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Dear David, Linda, Barry, Kevin and Wayne

Court of Appeal judgment

No doubt you will now have had an opportunity to review the Court of Appeal's decision in its entirety.

Linda and I thought it might be useful for you to receive from us a review of the judgment should you need to report to your Trustees and the Council. In this note we will summarise the Court's decision. We will outline the basis upon which an appeal could be brought by IRD should they choose to do so. Finally we will review the cost award that have been made, both in the Court of Appeal and the High Court.

Introduction

As you are aware, the Court of Appeal judgment dismissing the Inland Revenue Department's appeal was issued on 6 September 2005. The judgement endorses the High Court declaration that the Wellington Regional Stadium Trust (**Trust**) is not a CCTO as that term is defined in section 6 of the Local Government Act 2002 (**LGA 2002**). It also confirms the Trust's cross-appeal:

- that sections 5 and 6, Schedules 8 and 9 and Part 5 of the LGA 2002 do not apply to the Trust;
- that the provisions of the Wellington Regional Council (Stadium Empowering) Act 1956 (**Empowering Act**) mean that the LGA 2002 provisions do not apply to the Trust.

The decision

As you are aware, the Court considered two arguments:

- 1 Whether **the** Empowering Act represented a statutory code for the Trust's establishment, governance and accountability and administration so that the relevant provisions of the **LGA 2002** do not apply (the Empowering Act argument).
- 2 Whether the Trust comes w^hin the definition of CCTO in section 6 of the **LGA 2002** (the CCTO argument).

Empowering Act argument

The Court held that provisions of the Empowering Act are a code. The provisions of the LGA 2002 therefore do not and have never applied to the Trust.

The Court also found that the LGA 2002 definition of CCTO cannot **be** imported, on a standalone basis, into the Income Tax Act. The Court did not support the Inland Revenue Department's argument that even if the Empowering Act was **a** code that overrode the application of the LGA 2002, that that result would not have an impact on the provisions in the Income Tax Act. This argument was not accepted.

CCTO argument

The Court held that even if the Empowering Act conclusions were incorrect, the Trust did not come within the definition of a CCTO in section 6 of the LGA 2002. The reasons were as follow:

- The Empowering Act and the Trust Deed form the foundation **of** the Trust **and** have ongoing effect in regard to **its** purpose.
- The **fact** that the Trust has an operating surplus and that it **is** operated in a businesslike manner are insufficient in themselves to mean that it's purpose must be profit-making.
- The Trust is required **by** the Empowering Act **to be** a charitable trust, with all the limitations this requires, which include specific provisions in the Trust Deed requiring that the income of the Trust be expended only for the purpose **of** administering and maintaining the Trust, and for the purposes specified in the Trust Deed.
- The manner in which the Trust was funded (**as** set out in the Funding Deed) recognised the community and charitable nature of the Trust and the fact that the stadium could not be built and could not operate had it been required to do so on commercial funding terms. Although the Trust made operating surpluses, this was only possible because of the totally non-commercial funding terms.
- **Use** of the word 'for' and the omission of the word 'intention' in the definition of CCTO requiring that:

'a CCTO operates a **trading** undertaking **'for'** the purpose of making a profit'

has significance and suggests that there is an assumption that there will be one purpose or aim or end in view. The Court observed that it was unclear what **the**



position would be if there were truly more than one purpose but noted in this case the Trust **did** not have more than one purpose. The Trust's purpose *is* set out in section 6(2)(a) of the Empowering Act (and reflected in the Trust Deed) which provides:

The Wellington Regional Stadium Trust -

- (a) shall be responsible for **the** planning, development, construction, ownership, operation and maintenance of **the** stadium as a multi-purpose sporting and cultural event: and
- (b) may undertake such additional function **as** are specified in the Trust Deed establishing trust, being functions ancillary to the responsibilities in paragraph(a) of this subsection for the benefit of the public of **the** region.

The Judgement sets out a number of observations in regard to the LATE regime (**now** covered by the CC0 and CCTO provisions in the **LGA 2002**) and its original introduction into the **LGA 1974**. It notes that the main aim of the introduction of the LATE provisions **was** to put commercial enterprises undertaken by local authorities in a competitively neutral basis with the private sector, and that the taxation of **LATEs** was a vital part of that strategy, **but** that it was never intended that true charities that are not in competition with the private sector and that reinvest in their charitable purposes be caught.

It is noted that the stadium does compete with other entertainment, exhibition and conference venues, however many **of** these, and certainly those which could be seen **to** be **the** closest competitors of the stadium, are themselves run by local authorities or by trusts.

The Court concluded that:

- the mere intention to **make** operating surpluses is not sufficient for a trading undertaking to be considered to be operating with the intention or purpose **of** making a profit in terms of the **LGA 1974**;
- **the** Trust could never operate on proper commercial terms because:
 - **it** only makes operating surpluses because of funding on non-commercial terms;
 - it cannot distribute its profits;
 - **it is** inherently charitable and is not competing in any meaningful sense with any private sector organisation, and **it is** highly unlikely **to be** doing so in the future.

Appeal to the Supreme Court

We have discussed the decision with Lindsay McKay and he agrees with our assessment that it is unlikely that the IRD will appeal.

If they **wish to** appeal then they must first apply to **the** Supreme Court for 'leave'. In effect to get permission to bring the appeal. To get that, they would need to show that:

- the appeal would involve a matter of general or public importance; or

- the appeal involves a matter of general commercial significance.

In our view it is possible that the Supreme Court would find the issue as to the application of ~~the~~ definition 'for the purpose of making a profit' as a matter involving 'general commercial significance'.

However, on the merits of the argument, given the IRD have now lost 4-0 in terms of judgments, (four judges to date have found against them) our position on the likelihood of an appeal remains the same.

If the IRD are to file an application for leave they must do so within 20 working days, that is prior to **3 October 2005**. Obviously **we will keep** you informed of any eventualities.

Costs - High Court and Court of Appeal

We have an award of costs from both the High Court and the Court of Appeal.

You may recall that the issue of costs went back to the High Court Judge (McKenzie J) **as** we could not agree with the IRD on the amounts. After written submissions were provided by **both** parties, we were awarded the following:

- costs of \$54,100
- Disbursements of **\$405.45** plus **\$583.66** if so **fixed** by the Registrar
- **Experts** fee \$19,181.25
- **TOTAL \$73,686.70** plus \$583.66 if so **fixed** by the Registrar

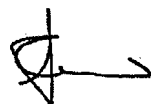
To **be** deducted from this is the sum of \$3,000 which was awarded against us on our Rule 418 applications to have the trial **split** into two issues. You will recall that this was an application that was initially refused by the Master and then on appeal by the High Court Judge.

The Court of Appeal have awarded to the **Trust** \$6,000 in respect of costs.

We intend to correspond with the IRD as soon as the appeal period **is up** to obtain from them payment of the amount that is outstanding. We are presuming that this, when received will be divided equally amongst you.

Please feel **free** to contact **us** if you **have** any enquiries regarding the judgment or any issue arising out of **it**.

Yours sincerely



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