IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2001-485-928

IN THE MATTER OF	an application pursuant to the Declaratory Judgments Act 1908
BETWEEN	THE WELLINGTON REGIONAL, STADIUM TRUST Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
AND	THE COMMISSIONER OF INLAND REVENUE Second Defendant

Hearing: 8 and 9 June 2004

Appearances: L McKay and S M O'Sullivan for plaintiff
A Beck and K Whitiskie for second defendant

Judgment: 12 July 2004

JUDGMENT OF MACKENZIE J

Introduction

[1] This is an application under the Declaratory Judgments Act, seeking a declaration as to the status of the plaintiff, a charitable trust which operates the Welington Stadium. The essential issue is whether or not the plaintiff is a "council-controlled trading organisation" under the Local Government Act 2002. The plaintiff seeks a declaration that it is not. The second defendant seeks a declaration that it is. The first defendant has not taken an active part in the proceedings.

[2] The plaintiff says that this issue is of significance for two reasons, in that, if it is held to be a council-controlled trading organisation, the following consequences will follow:

(a) s 63 of the Local Government Act 2002 will apply to loans which have been made by the Wellington Regional Council and the Wellington City Council to the plaintiff and

(b) the plaintiffs status as a charitable trust eligible for the income tax exemptions contained in s CB(4) of the Income Tax Act 1994 will be lost.

Facts

[3] Evidence was given by affidavit. Three affidavits were filed by the plaintiff:

(a) Ms F H Wilde, who was Mayor of Wellington between 1992 and 1995 and was previously the chair of both the Wellington Stadium Development Trust and the Wellington Regional Stadium Trust and is currently patron of the Wellington Regional Stadium Trust;

(b) Mr D M Gray, Chief Executive of the plaintiff and previously Chief Executive of its predecessor, the Wellington Stadium Development Trust;

(c) Mr J R Eaton, chartered accountant.

For the defendant, an affidavit from Mr M J Lazelle, chartered accountant, was filed. Ms Wilde, Mr Gray and Mr Lazelle were cross-examined on their affidavits.

[4] I outline briefly the essential facts, which are to a large extent uncontested. It is necessary to examine some aspects of the facts in more detail, particularly where there is a contest over them, but it is convenient to defer that to the discussion on the legal issues.

[5] The need for a new sports stadium in the Wellington region was identified and the Wellington Regional Council ("WRC") arranged a meeting in August 1993. Following that, various preliminary studies were undertaken, investigating several

possible sites. In September 1994 the Wellington Regional Stadium Trust steering group was established, at the initiative of the Wellington City Council ("WCC"), to lead the project for its preferred site, the Wellington railyards. In November 1995, the Wellington Regional Stadium Development Trust ((the Development Trust") was established by WCC as the settlor. The members of the steering group became the original trustees of that Trust. Ms Wilde was appointed to the Chair of the Development Trust. The Development Trust obtained a commitment for funding from WCC, of a limited amount, to enable the proposal to be progressed. In August 1995, WRC had confirmedthat it would advance up to $25 million, subject to the passage of special legislation to allow WRC to provide the funding and carry out its associated responsibilities, and to the risks of the project being appropriately managed. Special legislation was promoted, and' a local, Act, the Wellington Regional Council (Stadium Empowering) Act 1996 ("the empowering Act") was passed on 2 September 1996. That Act:

(a) enabled WRC to lend up to $25m to the Trust, on such terms and conditions as WRC thinks fit; and

(b) required WRC, before making any loan, to establish, with WCC, the plaintiff, Wellington Regional Stadium Trust.

[6] The plaintiff was established pursuant to a trust deed in November 1997, and was incorporated under the Charitable Trusts Act 1957 in December 1997. Funding of $40 million, out of a total of $131 million total funding required to build the stadium, was provided by WCC (as to $15 million) and WRC (as to $25 million) by way of subordinated, non-recourse loans. The plaintiff took over the assets, liabilities and obligations of the Development Trust in March 1998. A construction contract was finalised in March 1998, and *the* Stadium was built and completed in December 1999.

[7] In May 1998, the plaintiff received confirmation from the second defendant, the Commissioner of Inland Revenue, that the Commissioner had given approval for charitable and donee status for the purposes of the Income Tax Act 1994 and the Estate and Gift Duties Act 1968. Subsequently, the Commissioner advised, by letter

dated 10 January 2000, that the charitable approval ceased on 31 March 1999, as a result of changes in the Local Government Act, and consequent changes to the Income Tax Act 1994. The plaintiff contests the conclusion that it no longer has charitable status, and, in particular, it contests the claim that it had, by virtue of the changes in the 'legislation, come to fall within the definition of "local authority trading enterprise"("LATE") under the Local GovernmentAct 1974 (the 1974 Act), and, subsequently, the definition of "council-controlled trading organisation"("CCT0") under the Local Government Act 2002 (the 2002 Act). This proceeding results from that disagreement between the plaintiff and the Commissioner.

Issues

[8] The plaintiff makes two principal submissions as to why it does not fall within the provisions of the Local Government legislation. It says:

(a) That the empowering Act represents a statutory code for the plaintiffs establishment, governance, accountability and administration, and that the relevant provisions of the local government legislation do not apply;

(b) Alternatively that, if the local government legislation does apply, then the plaintiff is not within the definition of a CCTO for the purposes of the 2002 Act.

[9] The Commissioner's letter which gave rise to the dispute was written at a time when the 1974 Act was in force, and the proceedings when commenced sought declarations under that Act, Amended pleadings were filed in May 2003 which seek declarations only under the 2002 Act. Accordingly, my consideration of the issues is limited to the 2002 Act. It is, however, necessary to refer to the 1974 Act, and the amendments to it, in dealing with the issues under the 2002 Act.

Whether the plaintiff is a CCTO

[10] I consider it is appropriate to deal with the second issue first. My treatment of this issue proceeds with the following steps:

(a) the relevant provisions in the legislation;

(b) the evidence particularly relevant to the issue;

(c) the meaning of the relevant terms in the legislation;

(d) discussion of the evidence in the light of that meaning;

(e) conclusion.

(a) The *Relevant Legislation*

[11] Legislative provision for the separate incorporation of local authority-operated trading entities was first introduced by Part 34A of the 1974 Act, which came into force on 1 November 1989. That Part was repealed, as from 1 July 2003, by the 2002 Act. Section 594B of the 1974 Act contained a definition of "local authority trading enterprise". That was amended on several occasions. The most relevant amendment, for this proceeding, was made in 1999, with effect from 1 April 1999. At the time of its repeal by the 2002 Act, the definition was as follows:

> **594B Definition of local authority trading enterprise**
>
> (1) In this Part of this Act, the term *local authority trading enterprise*—
>
> **[(a) Means**
>
> (i) A company in which equity securities carrying 50% or more of the voting rights at a meeting of the shareholders of the company are—
>
> (A) Held by 1 or more local authorities; or
>
> (B) Controlled, directly or indirectly, by 1 or more local authorities; or
>
> (ii) An organisation that—
>
> (A) Operates a trading undertaking with the intention or purpose of making a profit; and
>
> (B) Is subject to significant control, directly or indirectly, by 1 or more local authorities; but]
>
> (b) Does not include .... [Several exclusions, not relevant in this case, are set out.]

(2) For the purposes of [[subsection (1)(a)(ii)]],-

organisation means any partnership, trust, arrangement for the sharing of profits, union of interest, co-operation, joint venture, reciprocal concession or other similar arrangement; but does not include a company or a committee or joint committee of a local authority:

significant control means, in relation to an organisation,—

(a) Control of [50] percent or more of the votes at any meeting of the members or controlling body of the organisation; or

(b) The right to appoint [half or more of the] trustees, directors, or managers (howsoever described) of the organisation,—

whether or not jointly with other local authorities or persons.

(3) Where any local authority trading enterprise is not a company,—

(a) References in this Part of this Act to equity securities include, in relation to that enterprise, any form of voting rights in that enterprise; and

(b) References in this Part of this Act to the directors and the directorate include, in relation to that enterprise, trustees, managers, or office holders (howsoever described) of that enterprise.

[12] Those provisions were replaced, as from 1 July 2003, by the 2002 Act. The term "local authority trading enterprise" ("LATE") was replaced by "council-controlled trading organisation" ("CCTO"). The relevant definitions are in s 6 of the 2002 Act:

6 Meaning of council-controlled organisation and council organisation

(1) In this Act, unless the context otherwise requires,—

council-controlled organisation means a council organisation that is—

(a) a company—

(i) in which equity securities carrying 50% or more of the voting rights at a meeting of the shareholders of the company are—

(A) held by 1 or more local authorities; or

(B) controlled, directly or indirectly, by 1 or more local authorities; or

(ii) in which 1 or more local authorities have the *right*, directly or indirectly, to appoint 50% or more of the directors of the company; or

(b) an organisation in respect of which 1 or more local authorities have, whether or not jointly with other local authorities or persons,—

(i) control, directly or indirectly, of 50% or more of the votes at any meeting of the members or controlling body of the organisation; or

(ii) the right, directly or indirectly, to appoint 50% or more of the trustees, directors, or managers (however described) of the organisation

council-controlled trading organisation means a council- controlled organisation that operates a trading undertaking for the purpose of making a profit

council organisation means—

(a) a company

(i) in which equity securities carrying voting rights at a meeting of the shareholders of the company are—

(A) held by 1 or more local authorities; or

(B) controlled directly or indirectly, by 1 or more local authorities; or

(ii) in which 1 or more local authorities have the right, directly or indirectly, to appoint 1 or more of the directors (however described) of the organisation; or

(b) an organisation in respect of which 1 or more local authorities have, whether or not jointly with other local authorities or persons,—

(i) control directly or indirectly, of 1 or more of the votes at any meeting of the members or controlling body of the organisation; or

(ii) the right, directly or indirectly, to appoint 1 or more of the trustees, directors, or managers (however described) of the organisation.

(2) For the purposes of subsection (1), *organisation* means any partnership, trust, arrangement for the sharing of profits, union of interest, co-operation, joint venture, or other similar arrangement; but does not include a company, or a committee or joint committee of a local authority.

(3) If a council organisation is not a company, references in this Act, in relation to the council organisation, to—

(a) equity securities include any form of voting rights in that organisation; and

(b) the directors and the board include trustees, managers, or office holders (however described in that organisation); and

(c) shareholders include any partners, joint venture partners, members, or other persons holding equity securities in relation to that organisation; and

(d) the constitution include any rules or other documents constituting that organisation or governing its activities; and

(e) subsidiaries include any entity that would be a council-controlled organisation if the references to "local authority" or "local authorities" in

subsection (1) read "council-controlled organisation'' or "council-controlled organisations".

(4) The following entities are not council-controlled organisations:

[Several exclusions not relevant in this case, are set out.]

(5) In this section, terms not defined in this Act, but defined in the Companies Act 1993, have the same meaning as in that Act,

[13] It is common ground that the plaintiff is, if the local government legislation applies to it, an "organisation". It is also common ground that the requisite degree of council control exists (in that, under the trust deed, the power of appointment and removal of trustees is vested in the WCC and the WRC, as settlors under the trust deed) so that, if the local government legislation applies, the trust falls within the definition of "council-controlled organisation'' under the 2002 Act.

[14] The sole question therefore is whether the plaintiff operates a trading undertaking for the purpose of making a profit, so as to fall within the definition of "council-controlled trading organisation" under the 2002 Act.

[15] The first issue is whether the plaintiff "operates a trading undertaking". The plaintiff invited this Court to assume that the "trading undertaking" prerequisite is fulfilled with reference to the plaintiffs stadium operations. The plaintiff reserves its position on that issue should this proceeding go further. For that reason, I do not need to consider that question. I proceed on the basis that the plaintiff operates a trading undertaking.

[16] That leaves the question whether the plaintiff operates its trading undertaking "for the purpose of making a profit" under the 2002 Act, The answering of this question involves a consideration both of the evidence as to the formation and operation of the plaintiff and of the meaning of the expression "for the purpose of making a profit'', and a determination whether, on the evidence, the plaintiff falls within that meaning.

(b) *The evidence relevant to this question*

[17] Ms Wilde, in her affidavit, described the motivation behind the proposal to build a stadium in the Wellington region. She said:

> "After my election as Mayor in 1992, I was briefed on a number of issues relating to Wellington City. One of those issues was the need for a new sports stadium of some kind. This need was evident firstly because of the state of the grandstands at Athletic Park' which were verging on being a safety issue and the fact that the ground was in fact owned by the Tenths Trust and leased to the Wellington Rugby Union.
>
> The primary driver for the Stadium was the need to replace Athletic Park. However, at that time the Wellington City Council (WCC) was also developing a strategy around the promotion of tourism and events as a driver for hospitality sector. An important part of this economic development policy was adequate infrastructure for concerts and other events and the proposed Stadium was a key part of this. Obviously Athletic Park, being in the middle of a quiet suburban area, would not have been a suitable location for such a venue. As Mayor, I was closely involved, trying to bring the various parties together to find an appropriate solution."

[18] Ms Wilde described the views formed by the steering group as to the viability of a stadium in these terms

> 24. As the development progressed and we learned more about the economics of stadia development and use, it became very clear to us that stadia generally do not make money. They are not profit generating businesses. In most other countries they are, in fact, built and funded by either local, regional or central government. There was evidence that the initial capital was commonly treated as an establishment cost and, even then, in many cases they appeared to have an ongoing business model that was not very profitable. So, even as a going concern, apart from the cost of capital, we were being told that a stadium was not very easy to run and to keep its head above water.

[19] She went on to note that the steering group's consultants had made observations regarding the economic benefits to the broader community which could be seen from international experience. She described the views of the steering group in these terms:

> 25A .... In our case, what a stadium would provide for the community was:

- A multi-purpose sporting and cultural venue for the region so that sporting and cultural events of an international quality could take place.
- The flow on economic benefit to the region as a whole, identified by BERL in creating wealth and jobs for the region.

[20] Ms Wilde also described the reasons for the adoption of the governance structure which was chosen, namely a charitable trust established by a trust deed. She said:

> 26 The recommendation to use a charitable trust was made after a considerable amount of legal advice had been obtained. It was considered by both the legal advisors and the business people on the Steering Group to be the most effective structure for the following reasons:
>
> - It ensured that the ultimate ownership remained with the community and that the asset would have to be maintained permanently for charitable purposes beneficial to the community.
> - It was appropriate for a business that was not set up for profit-making purposes.
> - It provided a suitable structure for the two Councils to fund
> - It was tax effective.

[21] As to the financial structure of the plaintiff, Ms Wilde said in cross-examination that the idea was that it would have to be viable operationally; what they didn't want was a stadium that after three or four years would suddenly collapse financially and then would require another large injection of money from the Councils to keep it going.

[22] The objects for which the trust was established are set out in the trust deed. These are:

> 3.0 Objects of the Trust
>
> 3.1 The objects for which the Trust is established and its responsibilities and additional functions are:
>
> (a) To be responsible for the planning, development, construction, ownership, operation and maintenance of the Stadium as a high quality multi purpose sporting and cultural venue;

(b) To provide at the Stadium high quaiity facilities for use by rugby, cricket and other sports codes, musical, cultural and other users including sponsors, event and fixture organisers and promoters, so asto attract to the Stadium high quality and popular events for the benefit of the public of the Region;

(c) To administer the Stadium, and the Trust Assets on a prudent commercial basis so that it is a successful, financiaIly autonomous community asset;

(d) Generally to do all acts, matters and things that the Trustees consider necessary or conducive to further or attain the objects of the Trust set out above for the benefit of the public of the Region including the acquisition of any land or interest in land or other assets as an ancillary ground or grounds or additional assets for the Stadium or for other purposes anciIlary to the Stadium and to maintain and operate that venue or those assets to a high standard; and

(e) Subject to the fulfilment of the objects and responsibilities set out in sub clauses 3.1(a) to (d) inclusive, to govern and manage the Stadium and Trust Assets so as to repay all debt of the Trust (including to the Settlors) as soon as is reasonably practicable.

[23] Mr Gray in his evidence described the plaintiff's funding. The total cost of the stadium was approximately $131 million. A total of $133m was funded as follows:

(a) $40 million was provided by non-recourse loans from WCC and WRC, as I have described. Those advances were made under the terms of a funding deed dated 30 January 1998. They were made as a loan, which was interest-free and unsecured, and WCC and WRC have limited rights of recourse to claim repayment. They are to be repaid only from surplus funds, which term is defined in the funding deed as follows:

"Surplus finds" means in respect of the Trust and any controlled entity of the Trust the difference in each Financial year between:

- the sum of all income of any nature, gifts, donations, legacies and grants, funds received on the disposal of any asset, and any funds of a capital nature including by way of loan, received by the Trust, and including the release of any provision or reserves to the general purposes of the Trust, and
- the sum of all costs, expenses, taxes or charges of any nature, any appropriate provisions or reserves to meet liabilities and maintenance of the Trust Assets, any appropriate reserve to provide for capital works to

> replace or improve Trust Assets, appropriate capital expenditure in furtherance of the Trust's objects and any debt reduction, including any periodic repayment of Councils loan made during the Financial Year (other than Surplus funds repaid from any prior financial period).

(b) $53 million was provided by the sale of corporate boxes, memberships, naming rights, and signage, and from sponsorship.

(c) $7 million was obtained from grants from the Lotteries Grant Board and the Community Trust of Wellington totalling.

(d) $33 million was borrowed from ANZ Bank.

[24] Mr Gray deposed that the stadium could not operate at a profit in a conventional, private-enterprise model sense. He noted that other stadiums in New Zealand and Australia had encountered financial difficulties. As to the object set out in clause 3.1(c) of the trust deed, namely the administration of the stadium on a prudent commercial basis so that it is a successful financially autonomous, community asset, Mr Gray said:

> 59. The third object of the WRST was to administer the Stadium and its assets on a prudent commercial basis so that it is a successful, financially autonomous community asset. I understand that to mean in the first instance that we were to operate the Stadium in a manner that allowed us to meet our financial commitments to our financiers. Further, that we were to ensure that the Stadium operated in a manner that would mean that it would not be necessary to return to our stakeholders for further financial assistance, The WRC required specific empowering legislation to provide any assistance and this heightened the WCC's concerns that it might be a lender of last resort. In addition, we must maintain the Stadium to international standards and meets worlds best practice.

[25] Mr Gray described the nature of the events which the stadium holds. He said that there are a lot of events which are not driven by a desire to generate revenue, but rather.to ensure that the maximum number are getting a benefit from the stadium as a community asset. In cross-examination, he was asked how the stadium would resolve a conflict between a high paying event and a community event. He said that it would depend on the event, but that they have never faced that situation where they have not been able to resolve it.

[26] Mr Gray said that the plaintiff employs 13 full time staff, with four senior managers reporting to him. Several functions such as catering, cleaning and security are contracted out, on commercial terms In cross-examination, he agreed that his role as chief executive was comparable with that role in a medium-sized company, with the difference that the two major stakeholders are both local bodies, which introduces an element into management which he had not experienced before this.

[27] Mr Gray agreed in cross-examination that one of the plaintiffs aims is to operate at a profit, but said that it has to bear in mind the objectives under the trust deed of hosting a variety of events across a range of sporting and non-sporting activities, and community events. He said that,the stadium has generated an operating surplus in every year, but that, to service the interest and principal repayment requirements of the loan, the stadium has to generate a surplus in the region of $2 million per annum, that it has not *done* so, and it is doubtful if it will do so in the next three years. Mr Gray deposed that the terms of that loan were negotiated in January 1999, but were changed during the course of the financial year ended 30 June 2002 because neither term loan repayments nor the banking covenants could be met. No payment was required in the financialyear ending 30 June 2002, and payments required for subsequent years are now as follows:

30 June 2003 $1M

30 June 2004 $1.5M

30 June 2005 $1.5M

30 June 2006 $1.5M

30 June 2007 $6M and renegotiation of the terms relating to the balance

[28] Mr Lazelle expressed the opinion that the plaintiff is operating a trading undertaking and operates the stadium facility with a purpose of making a profit. He noted that the annual reports indicate that the trust has invested $124 million in facilities specifically designed for the provision of sports and entertainment events. The stadium's customers pay to attend and in the year to June 2001 the facility produced revenue from events of *$6* million, and since the facility's opening 1.1million people have attended events. The trust's operations also involved significant operating expenses. He said that the events at the stadium are clearly

fundamental to its existence and operation and in his opinion the scope and intensity of operations clearly indicate that the trust is operating a trading undertaking. He further expressed an opinion that the trust operates with the purpose of making a profit. He reached that conclusion having taken account of the objects of the trust, its financial structure, annual reports, management structure and business plan. He noted that the terms of the ANZ Bank loan would be regarded as normal commercial terms. He noted that in order to be financially autonomous and to repay debt the trust must make significant profits. The ANZ Bank loan requires repayments increasing on an annual basis from $1.5 million in 2002 to $6 million in 2007. He noted that in the year to June 2001, after its first successful full year, the plaintiff produced a cash surplus from operations of $1.7 million on revenues of approximately $10 million. He noted that significant profits will be required to meet the ANZ repayment requirements and that operational priority will have to be given to increasing revenues and controlling costs.

[29] Mr Lazelle gave some analysis of the plaintiffs trading position. The stadium was completed in December 1999. In the year ended 30 June 2000, the plaintiff had operating revenues of $8.56 million, and a net operating surplus of $1.7 million. In the year ended June 2001, the first full year of operations, total revenues were $12.92, and the surplus was $0.82 million. Mr Lazelle noted that the 2000 business plan includes forecasts for the five year period to 2004/5. These forecasts project revenues and surpluses as follows:

	2000/1	2001/2	2000/3	2003/4	2004/5
	$m	$m	$m	$m	$m
Revenues	12.82	12.66	13.51	13.84	13.24
Surplus	1.57	1.61	2.29	3.01	2.40

(c) *The meaning of the relevant terms in the legislation*

[30] I consider the meaning of the expression "for the purpose of making a profit". There are two key words, "purpose" and "profit". Mr McKay submits that the leading New Zealand decision on the meaning of the word "purpose" is that of Barrowclough CJ in *Plimmer v Commissioner of Inland Revenue* [1958] NZLR 147.

In that case, the taxpayer was one of a group of persons who wished to acquire all the ordinary shares in a company. The holder of the ordinary shares also held a number of preference shares. The group was not interested in the preference shares and did not wish to purchase them. The holder of the ordinary shares, however, would not sell unless the group *also* purchased the preference shares. Accordingly,' with reluctance and only because the ordinary shares could not be purchased without purchasing also the preference shares, the group purchased the whole of the shares both preference and ordinary. The group had sufficient ready monies to pay for the ordinary shares but required temporary accommodation *to* pay for the preference shares. They arranged that accommodation on the basis that it was their intention to sell all the preference shares as soon as possible. The issue before the Court was whether the preference shares had been acquired for the purpose of selling them. Barrowclough CJ held that the preference shares were not acquired for the purpose *of sale,* As to the meaning of the term "purpose", he said, at p 151:

> A man's purpose is usually, and more naturally, understood as the object which he has in view or *in* mind. One can scarcely have a purpose of selling without having also an intention of selling, but, in ordinary language, "purpose." connotes something added to "intention", and the two words are not ordinarily regarded as synonymous. Though "purpose" may sometimes mean "intention", the Court should hesitate *to* adopt that more restricted meaning unless the statute clearly evidences such an intention.

[31] He held in that case that the sale of the shares was not the object which the taxpayer had in mind. He did not buy the preference shares for the purpose or *with* the object of selling them but solely because he could not acquire the ordinary shares unless he undertook contemporaneouslyto acquire *the* preference shares.

[32] That decision was referred to by the Court of Appeal in *Commissioner of Inland Revenue v Walker* [1963] NZLR 339. There, the taxpayer bought a block of land with the intention of adding it to other adjoining farm land owned by him. and making one economic unit. Part of the land purchased was subdivisible. At the *time* of purchase the taxpayer intendedto carry out such a subdivision and that intention was duly carried out. The Court of Appeal (North and Turner JJ, Gresson P dissenting) held that in the circumstances it was the dominant purpose of the taxpayer in buying the whole property which mattered, His purpose in buying the whole block was to enlarge the area of his farm and his intention to subdivide part of

the area was but a necessary incident or step in the fulfilment of his real or dominant purpose. North J and Turner J both referred with approval to the decision in *Plimmer*. North J expressly agreed with the conclusion that, in the context, "the word 'purpose' is not to be regarded as merely the equivalent of 'intention'". Turner J said that "The distinction, though fine, is a red one". Gresson P, dissenting, did not refer to *Plimmer*. He held that it was the dominant purpose of the taxpayer in purchasing the subdivisible part of the land (as opposed to the whole of the land) which was relevant.

[33] The distinction between intention and purpose was also recognised by the Court of Appeal in **Commissioner of** *Inland* **Revenue v** *National* **Distributors Ltd** *[1989]* 3 NZLR 661, Richardson J said at *666:*

> It is well settled that the *test* of purpose *is* subjective requiring consideration of the state of mind of *the* purchaser as at the time of acquisition of the property. Where the taxpayer is a company it is the collective purpose in the minds of *those* in control of those decisions of the company which is determinative. Where there is more *than* one purpose present taxability *turns* on whether the dominant purpose was one of sale or other disposition ...

He went on *to* say at 666-667:

> In some factual situations it may be necessary to draw a careful distinction between motives and intentions and purposes, *even* though the ideas conveyed by the respective words merge into each other without a clear line of differentiation...

Doogue J, in a dissenting judgment said, referring to *Plimmer,* at 675:

> In that case the Chief Justice refused., in my view rightly, to read the word "purpose" as meaning "intention".

[34] *Mr* Beck, in answer to Mr McKay's submissions in this regard, referred to *the* decisions in ***Commissioner of Inland Revenue v Hunter*** [1970] NZLR 116 and ***Holden v Commissioner of Inland Revenue*** [1974] 2 NZLR 52 *(PC).* Both of those cases date from the days of exchange control. In both cases, taxpayers had sterling funds in England, which they wished *to* remit to New Zealand. To obtain a more favourable exchange rate than was obtainable at the official rate, the taxpayers purchased *UK* securities with the sterling, and immediately re-sold the securities for New Zealand currency. The sale price exceeded the purchase price, and the Commissioner sought to levy tax on *the* difference, In each case, it was argued that

the taxpayer, *in* purchasing the English securities, had the purpose of converting the sterling funds into New Zealand currency, and that the stock had accordingly not been purchased for the **purpose of** selling it. In each case, that 'argument was rejected. In *Hunter,* North P drew *a* distinction between immediate purpose and ultimate object. He said at 121:

> But on the plain reading of the section we are only concerned with whether the facts establish that the conversion stock was acquired for the purpose of selling. Her ultimate object it is true was to transfer her English funds to New Zealand but her purpose in acquiring the English stock was to sell it immediately and in the circumstances of the present case we are not called upon to determine the more complicated questions that arise in such cases as *Commissioner of Inland Revenue v, Walker* (supra). I am accordingly of opinion that *Mr* Richardson's first submission should be accepted.

McCarthy J said at 127:

> In *Commissioner of Inland Revenue v. Walker* [1963 NZLR 339, this Court accepted the principle that where more than one purpose can be perceived, it is the dominant one which is decisive. But it is the dominant purpose of the acquisition of the particular property: the section says "if the property was acquired for the purpose *of* selling *or* otherwise disposing of it". Purpose must, naturally, be distinguished from motive or expectations. In the present case, the long-range aim of the objector was to move her money from London to New Zealand But as I view her actions the dominant purpose of the purchase of the conversion stock was not that.

[35] In *Holden,* that same issue was dealt with by the Privy Council. Lord Wilberforce, in delivering the judgment of their Lordships, said at 54:

> Their Lordships deal first with the second point, and do so briefly since they are in agreement with the Court of Appeal, which on this point was unanimous in these cases and in *Hunter's* case, that the Commissioner's contention is correct. It is clear that the relevant enquiry is for what purpose was the property acquired, and, if there was more than one purpose, what was the dominant purpose (see *Commissioner of Inland Revenue v Walker* [1963]NZLR 339). In the present cases it is not relevant to enquire what was the dominant purpose, since the only purpose for which the securities were bought was that they should, immediately, be sold. The appellants argued that this purpose was only incidental to the widerand more essential purpose, which each taxpayer set out to achieve, namely to remit funds from the United Kingdom to New Zealand but that, in their Lordships' opinion, is irrelevant. There can be only one answer to the question for what purpose the securities were bought, and the fact that the purchase and sale were part of a wider objective cannot affect that answer. *Walker's* case on its facts and ratio decidendi is clearly distinguishable from the present.

[36] I do not consider that those *two* cases are in conflict with the cases to which I was referred by *Mr* McKay. X regard those two cases as consistent with the propositions that:

(a) "purpose'' and "intention" are distinct; and

(b) the purpose must (in the absence of some indication to the contrary) be the dominant purpose.

[37] All *of* those cases deal with the meaning of the term "purpose" in *the* context of income tax, *Another* context in which the word is used is in the Commerce Act, where the purpose of a person in taking certain actions is relevant. In *Union Shipping New Zealand Ltd v Port Nelson Ltd* [1990]2 NZLR 662, McGechan J said at p 707:

> Like so many mental concepts, the reference to "purpose" has its difficulties. The word used is not merely "intention". Intention to do an act, which it is known will have anticompetitive consequences, in itself is not enough. "Purpose" implies object or aim.

[38] It is to be noted in that case that the term "purpose" was *not* confined to the sole purpose, or the dominant purpose, because of the different wording of the legislation.

[39] The term "purpose" is also used in the Goods and Services Tax Act 1985. That Act requires an enquiry as to purpose for a number of reasons, including whether goods or services were acquired for the principal purpose of making taxable supplies. In *Commissioner of Inland Revenue v BNZ Investment Advisory Services Ltd (1994)* 16NZTC [1,11], Doogue Jsaidat 11,115:

> The parties spent some time in their submissions in respect of the meaning of the words "principal purpose". So far as the word "purpose" is concerned, there was no real difference between them in their submissions. They relied upon cases such as *Plimmer* v *CIR* [1958]NZLR 147, *CIR v Hunter* [1970] NZLR 116, *CIR v National Distributors Ltd* [1989]3 NZLR 661, and *CIR v Walker* [1963]NZLR 339. They were agreed that purpose is the object which the taxpayer has in mind or in view. It is not synonymous with intention or motive.

[40] To similar effect in the GST context is this comment of Chisholm J in *Wairakei Court Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,202 at 15,206:

> *Purpose* is a reference to the object that the taxpayer had in mind or in view. This is not synonymous with intention or motive. Moreover, care must be taken to avoid confusing the means by which the taxpayer achieves its purpose with the purpose itself.

[41] It is clear from those authorities that, in most contexts, the term "purpose" is to be distinguished from "intention". consider that that is the case in the context of the legislation with which I am concerned in this case. One of the factors which leads me to that conclusion in the context of this legislation is the difference in wording between the 1974 Act and the 2002 Act. As I have noted, the 1974 Act refers to operating a trading undertaking "with the intention or purpose of making a profit". The 2002 Act refers to operating a trading undertaking "for the purpose of making a profit". There are two significant features of that change in wording:

(a) The omission of the word "intention" in the 2002 Act; and

(b) The change in the preposition, from "with" in the 1974 Act to "for" in the 2002 Act.

[42] On this second point, Barrowclough CJ in *Plimmer* attached importance to the preposition. He said at p 151:

> Furthermore, there is in the wording of the statutory provision which I have to construe a strong indication that the Legislature did not intend the word "purpose" to be read as meaning mere intention only, [43] Mr Irvine contends. If the Legislature meant by the word "purpose" the same thing as "intention" it would surely have said "with the purpose" and not "for the purpose". "With the intention of selling" would have been an apt expression: "for the intention of selling" can scarcely be said to be an elegant or stylish phrase. I see no reason to attribute to the Law Draftsman or to Parliament a conscious intention to employ such an inelegant phrase. If Parliament had intended "purpose" to include, not only the object in view or in mind, but also the intention in mind, it would have been more appropriate to say "with or for the purpose of selling" or still more appropriately and clearly "for the purpose or with the intention of selling".

[43] As to the omission of the word "intention", I consider that the only proper conclusion to draw, is that the omission of that word was deliberate. Thus, the

changed definition in the 2002 Act had the effect of narrowing the test. I do not consider that it would be right to assume *that* the drafter of the 2002 Act regarded the expression "intention or purpose" in *the* 1974 Act as tautologous, and omitted the word "intention" for that reason. The case law which holds that the words intention and "purpose" are not synonymous is strong, and extends across a number of statutes. do not consider that a drafter who wa[redacted] law could have regarded the expression in the 1974 Act as tautologous.

[44] That analysis of the distinction between "intention" and "purpose" raises an issue concerning *Mr* Lazelle's evidence. It is clear from *his* evidence that Mr Lazelle regarded the words "intention" and "purpose" as being synonymous. In an earlier affidavit, he had referred to both intention and purpose. He subsequently filed a second affidavit *in* substantially the same terms, which he had been asked to swear, to effect, as he explained in cross-examination, '(sometidying up of the wording here and there". The second affidavit had been amended to refer to "purpose" rather than "intention and purpose". That change did not mean that he had to make any difference to the wording of the affidavit so far as his conclusions, or the reasons for those conclusions, were concerned. He *agreed* with the suggestion from the Bench that he was using the words "intention" and "purpose" redly as being synonymous.. Furthermore, he stated in cross-examination that he had not, *in* preparing his evidence, been given by counsel *any* definition of the legal concepts of intention or purpose of making a profit. He had not conducted any legal research for himself, and is not legally qualified.

[45] Mr McKay objected to the evidence on the grounds that it addresses the ultimate issue which the Court *is* to determine, and that Mr Lazelle is not qualified as an expert on the issue. Mr McKay did not *go* so far as to object to its admission, but he submitted that it goes *to* the weight that the Court should attach to it. For the reasons I have given, I have derived only limited assistance from Mr Lazelle's opinion.

[46] The next word to be considered is "profit". I *am* deal with that quite shortly, Mr McKay submits that, there being no definition of the word "profit" in the Local Government legislation, it should'be interpreted in the terms *in* which it was

described by Richardson J in *Grieve v Commissioner of Inland Revenue* [1984] 1 NZLR 101 that is, it is a surplus over cost. I note that the word is defined, in the relevant definition in the Shorter Oxford English Dictionary, as "the excess of returns over outlay". I consider that the word has that ordinary meaning in *the* 2002 Act.

[47] Having looked separately at the two key words in the phrase, it is necessary to look at the phrase as a whole. Mr Beck for the Commissioner referred to *the* report of the Internal Affairs and Local Government Select Committee on the *1999* amendments, which inserted thedefinition of **"LATE"** which is set out above. He noted that the Select Committee referred to an analogy between a trading undertaking with the intention or purpose of making a profit, and a business. The Select Committee said:

> From a tax perspective, carrying out "a trading undertaking with the intention or purpose of making a profit" is analogous to running a "business". Whether an activity constitutes a business is a *test* that has been set down by case law. To be considered a business, an activity must exhibit certain characteristics. whether an activity demonstrates *these* characteristics will therefore also determine whether an organisation is carrying out a trading undertaking with the intention *or* purpose *of* making a profit. The test is necessarily flexible *at* the boundaries, and therefore enables some non-commercial organisations to operate incidental fund-raising activities without being considered businesses.

[48] The Select Committee went on to say:

> We are confident that the business test is sufficiently robust *to* distinguish correctly between charitable organisations that make a profit only to reinvest it in the organisation and profit-making trading organisations *that are* not intended to be exempt *from* taxation.

[49] In a similar vein, the then Minister of Local Government, introducing the third reading of the legislation, *said*

> The select committee wad satisfied, after discussing this issue with Inland Revenue Department officials, that the business test to be applied by the department to determine whether an organisation is or is not a business *is* both robust and will enable *a* distinction to be made between organisations that make a profit to reinvest back in themselves in pursuance of the charitable objectives and those whose prime purpose is to make a profit for shareholders.

[50] It is not appropriate to attach too much significance to comments by the *Select* Committee and the Minister, in relation to the 1999 amendments, in interpreting the 2002 Act. However, I consider that the distinction made by the Select Committee and the Minister between charitable organisations that make a profit only to re-invest it in the organisation and profit-making trading organisations is a distinction which is reflected in the words of the definition. I do not consider that a trading undertaking whose profit objective is limited to making sufficient profit to meet the financial commitments of the organisation, so that those profits will necessarily be retained, and which does not have the aim of generating a surplus which will be available to its stakeholders, can be said to have the purpose of making a profit. Thus, I consider that the distinction which the Minister and the Select Committee made does, on this issue, capture *the* essence of the phase.

[51] The Select Committee also said:

> "We *do* not favour *the* adoption of a primary purpose test. To do so would create an addition layer of ambiguity as to the legal definition of a "primary" purpose. Furthermore, truly commercial organisations could restructure .to avoid the "primary" purpose of operating as a business, thereby avoiding tax payments."

[52] The fact that the Select Committee did not favour a primary purpose test may cast some doubt upon whether the case law (particularly ***Walker* and *Hunter)*** to which I have referred, which holds that it is the dominant purpose which is relevant, should be applied in this case. I do not *think* the absence of a reference *to the* primary purpose leads to a different result here from that in the cases to which I have referred. The reference in the 2002 Act is to the purpose, not to a purpose. That indicates that there must be an examination of the facts to ascertain a single purpose. Where there is more than one purpose, I consider that it is the dominant purpose which is relevant.

(d) Discussion

[53] Having considered the meaning which *is* to be attributed both to the two principal words in the phrase "for the purpose of making a profit", and to the phrase

as a whole, I turn to consider the application of that phrase to the evidence in this case.

[54] The Commissioner submits that from its inception and throughout its existence the plaintiff has operated the stadium as a business. I accept that that is so. However I *do* not consider that it is sufficient, to bring *a* trading undertaking within the definition of a CCTO, that the *trading* undertaking has the hallmarks *of* a business. Any trading undertaking could be expected to operate along business lines, and to have the characteristics associated with a business. But not *every* trading undertaking falls within the definition. There must additionally be the purpose *of* making a profit. Not every trading undertaking which operates along business lines necessarily has that purpose.

[55] Nor is it sufficient, to bring the plaintiffwithin the definition, that it makes a profit. I accept, on the evidence, that it *does* so. Ihave referred, in paras **[27]** and **[29]** to the evidence of Mr Gray and Mr Lazelle as to the surplus, and the amounts required for principal repayments. It is clear from that evidence that a *very* large part, if not all, of the projected surpIuses will be required for the purpose of making principal repayments. If those payments are not made, the plaintiff will be in breach of the loan agrement. In my view, the evidence clearly establishes that:

(a) the motives of the promoters of *the* plaintiff were to provide a stadium for the use and benefit of the Wellington region;

(b) the Councils sought to establish the plaintiff in such a way that it would not require further injections of money from them, but the Councils did not expect to obtain a return on the money that they did contribute;

(c) *the* building of the stadium could not be achieved without borrowing money on commercial terms

(d) the terms of the borrowing require principal repayments, which can only be met if there is a profit fromwhich to pay them.

[56] I consider that it is clear that the motives of the settlors, WRC and WCC, in establishing the plaintiff, and promoting the development of the stadium, were not

profit oriented. The $40 million which they contributed by means of non-recourse loans is the equivalent of what, in a normal commercial structure, would be capital. A capital provider who has the purpose of making a profit would expect the enterprise to generate a return on that capital. The "surplus funds" as defined in the funding deed, as set out in paragraph [23] above, excludes from that term many items which in accounting terms would be capital items. Thus, not all "profits", are available for repayment of the Councils' loans. Because the plaintiff is a charitable trust, clauses 5 and 6 of the trust deed confine the application of income and capital to the objects of the trust. Accordingly, no distribution of its profits to the Councils is possible, except to the extent that that is provided for by contract. The only relevant contract is the funding deed. The terms of the loans are such that WRC and WCC will receive no return by way of income. The possibility that they will even receive repayment of the principal is regarded by them as a distant one. It therefore cannot properly be said that the purpose of the promoters of the stadium was to obtain profits.

[57] Nor, in my view, can it properly be said that the purpose of the plaintiff itself, as distinct from the purpose of its promoters, is to obtain profits. In the operation of the stadium, the plaintiff must necessarily make earnings that are within the meaning of the term profit, if it is to be able to meet its principal repayment obligations. However, the need to apply those profits to principal repayment on the bank loan means that there will be no cash surplus available, on the plaintiff's projections, in the forecast future. The profits are a means to an end, namely to enable the stadium to operate as a going concern, not an end in themselves, As Ms Wilde said in cross-examination:

> It needed *to* be run in a businesslike way. It needed to have what I'd call commercial imperatives, but at the same time it was something fundamentally for the community benefit and particularly for the economic benefit of the city and the region

[58] I consider that the evidence establishes that the plaintiff falls within the category of organisations identified by the Select Committee and the Minister in 1999, namely charitable organisations which *make* a profit only to reinvest it in the organisation.

[59] Mr Beck placed some reliance on the fact that Jade Stadium Ltd, a company owned by the Christchurch City Council which operates a stadium, states in its annual report for 2001 that the company is a LATE as defined in s 594B of the 1974 Act. I derive no assistance from that in deciding on the status of the plaintiff. The definition of LATE in the 1974 Act included any company owned by a local authority. The qualification as to the operation of a trading undertaking with the intention or purpose of making a profit applied only to organisations which were not companies; So Jade Stadium Limited was clearly a LATE under the 1974 Act. Under the 2002 Act, the qualification applies to all entities. Whether Jade Stadium Ltd meets that qualification, so as to be is a CCTO under the 2002 Act or not I do not know. I have no information as to its 'operations to be able to make any comparison between it and the plaintiff. In any event, I would not find it useful to undertake a comparison. I am concerned only with the plaintiff, and the conclusion which I have reached is based upon the evidence as to the plaintiff' s structure and operation.

[60] Mr Beck also submitted that policy considerations point to the Conclusion that the plaintiff should be held to be a CCTO, in that, if it is not, it would be exempted from the public accountability processes which regulate such organisations. The plaintiff is subject to the accountability mechanisms contained in the trust deed, as required by the empowering Act. Schedule 2 to that Act requires that the trust deed shall contain such of the provisions of the 1974 Act dealing with community trusts as are appropriate and relevant. Since Parliiament has specifically required accountability provisions modelled on those for a community trust, I do not think the Court should attribute to Parliament an intention that the governance and accountability provisions applying to a CCTO should also apply to the plaintiff.

[61] I am therefore satisfied that the dominant purpose of the plaintiff is not that of making a profit. The dominant purpose, in my view, is the pursuit of the objects in paragraphs (a) and (b) of the objects clause set out in paragraph [22] above. Paragraph (c) is, in my view, more in the nature of an object designed to assist in the achievement of objects (a) and (b) than a principal object in its own right,

(e) *Conclusion*

[62] For these reasons, I hold that the plaintiff does not operate its trading undertaking for the purpose of making a profit. The plaintiff is accordingly not a "council-controlled trading organisation" for the purposes of the Local Government Act 1992.

[63] It follows from that finding that Part 5 of the 2002 Act, and in particular s 63, does not apply. Nor does s CB4(3)(a) of the Income Tax Act 1994 apply to *the* plaintiff,

The effect of *the* empowering Act

[64] The first submission made by the plaintiff *is* that the empowering Act represents a code for the plaintiffs establishment, governance, accountability and administration, and that the provisions of that code conflict in substantial part with *the* LATE provisions in the 1974 Act and the CCTO provisions in the 2002 Act. The plaintiff submits that, in accordance with the doctrine of ***generalia specialibus non derogant,*** the special legislation represented by the empowering Act *is* not to be *taken* as altered or derogated from by the general provisions of the later 2002 Act. On this basis, the plaintiff submits that the 2002 Act has no application to,it.

[65] Because I have reached the view, *on* the facts, that the plaintiff does not fall within *the* definition of "council-controlled trading organisation", it is not necessary for me to consider that question. I consider that it is somewhat unreal in the light of my finding, to consider a question which would arise only if I had reached the opposite conclusion. The plaintiff in effect submits that the question is purely one of statutory interpretation, which can be considered in isolation from the facts. I do not think it appropriate to approach the question in that way. It must be considered in the light *of* the circumstances of the entity which was created *in* accordance with the empowering Act. Whether Parliament is to be presumed to have intended that the empowering Act would override the otherwise applicable provisions in the 2002 Act is *a* hypothetical situation which, on the view I have formed as to the applicability of

the 2002 Act, does not arise. I do not consider that I should attempt to attribute an intention to Parliament, as to the interrelationship between the two pieces of legislation, based on an assumption which is at variance with what I have held to be the correct position. In my view, the plaintiff is not subject to Part 5 of the 2002 Act, not because the empowering Act is to be interpreted as overriding that part, but because the entity established under the empowering Act was established in a way which does not,bring it within the scope of that part. The first issue raised by the plaintiff therefore does not arise.

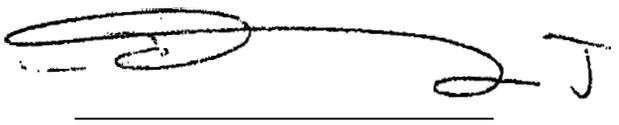
[66] For those reasons, I do not propose to deal with the plaintiff's submissions on this issue. There is, however, one aspect upon which I should comment. *One* of the concerns expressed by the plaintiff, if it was held to be a CCTO, was that s 63 of the 2002 Act would apply to it, and that that would require both WRC and WCC to charge interest equivalent to that which. WRC or WCC would themselves have to pay if they were borrowing that money. I accept the submission of counsel for the plaintiff that that result would follow so far as the WCC loan is concerned. *I* do not, however, accept that it would follow with respect to the WRC loan. The making of that loan, on such terms and conditions as WRC in its absolute discretion thinks fit, is authorised by s4 of the empowering Act. That section, which deals specifically with the loan in question, must, in my view, clearly override the general provision in s 63 of the 2002 Act. That is so, whether or not the whole of the empowering Act would override the whole of Part 5 of the 2002 Act.

Result

[67] For the foregoing reasons, I declare that the plaintiff is not a council-controlled trading operation within the meaning of that term as it is defined in s 6 of the Local Government Act 2002.

Costs

[68] Counsel may submit memoranda as to costs. Counsel for the plaintiff should submit a memorandum within 21 days. Counsel for the second respondent should reply within a further 14 days.



A D MacKenzie J

Signed at 10 a.m./~~p.m.~~ this 12th day of July 2004

Solicitors

Phillips Fox, Wellington, for plaintiff
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