Charities Board was wrong to conclude that it could not backdate NCWNZ's registration as a charitable entity to 19 August 2010. NCWNZ says that, in terms of s 20(2)(b), its reregistration could have been dated as early as the date of its first application for registration as a registered charitable entity, namely 29 May 2008. Hence the date of 19 August 2010 was one upon which the Charities Board could have deemed it to have been reregistered.

[21] If NCWNZ succeeds in the Effective Date Appeal, the Tax Challenge will be rendered moot. The Commission acknowledges that, in those circumstances, NCWNZ will not be liable for any tax during the Deregistration Period.

[22] In the Tax Challenge, and separately from its argument as to the proper interpretation of s 20(2)(b) of the Charities Act, NCWNZ says that it remains a tax charity within the meaning of s CW41(5)(b) because it meets the criteria in subss (i) and (ii) and, importantly, has not been notified by the Commissioner that it is not a tax charity, in terms of subs (iii).

[23] In both the Effective Date Appeal and the Tax Challenge, NCWNZ emphasises what it regards as the inappropriate and unfair outcome of the interpretation adopted by the Charities Board and by the Commissioner. It has, at all times it says – as recognised by both the Registration Decision and the Reregistration Decision – qualified for registration as a registrable tax entity. As such, the interpretations it argues for are consistent with the scheme of the legislation and, in particular, the relevant transitional provisions.

Application for leave to introduce further evidence

[24] NCWNZ wishes to introduce "updating" evidence: this evidence would, in general terms, cover the effects – as at the present time – of the fact that NCWNZ was, during the Deregistration Period, not registered as a charitable entity. NCWNZ says that the full scale of those effects did not become apparent until after the Reregistration Decision. It considers that factual context relevant to the interpretation of s 20(2)(b) of the Charities Act. It also wishes to give evidence as to the course of action it took, both as regards the Charities Board and the Commissioner, following the Deregistration Decision. It says that the effect of the interpretation of s 20 of the Charities Act and s CW5 of the Income Tax Act taken by the Charities Board and the Commissioner respectively, on the course of action it took are matters the Court should properly be aware of when considering the interpretation questions raised by the Effective Date Appeal and the Tax Challenge.

[25] NCWNZ has not, unfortunately, followed the usual course of providing the Court with the further evidence it wishes to adduce.

[26] NCWNZ bases its application on two grounds:

(a) First, that r 20.16 of the High Court Rules, which limits the extent to which further evidence may be adduced in appeals to the High Court, should not apply here, because applications to the Charities Board for registration are not adversarial proceedings which generate a record. Hence, appeals under s 59 of the Charities Act should be hearings de novo and not on the record below.

(b) Alternatively, NCWNZ says that it satisfies the r 20.16 criteria.

[27] The Charities Board opposes that application. It says there are no reasons why appeals under s 59 of the Charities Act should not be subject to the normal rules applying to appeals to the High Court. It says further that the special reasons required, in terms of r 20.16 of the High Court Rules, for the admission of further evidence on appeal are not satisfied here. It points to the prejudice to it involved if irrelevant evidence lengthens the hearing. It also notes the underlying policy of

r 20.16, that the ability to introduce further evidence should not in effect allow an appellant to have a second bite at a substantive first instance decision.

[28] As Ms Barker for NCWNZ submitted, the approach of the High Court to date has been to apply the normal High Court appeal rules regarding further evidence to appeals under s 59 of the Charities Act. That approach is currently under challenge before the Court of Appeal. Pending the outcome of that challenge, I take the same approach as my fellow Judges in this Court and find that r 20.16 of the High Court Rules does apply.

[29] Having said that, I think in these relatively unusual circumstances there is force in the arguments for NCWNZ as to why updating evidence of the sort it wishes to adduce should in terms of r 20.16 be admitted. I do not see any particular prejudice for the respondent: its role is not as adversarial opponent of NCWNZ's appeal, but rather to assist the Court. I also think it will be of assistance to the Court to understand the circumstances which provide the background to this appeal. Section 20, while not only transitional, certainly had a particular significance in the transitional period before and after the Charities Act came into force during which pre-existing charitable entities applied for and were granted registration as registered charitable entities. Understanding the factual context for NCWNZ's appeal may well, in my view, be relevant to the interpretation of s 20(2)(b). Furthermore, the evidence may also be of relevance in the Effective Date Appeal as, if the Court concludes that s 20(2)(b) is to be interpreted as NCWNZ submits, the Court itself may conclude it appropriate to backdate NCWNZ's registration. In those circumstances, the Court must be satisfied as to the matters set out in s 20(3). The question may also arise whether the Court could, notwithstanding that it interprets s 20(2)(b) in the manner contended for by the Charities Board, conclude that it itself has power under s 61 of the Charities Act to backdate NCWNZ's reregistration in the manner NCWNZ wishes.

[30] I therefore grant NCWNZ's interlocutory application to adduce further evidence. That evidence will be by way of affidavit, and is to be limited to no more than 10 pages. Ms Barker should also bear in mind my observations to her during

the hearing of these applications as to what is and is not relevant for the purposes of the Effective Date Appeal.

[31] That updating affidavit evidence is to be served and filed by Friday 26 June 2014. Thereafter the parties are to liaise with the Registrar for this matter to be listed in the next available Judge's chambers list for a hearing date to be allocated and timetabling directions made.

Service on Attorney-General

[32] The Attorney-General has a long established role as parens patriae, the protector or guardian of charities.[2] In *Wallis v Solicitor-General*, the Privy Council, sitting on appeal from the New Zealand Court of Appeal, observed that:[3]

> It is the province of the Crown as parens patriae to enforce the execution of charitable trusts, and it has always been recognised as the duty of the law officers of the Crown to intervene for the purpose of protecting charities …

[33] This role continues today,[4] but has not been considered in the context of the Charities Act.

[34] NCWNZ considers that the issues raised by these proceedings ought properly to receive attention from the Attorney-General, as they raise important issues relating to the way in which charities regulation is being carried out. Whether or not that is the case would clearly be a matter for the Attorney-General, considering his role as parens patriae in the context, now, of the Charities Act

[35] But at this point, I see no reason why the Attorney-General should not be served. The regime introduced by the Charities Act remains a reasonably new one which has given rise to a degree of contention between charities and regulatory authorities. The Charities Act itself is silent on the role, if any, of the Attorney-General. This, apparently, is in distinction to the equivalent legislation in the United Kingdom.

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2 See for example *Kaikoura County v Boyd* [1949] NZLR 233 (SC and CA) at 262; *Wallis v Solicitor-General for New Zealand* (1903) NZPCC 23 at 181-182.

3 At 181-182.

4 *Laws of New Zealand Charities* (online ed) at [273]-[274].

[36] Serving these proceedings on the Attorney-General will provide an opportunity for the Attorney-General to consider the issue of whether participation is appropriate. Accordingly I grant the NCWNZ's application and order service on the Attorney-General.

Consolidation

[37] Rule 10.12 of the High Court Rules provides:

> **When order may be made**
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> The court may order that 2 or more proceedings be consolidated on terms it thinks just, or may order them to be tried at the same time or one immediately after another, or may order any of them to be stayed until after the determine of any other of them, if the court is satisfied–
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> (a) that some common question of law or fact arises in both or all of them; or
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> (b) that the rights to relief claimed therein are in respect of or arise out of–
>
> (i) the same event; or
> (ii) the same transaction; or
> (iii) the same event and the same transaction; or
> (iv) the same series of events; or
> (v) the same series of transactions; or
> (vi) the same series of events and the same series of transactions; or
>
> (c) that for some other reason it is desirable to make an order under this rule.

[38] Rule 10.13 provides, additionally:

> Rule 10.12 applies even though–
>
> (a) the relief claimed in the proceedings is not the same; or
>
> (b) 1 or more of the more proceedings–
>
> (i) is pending in the court in the exercise of its admiralty jurisdiction; or
> (ii) is brought under the provisions of an Act conferring special jurisdiction on the court.

[39] As noted in *McGechan on Procedure,* these rules confer a very wide procedural discretion on the Court.[5] Among the factors to be considered will be savings in time, cost and judicial resources and removing the risk of inconsistent decisions. At the same time, when considering the potential shortcut of

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[5] Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR10.12.01]–[HR10.12.04].

consolidation or trial at the same time the Court must take care to avoid confusion through multiplicity of parties and issues.

[40] There is no question here that the Effective Date Appeal and the Tax Challenge arise essentially out of the same facts and circumstances: those facts and circumstances are the decision of the Charities Board not to backdate the reregistration of the Commission to 19 August 2010, and the consequences that flow therefrom.

[41] NCWNZ points to the saving and convenience of having the related issues of the proper interpretations of s 20(2)(b) of the Charities Act and s CW41(5)(b) of the Income Tax Act considered at the same time. For their parts, the Charities Board and the Commissioner say involving each of them in the other's argument will unnecessarily and to their prejudice add to their costs.

[42] By my assessment there are two competing considerations here.

[43] First, I accept NCWNZ's argument that, particularly given its status as a charity, there is a real public interest in limiting its exposure to the cost of two separate proceedings that arise out of the same facts and circumstances and that consider interpretational issues of two related provisions, albeit of separate pieces of legislation. But, at the same time, the fact is that if NCWNZ succeeds in the Effective Date Appeal, the Tax Challenge will be rendered moot and the Commissioner would not be required to participate at all. Having said that, I note that, under the provisions of the Tax Administration Act there has already been extensive engagement between NCWNZ and the Commissioner. The Tax Challenge, to the extent of the interpretational argument relating to s CW41(5)(b), is a relatively confined exercise.

[44] On balance, I am satisfied that it is appropriate in these circumstances that the Effective Date Appeal and the Tax Challenge – to the extent that it involves the question of the interpretation of s CW41(5)(b) – be heard together. In many ways, that conclusion reflects my decision to allow NCWNZ to adduce updating evidence of the effect on it of the Deregistration Decision. I do not anticipate that that

evidence will call for any significant response by either the Charities Board or the Commissioner. Rather, and as noted, it will be contextual. It will provide a common context for the two related interpretational questions. It is sensible, in my view, for those two interpretational issues to be considered at the same time.

[45] In these circumstances, I do not consider that formal consolidation is necessary: rather hearing the appeals at the same time, to the extent I have indicated, will promote the efficient use of everyone's resources. If there are other aspects of the Tax Challenge then they can be dealt with separately, and at a later point if necessary.

Amend intitulement

[46] The Charities Board says the intitulement of these proceedings should be amended so that it conforms with r 20.9(2) of the High Court Rules. That rule provides:

> **Contents of notice of appeal**
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> (1) Unless the court otherwise directs, a notice of appeal must—
>
> (a) have a heading stating the full name and description of each party and referring to the enactment under which the appeal is brought; and
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> (b) specify the decision or part of the decision appealed against; and
>
> (c) specify the grounds of the appeal in sufficient detail to fully inform the court, the other parties to the appeal, and the decision-maker of the issues in the appeal; and
>
> (d) specify the relief sought.
>
> (2) The notice of appeal must not name the decision-maker as a respondent.
>
> (3) Subclause (2) does not—
>
> (a) apply to appeals to the court under the Commerce Act 1986:
>
> (b) limit or affect rule 20.17 (which entitles a decision-maker, other than a District Court, to be represented and heard on an appeal).
>
> (4) An appellant may amend a notice of appeal at any time with the leave of a Judge.

(5) If the notice of appeal does not attach a copy of the decision against which the appeal is brought, the appellant must file a copy of that decision immediately it becomes available.

[47] NCWNZ opposes that application: it says the Charities Board is, in fact, the opposer – on an adversarial basis – to its appeal and the intitulement of these proceedings should reflect that.

[48] The principle behind r 20.9(2) has been described in the following terms:[6]

> [12] The traditional rationale for the principle that a decision-maker ought not appear on an appeal from its own decision is that a judicial body "should strive not to enter into the fray in a way which might appear to favour the interests of one of the parties": *NZ Engineering IUOW v Court of Arbitration* [1976] 2 NZLR 283 (CA), at p 284. That concern may arise acutely when the appeal might lead to further proceedings before the decision-maker.

[49] The Court went on to observe:

> [19] Several rationales for the principle that a decision-maker ought not become a protagonist in an appeal from its own decision emerge from the authorities and the Rules: involvement in an appeal from its own decision lends the decision-maker an appearance of partiality; in particular, it is difficult to be and appear impartial in proceedings before the decision-maker that may follow the appeal; alternatively, the decision-maker may be functus officio, with no further role to play in the case; the decision-maker can provide appropriate assistance without being named; it is for the Court to decide when such assistance is appropriate, and the Rules confer a discretion not to hear from the decision-maker so long as it is not a party; and the decision-maker may be put to unnecessary expense if named.

[50] In *Canterbury Development Corporation v Charities Commission*, Young J, referring to r 20.17, indicated his view that the Charities Commission should not have been named as a party to the proceedings.[7] In other appeals under s 59, the Charities Commission has been so named.

[51] I accept that here there is only one party to the decision being challenged, namely the Reregistration Decision. The question of maintaining impartiality between the parties is, therefore, not as material here as in other circumstances.

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6 *Fonterra Co-operative Group Ltd v Grate Kiwi Cheese Co Ltd* (2009) 19 PRNZ 824 (HC).

7 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC) at [108].

[52] At the same time, in my view it is important that the Charities Board acts, and continues to act, in the manner contemplated by r 20.17, and reflected by r 20.9. Whilst it may oppose, it is not to do so adversarially and is not to unnecessarily enter the fray. Its role is, very properly, to assist the Court.

[53] I therefore conclude that it is appropriate for the intitulement of the Effective Date Appeal proceedings to be amended. These proceedings are, hereafter, to be intituled in the following manner:

UNDER	the Charities Act 2005
IN RE	THE NATIONAL COUNCIL OF WOMEN OF NEW ZEALAND INCORPORATED Appellant
IN THE MATTER OF	an appeal against a decision of the Charities Board as to the date to which a successful application for reregistration may be backdated under s 20(2)(b) of the Charities Act 2005.

[54] All questions of costs are reserved.

"Clifford J"

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