

Charitable Trusts and Freemasonry

Although the exact origins of Freemasonry are long since lost, its history can be traced back to as early as the Middle Ages and to highly skilled stonemasons who formed themselves into lodges to protect their skills and secrets and to pass on this valuable knowledge onto selected apprentices. Freemasonry is considered to be one of the world's largest and oldest fraternal organisations, whose principles of integrity, goodwill and charity form the foundation for an individual's way of living. Freemasonry is renowned for its key support of charitable activities and community services. Freemasonry in New Zealand is divided into three Masonic Divisions, each of which is divided into a number of Districts, and each District has a number of Lodges. The Grand Lodge of New Zealand, based in Wellington, oversees all of these.¹

Freemasonry is no stranger to the courts. Over the decades the courts have determined that, inter alia, a bequest for maintenance and upkeep of a Masonic Temple was void for uncertainty;² that freemasonry does not comply with the requirements of the advancement of religion for charitable purposes;³ and that a Masonic complex was not a charitable trust.⁴ The very recent appeal to the High Court in relation to the Charities Commission's decision not to grant the Grand Lodge of Antient Free and Accepted Masons in New Zealand charitable status⁵ adds to the growing jurisprudence of freemasonry and charitable status. This case arose from the requirement for the Grand Lodge of New Zealand to apply to the Charities Commission for registration as a charity as necessitated under the Charities Act 2005. Prior to this application, the Grand Lodge "had enjoyed 50 years of tax-exempt status as a charity under the previous applicable law."⁶

The Charities Act 2005 may have gone some way to codifying and entrenching charity law, but "the starting point for any foray into charity is the Statute of Elizabeth I, 43 Eliz I c4 1601 known as the Charitable Uses Act 1601."⁷ There is no statutory definition of charity but the Preamble of the Charitable Uses Act 1601 provides a non-exhaustive list of purposes that are considered charitable, including: relief of the poor, maintenance of schools, the education and preferment of orphans and the support of tradesmen. Other purposes may also be charitable as "those purposes are charitable which that statute enumerates or which by analogies are deemed within its spirit or intendment."⁸ Lord Mcnaghten in the case of *Commissioners for Special Purposes of the Income Tax v Pemsel*⁹ "considered the list of

¹ "What is Freemasonry" Freemasons New Zealand <<http://www.freemasons.co.nz/cms/misc/what-is-freemasonry/>>.

² *Porter v Porter* [1925] Ch.746.

³ *United Grand Lodge of Ancient free and Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281 (CA).

⁴ *Shears v Miller* HC Timaru CP10/99, 30 May 2000.

⁵ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* HC Wellington CIV-2009-485-2633, 23 September 2010.

⁶ "Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand" (2010) Legal Case Notes Queensland University of Technology <<https://wiki.qut.edu.au/display/CPNS/Re+The+Grand+Lodge+of+Antient+Free+and+Accepted+Masons+in+New+Zealand>>.

⁷ Juliet Chevalier-Watts "Politics and Charity" (2009) March NZLJ at 53.

⁸ *Morice v Bishop of Durham* (1805) 9 Ves 399 at 405 per Sir William Grant MR.

⁹ *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

charitable purposes as set out in the [P]reamble and summarised the purposes into four categories”:¹⁰

- Trusts for the relief of poverty;
- Trusts for the advancement of education;
- Trusts for the advancement of religion; and
- Trusts for any other purposes beneficial to the community that do not fall under the preceding heads.

Any trust that wishes to obtain charitable status must establish that it falls under one or more of those heads. Additionally, a charity must also demonstrate that it meets three further requirements:

- “[T]hat the trust must be for public purpose;
- [T]hat it must be for the public benefit; and
- [T]hat it must be capable of being controlled by the court, if necessary.”¹¹

As to that second requirement, all charitable trusts must exhibit a public benefit, as opposed to a private benefit. This means that charitable trusts must benefit the public or some section of the public. In the case of *Pemsel*, Lord Mcnaghten only refers expressly to the requirement of public benefit in the fourth head of the charitable purposes categories stated above, although this characteristic is required undoubtedly in trusts for the advancement of religion and the advancement of education, Nonetheless it is argued whether there is an explicit requirement to demonstrate public benefit in trusts for the relief of poverty, however it is beyond the remit of this article to consider the latter point.¹²

It was against this rubric when applying for charitable status to the Charities Commission New Zealand that the Grand Lodge of New Zealand was required to demonstrate that its activities, properties and purposes were held for charitable purpose and that such purposes confer a public benefit. “The Grand Lodge sought to bring itself within [the] fourth head of matters beneficial to the community.”¹³ This head requires that purposes are conceptually beneficial to the public and that those purposes fall within the spirit and intendment of the Preamble of the Statute of Elizabeth.¹⁴ As noted by Justice France, when assessing cases brought under this head such as this case, it is necessary to consider the spirit and intent of the Statute of Elizabeth and compare the case law against that, as well as having regard to previous decisions that have been made in relation to that specific head of charity.¹⁵ This approach has been recently confirmed in the case of *Canterbury Development Corporation v Charities Commission*¹⁶ where Justice Young noted that the Preamble is still fundamental to

¹⁰ Juliet Chevalier-Watts “Trusts for Religious Purposes” (2010) March NZLJ at 55.

¹¹ Dr N Richardson *Nevill’s Law of Trusts, Wills and Administration* (10th ed, LexisNexis, Wellington, 2010) at 138.

¹² For further discussion on the public benefit test and trusts for the relief of poverty refer to Juliet Chevalier-Watts “Under the Law of Charity, Is the Principle of ‘Public Benefit’ Being Hindered By the Doctrinal Rule of Precedent?” (2008) Waikato Law Review at 194-208.

¹³ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [10].

¹⁴ *Ibid* at [11].

¹⁵ *Ibid* at [12].

¹⁶ *Canterbury Development Corporation v Charities Commission* HC Wellington CIV-2009-485-2133.

the requirement of establishing charitable purpose, and additionally a narrow approach in the interpretation of the spirit and intendment of the Preamble should be favoured.¹⁷

On 26 November 2009 the Charities Commission issued its Registration decision regarding the Grand Lodge in relation to charitable status. In reaching its decision, the Commission, inter alia, analysed the Book of Constitution of the Grand Lodge of Antient Free and Accepted Masons in New Zealand (the Constitution) and the Grand Lodge of Freemasons of New Zealand Trustees Act 1903 as its rules documents. The Commission acknowledged that whilst some of the purposes of the Grand Lodge were charitable, not all of them were,¹⁸ thus the Commission concluded that “the general purpose of the Grand Lodge is the promotion of freemasonry in New Zealand and this is not a charitable purpose.”¹⁹ The appeal by Grand Lodge from that decision was on the grounds that:

- a) It was submitted that because the Grand Lodge had held charitable status for more than 50 years it was not for the Charities Commission to reach a different decision; and
- b) It was submitted that the Charities Commission had erred in its assessment.²⁰

Justice France “found it convenient to address the appeal grounds in reverse order”²¹ and this article will emulate that approach.

Prior to considering the matters of charitable purpose and public benefit on the grounds submitted by the Grand Lodge, the Court provided some valuable information as to the basis of the application, which I also think is pertinent to consider in order to contextualise the application. The Grand Lodge made a single application in relation to all their assets. As a result, all the property held on trust, as well as all their expenditure, has to be for charitable purpose. If it is not, then it must be ancillary to that purpose in order to be considered charitable. The assets fell into three categories:

1. assets held under the Fund of Benevolence;
2. assets held pursuant to particular trusts that have their own stated purposes; and
3. all other assets held on behalf of the Grand Lodge for its general purpose.²²

Justice France was quick to note that the assets and expenditure of the Fund of Benevolence is clearly within the doctrine of charitable purposes and as such requires no further consideration.²³

¹⁷ Ibid at [44].

¹⁸ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [5].

¹⁹ *Charities Commission Registration Decision: The Grand Lodge of Antient Free and Accepted Masons in New Zealand* (2009) at [79]

²⁰ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [6].

²¹ Ibid.

²² Ibid at [13] – [14].

²³ Ibid at [15].

What is interesting is that the Charities Commission noted in its Registration Decision that it did not have any information about the “particular trusts” managed by the Grand Lodge and thus could not determine that these trusts therefore were exclusively charitable.²⁴ In light of this explicit acknowledgment by the Charities Commission, it is perhaps surprising that the Grand Lodge failed to provide the required pertinent information, and therefore perhaps not unexpectedly Justice France noted that due to the lack of information on those “particular trusts” the application should fail because they cannot be shown to be for charitable purpose. Indeed, Mr McKenzie QC accepted that these trusts should therefore be the subject of individual applications.²⁵ One wonders why the Grand Lodge made no amendment to exclude these assets from the application, as noted by the Court;²⁶ but perhaps further applications on the basis of these “particular trusts” by the Grand Lodge to the Charities Commission will answer that question. Nonetheless, “in anticipation that an amended application might be made that is limited to the Fund of Benevolence and the general funds”²⁷ the Court considered it appropriate to continue to address the issues submitted on the appeal.

The Court then considered it of great value to outline the pivotal role of The Board of General Purposes in order to assess fully Grand Lodge's charitable status. The Board of General Purposes (the Board), under the direction of the Grand Lodge, controls matters, oversees those who run the Fund of Benevolence, attends to day to day administration of the Grand Lodge's affairs and directs the trustees in relation to the general funds. Clause 222 of the Constitution provides information on the role of the Board.²⁸ The Court noted that Clause 222(b) appeared to be in response to the concerns raised by the Charities Commission, and the Clause confirms that surplus assets and income of the Grand Lodge must be deployed in favour of charitable purposes. However, what is relevant is that the funds deployed in favour of charitable purposes will only be deployed when the costs of the operations have been taken into consideration, thus “after the necessary expenditure in running freemasonry has been incurred, the balance will be expended only on charity.”²⁹

At first sight, such a method of administration by the Grand Lodge appears a logical way of managing funds. However, the law on charitable purpose is clear, and therefore the issue for the Court was whether the expenditure of the Grand Lodge in order to govern and administer freemasonry caused the Grand Lodge to fall outside the law of charity.³⁰

I concur with Justice France's view that the commitment by the Grand Lodge to gift unspent funds to charity should not be trivialised. The Grand Lodge funds scholarships and University Chairs. Nonetheless, the Court must establish whether the money that is spent on administering freemasonry is being expended for charitable purpose or whether such expenditure is ancillary to a charitable purpose.³¹

²⁴ Charities Commission *Registration Decision* above n 19 at [32].

²⁵ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [16].

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid* at [17] – [19].

²⁹ *Ibid* at [20].

³⁰ *Ibid* at [21].

³¹ *Ibid* at [23].

However, it is also important to recognise that s 5(3) Charities Act 2005 does not preclude an organisation achieving charitable status merely because it engages in non-charitable activities such as fundraising or sponsorship, so long as those activities are ancillary to a charitable purpose. This is a “limited exception on the requirement that the purposes be exclusively charitable.”³² The Grand Lodge therefore submitted that such activities, including training of members and expenditure on buildings and ceremony were ancillary to the purposes of freemasonry. The Grand Lodge made perhaps a rather surprising submission where they sought to differentiate their activities from those of the Craft Lodges. The Grand Lodge submitted that the promotion and advancement of the virtues set out in Antient charges were undertaken by each individual member of the Craft Lodges and thus were not the responsibility of the Grand Lodge. However I concur fully with the view set out by Judge France on this matter. It is inconsistent that on the one hand the Grand Lodge claims its overall charitable purpose comes from its relationship to freemasonry, and on the other, it seeks to differentiate itself from the day to day activities of its individual members. For the Grand Lodge to be able to establish charitable status, all its purposes for which the money and property is held must be charitable.³³ Attempting to distinguish the Grand Lodge from its Craft Lodges is to ignore its actual relationship with freemasonry and suggests an element of disingenuity.

The Court considered in some detail the issue of ancillary endeavours and thus the activities of the Grand Lodge that the Grand Lodge purported to be ancillary to its charitable purposes. It was not unreasonable for the Court to note that a number of the Grand Lodge's activities were not charitable, including organising meetings, setting the rules for the Craft, publishing rulings, organising training and seminars and making loans to its members for building works.³⁴ However, as noted earlier, having ancillary activities will not automatically be fatal to charitable status³⁵ so long as those activities are incidental or subordinate to the charitable purpose of the organisation.³⁶

The Court acknowledged that there is actually little authority as to what constitutes an ancillary activity³⁷ although *Re Education New Zealand Trust*³⁸ provided some quantitative measure where Dobson J cast doubt on whether an activity that constituted 30% of the Trust's activities could really be said to be ancillary.³⁹ Utilising this quantitative approach, France J noted that although the Grand Lodge had not actually provided information as to what proportion of expenditure is spent on general funds, it is quite possible that this expenditure could amount to 100% on general funds. On that basis, the Court in the instant case could not accept that the Grand Lodge's activities amount to ancillary purposes.⁴⁰ The case of *Re Education New Zealand Trust* and the instant case provide some much needed clarity surrounding the issue of what may amount to ancillary purposes as a quantitative

³² Ibid at [24].

³³ Ibid at [42] – [44].

³⁴ Ibid at [47].

³⁵ s 5(3) Charities Act 2005.

³⁶ Ibid at s 5(4).

³⁷ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [49].

³⁸ *Re Education New Zealand Trust* HC Wellington CIV 2009-485-2301 29 July 2010.

³⁹ Ibid at [43].

⁴⁰ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [49].

measure, however Justice France in the instant case went further and addressed the matter of ancillary purpose under a qualitative assessment.

The Court noted that the functions of the Grand Lodge are integral purposes of freemasonry. For instance: providing training seminars that focus on teaching the principles on which freemasonry is based, and improving communication and public speaking capabilities of the members are integral to freemasonry's charitable endeavours. Therefore the "reality is that these functions and purposes are why the Grand Lodge exists at all."⁴¹ So the Grand Lodge fails equally to meet the qualitative assessment of ancillary as much it failed to meet the quantitative assessment. Whilst his Honour could find nothing that would satisfy him that the non-charitable activities of the Grand Lodge would meet the ancillary test, such a finding should not be considered as undermining the activities of the Grand Lodge, which are clearly laudable and beneficial to the community. However, as rightly noted by his Honour, not all benefits to the community are charitable,⁴² and the instant case provides certainty on that matter and firmly entrenches that long standing notion.

As a further consideration, France J considered whether the general purposes and principles of freemasonry would fall under the fourth head of charity. There is little to suggest, prima facie, that the Grand Lodge would not present a compelling case. Indeed, his Honour referred⁴³ to the case of *United Grand Lodge of Ancient Free and Accepted Masons for Holborn Borough Council*⁴⁴ where the Court identified the purposes of freemasonry as to:⁴⁵

promote and advance those virtues which ever mason is charged to cultivate: good citizen, honest work, morality and wisdom, brotherly love, compassion, charity to the poor and belief in a supreme architect of heaven and earth.

There is nothing within this charge to freemasons that would necessarily exclude it, at first sight, from falling under the fourth head of charitable purpose. However, in order to meet the test of any other purpose beneficial to the community that purpose must provide a public benefit. Freemasonry exists as "an organisation of men who adopt the fundamental principle of integrity, goodwill and charity as the foundations for an individual's life and character [and is] a non-profit organisation that is heavily involved in supporting charity and community service."⁴⁶ This suggests that freemasonry, although strongly linked to charity, is not in itself charitable because it exists primarily for its members and their self improvement. This view finds support in the instant case as Justice France confirms that whilst self improvement of members is laudable and will have some public benefit, such a benefit is too remote to qualify it as charitable.⁴⁷ However, "the issue of public benefit" is often difficult to resolve."⁴⁸ Case law suggests an overly restrictive approach as to what

⁴¹ Ibid at [52].

⁴² Ibid at [55].

⁴³ Ibid at [57].

⁴⁴ Above n 3.

⁴⁵ Ibid at 1089.

⁴⁶ "What is Freemasonry" above n 1.

⁴⁷ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above 5, at [60].

⁴⁸ *Travis Trust v Charities Commission* HC Wellington CIV 2008-485-1689 3 December 2008 citing *Strathalbyn Show Jumping Club Inc v Mayes* (2001) SAS 73. Bleby J.

constitutes adequate public benefit that is “not always open to sound reason.”⁴⁹ Justice Bleby noted that:⁵⁰

Courts have tended not to recognise public benefit where benefits were conferred upon a group related to or employed by one or a group of persons, perhaps as representing a private privileged and closed group to which one is admitted either by birth, employment or some other privilege. On the other hand, there is an acknowledged public benefit where the beneficiaries consist of a relatively small group suffering a disability of some kind over which they have no control and which might equally be brought about by an accident of birth.

So in some cases the trust may confer tangible benefits on those in the relevant group, or that benefit may be more indirect, such as the provision of community facilities, and although that benefit may be elusive it “is a quality often plainly recognised when it exists.”⁵¹ In the case of *Strathalbyn Show Jumping Club* the class of beneficiaries upon whom the benefit was conferred was a group of individuals with a common interest in the sport of polo and who had been awarded membership approved by the controlling body of the organisation. Although even if there were less stringent restrictions on membership, His Honour doubted whether the class of beneficiaries would actually meet the test of public benefit.⁵² Similarly in the case of *Travis Trust*, which concerned a trust for the benefit of the Cambridge Jockey Club’s race program, Justice Williams noted that:⁵³

The jockey club has 350 members. Membership is not open to the public generally upon payment of a subscription or similar. Instead members must be elected after being proposed and seconded in writing by two members of the club. It is very much a private club similar in format to those considered in the *Strathalbyn* case. I hold that the Cambridge Jockey Club is not the community or a sufficient section of it to amount to “the public” in accordance with that requirement.

Returning to the matter of the Grand Lodge and the test of public benefit, Justice France does not deviate from this strict approach. His Honour refers to the actual matter of membership of freemasonry and construes that it too imposes too great a limitation on the public benefit factor. Membership is limited to men aged over 21 of good character who have been invited to join by a Master Mason, and who have not had three black balls appear against him in a ballot.⁵⁴ France J noted that this imposes a lack of public access, however, I would respectfully submit that the actual number of freemasons in New Zealand suggests that the very opposite may be true. In New Zealand there are over 10,000 freemasons,⁵⁵ which implies that the actual access is open to a substantial group of individuals. Nonetheless in the instant case perhaps the question of public benefit really turns on the fact that freemasonry exists first and foremost for the betterment of its members, and whilst laudable, does not qualify it is a charitable. Perhaps then it is unsurprising that His

⁴⁹ *Strathalbyn Show Jumping Club Inc v Mayes* (2001) SAS 73 at [97].

⁵⁰ *Ibid* at [96].

⁵¹ *Ibid* at [97].

⁵² *Ibid* at [109].

⁵³ *Travis Trust v Charities Commission* above n 48 at [58].

⁵⁴ *The Book of Constitution of the Grand Lodge of Antient Free and Accepted Masosns of New Zealand* (26th ed, Grand Lodge Wellington,2000)at [52]-[56].

⁵⁵ “What is Freemasonry” above n 1.

Honour agreed with the decision of the Charities Commission and declined the application of the Grand Lodge on these grounds.

In relation to the first limb of the appellant's submission, it was argued that because the Grand Lodge had held charitable status for more than 50 years, it was not open to the Charities Commission to come to a different decision.⁵⁶ The Charities Act 2005 transferred the decision making function of charitable status from the Commissioner of Inland Revenue to the Charities Commission. Any applicable tax exemption will only apply to an organisation's charitable activities if that organisation is registered as charitable by the Charities Commission.

The Grand Lodge submitted that the substantive law had not changed thus imposing a limit on the decision-making power of the new decision maker and as such the new decision maker should be limited in their ability to reach a different conclusion from the original body. Justice France interpreted this as meaning that there is either an absolute block on the capacity of the Charities Commission to reach an alternative decision from the Commissioner of Inland Revenue, or that the Charities Commission must consider previous charitable status as a predominant factor when assessing an application.⁵⁷

His Honour gives due consideration to these submissions. The Commissioner of Inland Revenue was tasked with granting tax exemption since 1933 however no reasoning was given for any decisions, therefore it would be difficult for the Charities Commission to give weight to an earlier decision where there was no evidence or discourse for that decision.⁵⁸ France J is quite unambiguous in his assessment: [t]he reality is that there now exists a new regime⁵⁹ and as such with contemporary regimes comes the possibility of contemporary decisions. However, such decisions are not at the expense of that which is prescribed by law. The test for charitable status has not changed, merely the procedure for applying that change, and that procedure provides transparency and is subject to scrutiny.⁶⁰ His Honour goes further, noting that if the status quo was intended to be preserved then the Charities Act 2005 would have been explicit in this matter because "it is inconceivable that Parliament intended existing charitable status to be protected from reassessment, yet did not say so."⁶¹ It is true that s13 of the Charities Act does preserve the temporary effect of some of the previous binding rulings made by the Commissioner of Inland Revenue but that is the limitation of the protection of the status quo thus the Grand Lodge's submission is not included in this explicit protection.

In addressing this matter, Justice France provides an explicit addressal of the role of the Charities Commission in New Zealand in relation its predecessor and firmly quashes any considerations that the Charities Commission may have been acting ultra vires or that it is bound by previous decisions. There can be no doubt therefore that his Honour was correct in finding the proposition by the Grand Lodge that the Charities Commission was bound to

⁵⁶ *Re The Grand Lodge of Antient Free and Accepted Masons in New Zealand* above n 5 at [6].

⁵⁷ *Ibid* at [63]-[64].

⁵⁸ *Ibid* at [66].

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *Ibid* at [67].

give effect to the existing charitable status quite untenable because “legislation does not say that, and its scheme and purpose suggests the opposite.”⁶²

This case provides further judicial examination of freemasonry and charitable status, adding to the growing list of jurisprudence in this area, and whilst that is to be welcomed, the decision is not without contention. Freemasonry's commitment to charity is unquestionable and it achieves these charitable objectives in numerous ways that are for the benefit of a large section of the community, however in considering the charitable status of the Grand Lodge, it is clear that the purposes of that body are not inherently charitable for the purposes of the Charities Act 2005. Nonetheless, I would respectfully question His Honour's view that freemasonry generally does not “benefit the public other than indirectly and intangibly by seeking to produce members who are better citizens.” His Honour did consider briefly the general purposes and principles of freemasonry but concluded that it is too insular as an organisation and that its membership is too restrictive. On the latter point, I submit that that test may be subject to scrutiny as considered earlier in the article and as a result the cases of *Travis Trust* and *Stathalbyn* on the matter of restrictive membership may be distinguished. It is perhaps unfortunate however that the Grand Lodge provided such limited information with respect to the activities of the Grand Lodge, the practise of freemasonry and expenditure of funds within the Grand Lodge. If such information had been provided, it is likely that his Honour would have been able to provide a more full addressal of these matters in relation to charitable purpose. Nonetheless there is the opportunity yet for further applications to be made with regard to the Fund of Benevolence and the general funds. I shall await those applications and the resulting decisions with interest although the test for public benefit will undoubtedly be construed just as narrowly and applied equally stringently.