

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 2/2005  
[2005] NZSC 21**

BETWEEN

JAROD PETER HESTER, PAUL  
COWARD, IAN SIDNEY ARDERN,  
RENWICK KALEI DECAIRES, DAVID  
THOMAS LEONARD WALMSLEY AND  
DAVID TE MAO ONEKAWA  
Applicants

AND

THE COMMISSIONER OF INLAND  
REVENUE  
Respondent

Hearing: 21 April 2005

Court: Elias CJ  
Tipping J

Counsel: W Akel for Applicants  
B A Corbett for Respondent

Judgment: 3 May 2005

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**JUDGMENT OF THE COURT**

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- A. The application for leave to appeal is dismissed.**
- B. Costs to the respondents of \$2,500 plus all appropriate disbursements to be fixed if necessary by the Registrar.**

**REASONS**

(Given by Elias CJ)

[1] The applicants are trustees of the Church of Jesus Christ of Latter Day-Saints Deseret Benefit Plan for New Zealand. The Plan provides retirement income for employees of the Church through a defined benefit and contributory superannuation

scheme. They claimed in the High Court that the income of the plan for 2001 was exempt from income tax on the grounds that the plan is a “trust for charitable purposes”. That characterisation was challenged by the Commissioner of Inland Revenue. The Commissioner’s contentions were upheld by O’Regan J in the High Court<sup>1</sup> and by the Court of Appeal.<sup>2</sup> The trustees now apply for leave to appeal to this Court.

[2] The test to be applied for determining whether the income from the plan was held by the trustees “for charitable purposes”, as required for exemption by s CB(4)(1)(c) of the Income Tax Act 1994 was considered in *Presbyterian Church of New Zealand Beneficiary Fund v Commissioner of Inland Revenue*.<sup>3</sup> In that case Heron J held that a superannuation scheme for Presbyterian Ministers was a trust for charitable purposes. Similarly in *Baptist Union of Ireland (Northern) Corporation Ltd v Commissioners of Inland Revenue*<sup>4</sup> MacDermott J had held that a fund which had the object of providing annuities for members of the Baptist Union of Ireland and their widows and orphans was a fund for charitable purposes.

[3] Although the Court of Appeal judgments expressed some doubt about the correctness of the *Presbyterian Church Fund case*, all Judges were content to apply it to the facts of the present case. On the facts, the Court of Appeal agreed with the reasons given by O’Regan J in the High Court that the wide scope of the beneficiaries who were the objects of the fund, exceeded any charitable purposes. The beneficiaries of the fund include all “members” who contribute to the Plan and who are “employees.” “Employees” are:

Any person who is engaged to work or works under a contract of service or apprenticeship with a Participating Employer whether by way of manual labour, clerical or professional work or otherwise and in respect of whom the Participating Employer in its sole discretion deems to be in its full-time and permanent employment.

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<sup>1</sup> (2004) 21 NZTC 18,421.

<sup>2</sup> (2005) 22 NZTC 19,007.

<sup>3</sup> [1994] 3 NZLR 363.

<sup>4</sup> (1945) 26 TC 335.

[4] “Participating employers” are defined to mean the trust board, the church college and any “associated employer” admitted to participation in the Plan. An “associated employer” is defined as:

Any employer which is or becomes directly or indirectly associated in business with or which is or becomes directly or indirectly controlled by the trust board or the church college or such other employer or body as the trust board or the church college may decide.

[5] The parties were in agreement as to the legal principles to be applied in ascertaining whether the purpose of the fund was charitable. There is no basis in the judgments for any suggestion that promoting the objects of the Church of Latter-Day Saints would not be for the advancement of religion. We do not accept the submission made by Mr Akel that ss 15 and 19 of the New Zealand Bill of Rights Act 1990 were engaged in such circumstances. Rather, in concurrent findings of fact in the cases below it has been held that the scope of the trust was so broad that, whether or not some members of the fund would have fallen within the *Presbyterian Church* principles, some clearly did not.

[6] If it cannot be said with certainty that the fund must be applied to charitable purposes, it is not charitable (see *Latimer v Commissioner of Inland Revenue*).<sup>5</sup> The courts below had before them extensive evidence of the range of employees who were potential beneficiaries of the trust. It was well open to them to conclude that the fund was not for religious purposes alone. We consider that the same conclusion could be drawn from the scope of the provisions of the trust deed set out above. Under s 13 of the Supreme Court Act 2003, leave cannot be given to appeal unless the court is satisfied that it is “necessary in the interests of justice for the Court to hear and determine the proposed appeal.” We do not accept that the proposed appeal raises any matter of general or public importance. On any view the case turned on a matter of fact upon which there are concurrent findings in the courts below. It does not raise any point of general importance.

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<sup>5</sup> [2004] 3 NZLR 157 (PC) at 169.

[7] For these reasons the application is declined. The respondent is entitled to costs which are set at \$2,500 together with disbursements to be fixed if necessary by the Registrar.

Solicitors:  
Simpson Grierson, Auckland for Applicants  
Crown Law Office, Wellington for Respondent