

# CASE COMMENT: *RE FAMILY FIRST NEW ZEALAND*

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*Re Family First New Zealand*<sup>1</sup> has been a much anticipated case because it is the first case, as far as the author is aware, to have considered, and applied the principles set out so eloquently in the 2014 Supreme Court case of *Re Greenpeace of New Zealand Inc.*<sup>2</sup> The *Greenpeace* decision was fundamental with regard to charity law in New Zealand because the majority of the Court held that political purposes and charitable purposes were not mutually exclusive and asserted that “[i]t is difficult to construct any adequate or principled theory to support blanket exclusion” in relation to political purpose or advocacy.<sup>3</sup> As a result, the exclusion of political purpose in charity law is now unnecessary in New Zealand. The High Court case of *Re Family First* therefore provides the first consideration of this contemporary approach. In summary, Collins J allowed the appeal brought by Family First against the Charities Board of the Department of Internal Affairs – Charities Services (the Board), in which it was determined that Family First was no longer eligible to be registered as a charitable trust. In allowing the appeal, his Honour directed the Board to reconsider Family First’s application, in light of the *Greenpeace* judgment, and indeed, this judgment. In arriving at that conclusion, Collins J provided some useful consideration of charity law principles.

For a body to be registered as a charity in New Zealand, it must fall under one or more of the four principal categories of charitable purpose, or heads of charity, which are: the relief of poverty, the advancement of education, the advancement of religion, and any other matters beneficial to the community.<sup>4</sup> The purposes must also be for public benefit. Where any one of the first three heads of charity is established, it is assumed, unless there is evidence to rebut that assumption, that the charity is for the public benefit. For the fourth category, the public benefit must be expressly established. A non-charitable activity will not negate charity so long as that activity is ancillary to the overall charitable purpose.<sup>5</sup>

Before addressing those considerations, we should firstly contextualise the background to the Family First judgment. The Family First trust deed was created on 26 March 2006, and it set out its six purposes, including: promoting and advancing research and policy supporting marriage and family as foundational to a strong and enduring society, and to educate the public in their understanding of the institutional, legal and moral framework that makes a just and democratic society possible. In 2006, it was incorporated under the Charitable Trusts Act 1957, and approved as a charitable entity by the Charities Commission (as it was then known), and registered under the Charities Act 2005 in 2007.

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1 *Re Family First New Zealand* [2015] NZHC 1493.

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

3 At [69].

4 Charities Act 2005, s 5(1); *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 at 583.

5 Charities Act, s 5(3) and (4).

In 2008, the Charities Commission made inquiries as to the extent of Family First's activities, including advocacy. As a result of these inquiries, the Charities Board (as it is now known) resolved to deregister Family First from the Charities Register in 2013. Family First filed a notice of appeal to the High Court shortly afterwards, and both parties agreed that Family First's appeal should be deferred until after the Supreme Court gave its judgment in *Greenpeace*, which was delivered in August 2014.

Obviously, the Board did not utilise the Supreme Court judgment in making its decision to deregister Family First; rather it was heavily influenced by the earlier Court of Appeal judgment, whereby that Court considered that the level of advocacy conducted by Greenpeace was beyond the permitted, at the time, level of ancillary to its charitable purposes, thus referring it back to the Board for further consideration. Greenpeace appealed the approach of the Court of Appeal with regard to political activity, hence leading to the Supreme Court judgment.

Collins J noted that there were four grounds of appeal, and for the purposes of this case comment, we will concentrate on the first three. Firstly, that the Board erred when it concluded that Family First's role and advocacy for its views in relation to the family is political and not a charitable purpose. This was addressed under the heading of "political purpose." Secondly, that the Board erred in deciding that the organisation's purposes do not include a purpose that is beneficial to the public under the fourth head of charity. This was addressed under the heading "benefit to the public." Thirdly, that the Board erred in deciding that Family First's purposes do not include the charitable purpose of advancing education. This was addressed under the heading "education purpose." I will address each point in turn.

## I. POLITICAL PURPOSE

In relation to the deregistration of Family First, the Board had asserted that Family First had two purposes that were political. Firstly, with regard to its views about family life, the Board asserted that this purpose did not have self-evident public benefit; that it was political, and as a result, not charitable. Secondly, the entity had a purpose to procure government action that would be consistent with its own view. The Board asserted that this purpose was directed to procuring legislative change and government policies, which was political and not charitable.

Collins J noted however that the Board's position that Family First's political objects could not be charitable was not reconcilable with the Supreme Court's approach taken in *Greenpeace*. This was because the Board's decision was based on a legal proposition that has now been found to be incorrect. His Honour affirmed the Supreme Court's determination that political purposes are not irreconcilable with political purposes. This therefore means that the appropriate course of action will be for the Board to reconsider the position of Family First in light of the Supreme Court judgment.

The Board had also asserted that Family First's advocacy role was "controversial", and therefore self-evidently not of public benefit. The Supreme Court however stated that it was not a criterion for registration as a charitable entity that the advocacy undertaken, or views expressed, should be generally acceptable or non-contentious.<sup>6</sup> As a result, Collins J stated that the Board should reconsider their approach with regard to controversial views, again in light of the Supreme Court determination.

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6 Re Greenpeace of New Zealand Inc [2014] NZSC 105, [2015] 1 NZLR 169 at [75].

## II. BENEFIT TO THE PUBLIC

Collins J stated that the Board should refer to analogous cases to determine public benefit. Nonetheless, his Honour did make a point of urging perhaps some restraint on this matter. The Board should be cautious not to match carefully the entity's purposes with organisations that have successfully been recognised as charitable entities. This approach would risk undermining the view of the Supreme Court that political purposes should not be excluded from being classified as charitable.

Instead, his Honour noted that cases that could be of assistance to the Board in undertaking its analogical assessment would be entities that advocate for the mental and moral improvement of society. However, Collins J did state that the Board should not automatically accept that Family First's purposes are charitable. The correct approach for the Board should be to assess whether Family First's activities are aimed at promoting the moral improvement of society. It is possible that some members of the Board may not personally approve of the views of Family First, but their subjective views should not be taken into consideration, and it may be possible to find a legitimate analogy between its role and other entities who have been found to be charitable. This methodology would be consistent with the obligations on the members of the Board to act with honesty, integrity and good faith.<sup>7</sup>

## III. EDUCATION PURPOSE

The Board concluded that Family First advanced its polemical views on traditional forms of marriage under the guise of education, and therefore this was not genuine advancement of education. To be a charitable educational activity, the organisation must promote learning, and this may be achieved via a variety of means. For instance, training programmes, conferences, or by carrying out or disseminating research that improves knowledge around a particular issue.<sup>8</sup>

Collins J did note that a report Family First commissioned from the New Zealand Institute of Economic Research was a legitimate piece of research that contained significant research that had not been undertaken previously. This report was not referred to by the Board in its decision-making process. As a result, his Honour stated that when the Board re-examines Family First's case, it will need to examine carefully this report, and determine if it is sufficient to qualify the entity's activities as including the advancement of education for the public benefit.

This judgment has been useful for two key reasons. Firstly, it illustrates how the principles enunciated in the much anticipated Supreme Court case of *Greenpeace* may be applied practically, even in potentially contentious circumstances. What this speaks to is the underpinning of fundamental charity law provisions, including the doctrine of public benefit, and the necessity for charity law to respond to contextual social frameworks. Charity law is therefore not constrained by historical approaches that may not be applicable, or relevant in a contemporary society, but at the same time, the High Court recognises the importance of ensuring that critical legal requirements of charity law are fulfilled.

Secondly, it demonstrates the importance of exercising objective assessment when considering appropriate and legitimate analogies between the role of Family First and organisations that have

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<sup>7</sup> Charities Act, sch 2, cls 17 and 18.

<sup>8</sup> *Re Hopkins Will Trusts* [1965] 1 Ch 669 at 680; *Re South Place Ethical Society* [1980] 1 WLR 1565 (Ch) at 1576.

advocated for similar improvements in society, as advocated by Family First. By undertaking such assessments, the decision that is reached is likely to demonstrate rational and legitimate considerations. This therefore has been a welcome decision in terms of demonstrating the evolution of charity law in a contemporary context.