# Latimer & Ors v Commissioner of Inland Revenue

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(2002) 20 NZTC 17,737

**Court of Appeal, CA 215/01.**

**Hearing: 16, 17 Apr, 21 May 2002; Judgment: 4 Jun 2002.**

*Income tax — Charities — Charitable purposes — Income tax exemption — Crown Forestry Rental Trust — Income tax liability of trustees — Crown selling existing tree crops on Crown forestry land together with licence — Fund containing rental payments administered by rental trust — Interest earned assisting Maori claims before Waitangi Tribunal — When all claims resolved any unused income to be returned to Crown — Whether trust established exclusively for charitable purposes — Whether income derived by trustees in trust for charitable purpose — Whether trust taxable as Maori Authority under special tax regime — Whether trust required to be established exclusively for charitable purposes — Whether income derived by trustees must be applied exclusively for charitable purposes — Whether purpose of assisting Maori in preparation for claims before Waitangi Tribunal a charitable one — Whether purpose was for public benefit — Whether public benefit charitable in nature where directed towards racial harmony in New Zealand — Whether exemption available where trust deed requiring payment of surplus income to Crown on winding up free from trust — Whether non-charitable purpose — Whether potential for abuse of charitable exemption in other cases — Income Tax Act 1976, s 61(25) — Income Tax Act 1994, s CB 4(1)(c)*

This was an appeal by the taxpayers and a cross-appeal by the Commissioner from a judgment of the High Court reported as *Crown Forestry Rental Trust* v *C of IR* (2001) 20 NZTC 17,311.

On 20 July 1989 an agreement was executed by the Crown, the New Zealand Maori Council and the Federation of Maori Authorities to provide for the terms and conditions upon which the Crown would sell existing tree crops on Crown forestry land to commercial purchasers together with a licence to use the land on an ongoing basis. The rent payable by each purchaser was to be put in a fund administered by a rental trust called the Crown Forestry Rental Trust ("the Trust"). The interest earned by the investment of the rent was to be made available to assist Maori making claims involving land before the Waitangi Tribunal. If the Waitangi Tribunal recommended that the licensed land must be returned to Maori ownership, the Trust had to pay all of the rental proceeds, in respect of the licensed land affected by the recommendation, to the successful Maori claimants. If the Waitangi Tribunal recommended that the licensed land was not liable to be returned to Maori ownership, the accumulated rental proceeds had to be paid to the Crown.

The High Court considered that the phrase "trustees in trust for charitable purposes" was indivisible. The correct interpretation was that it applied to income which was derived by a trust established for charitable purposes, the focus being on the purposes of the trust, not on the purposes to which the income derived by the trust was directed. The court found that the trust's stakeholder role, namely the receipt and holding of rental proceeds pending the recommendation of the Waitangi Tribunal, was performed as an integral part of the scheme pursuant to which the trust was established. The court said that the trust was set up for two distinct purposes, one of which related specifically to capital and the other to interest earned from the investment of the capital. The trust's stakeholder purpose had no charitable characteristic and the link between the two purposes did not give it a charitable purpose. The trust was therefore not within s 61(25) of the Income Tax Act 1976. The court then found that the assisting of a defined class of Maori claimants ("the assistance purpose") was a charitable purpose. If this had been the trust's exclusive purpose, the s 61(25) exemption would have applied. The High Court considered that the potential for the Crown to receive some income at the termination of the trust was irrelevant to the present issues.

The taxpayers appealed against the conclusion that s 61(25) did not apply and the Commissioner cross-appealed against the finding that the assistance purpose was charitable.

After judgment had been reserved following written and oral argument which had traversed the effect of the provision for payment to the Crown of surplus income remaining upon the winding up of the trust, it came to the Court of Appeal's attention that this matter had not been addressed in the Commissioner's cross-appeal. The Commissioner subsequently applied for leave to amend his cross-appeal to include the findings of the High Court on this point and leave was granted for the amendment.

***Held:*** taxpayers' appeal allowed; Commissioner's cross-appeal allowed; High Court judgment for the Commissioner confirmed.

1. The first limb of s 61(25) of the Income Tax Act 1976 does not require that a trust be established for charitable purposes, merely that the income in question be received for such purposes, in the sense that the trustees are not empowered to hold or apply it for any other purpose.

> (i) In this case it did not matter that the rental proceeds were held for eventual distribution to Maori or the Crown depending upon the recommendations of the Waitangi Tribunal or the outcome of negotiations. The important question was whether the income stream produced by the investment of the rental proceeds was dedicated at all times to charitable purposes.
> (ii) The two limbs of s 61(25) differed significantly in their language. The first limb, applicable to trusts, exempts income "derived by trustees in trust for charitable purposes". It says nothing about the establishment of the trust. In contrast, the second limb expressly limits the exemption in relation to a society or institution to one "established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual".
> (iii) It appeared from the ordinary language of the provision which, in a taxing statute, should not lightly be given a strained interpretation, that the Legislature had recognised the difference between trusts that may well mix charitable and other purposes and societies and institutions that usually did not. The Legislature, therefore, treated trusts

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differently and less restrictively when it came to the exemption of their income from taxation. This conclusion, from a reading of the language of s 61(25), was confirmed when the origins of the provision in 1916 were considered.
(iv) It is well-established law that charitable status is not afforded to a body, including a trust, which also has non-charitable objects. However, although a trust may not itself be exclusively charitable in its establishment, it may still have a separate charitable function. If a segregated part of its income was received and must be applied exclusively for charitable purposes, there was no reason why that income stream should be refused an exemption under s 61(25).

2. The purpose of assisting Maori in preparation, presentation and negotiation of claims before the Waitangi Tribunal was a charitable one. The case came within the fourth Pemsel division of "trusts for other purposes beneficial to the community" because the research funded by the trust was a means of finally determining the truth about grievances long held by a significant section of New Zealand society for the benefit of all members of New Zealand. (The Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531 cited.)

3. In the New Zealand context, it was impossible not to regard the Maori beneficiaries of the trust, both together and in their separate iwi or hapu groupings, as a section of the public for the purposes of a trust established by the Crown and Maori in terms of a compact between them and fulfilling the functions of the Crown Forestry Rental Trust.

4. The purpose of the public benefit was, in the context of New Zealand society at this time, of a charitable character. It was directed towards racial harmony in New Zealand for the general benefit of the community.

5. The provisions of the trust deed requiring the payment of surplus (unused) income to the Crown on a winding up, free from the trust, was a non-charitable purpose. Although the assistance purpose was wholly charitable, an exemption was not available under s 61(25) because the income was not derived in trust for charitable purposes in the sense of being dedicated at all times exclusively to charitable purposes.

(i) The accumulated interest was not given to the Crown for a charitable purpose. It was not a gift from the trustees, nor had the Crown ever committed itself to using it for charitable objects. It could not be argued that all sums received beneficially by the Crown were, without more, derived for charitable purposes.
(ii) The general rules governing Crown property were the same as for the property of private persons. The particular transaction must stamp the property with a charitable purpose. The deed provided for payment of the unexpended surplus income on winding up without restricting or specifying the purposes of that receipt.
(iii) Although the charge to tax was an annual one, it could not be said that in the years preceding the year of a winding up the income from the investment of the rental proceeds would be derived for charitable purposes exclusively. If not immediately needed for the assistance purpose it would be accumulated and if not subsequently so applied it would be carried forward until winding up and then paid to the Crown. There was no obligation on the trustees to apply it all to the assistance purpose in the year in which it was derived or in any future year.
(iv) Although this conclusion may indirectly have an adverse impact on the funding of the Waitangi Tribunal processes, there was an obvious potential for abuse of the charitable exemption in s 61(25) in other cases if a tax exemption was upheld for income of a trust which need not be applied in the year of receipt for charitable purposes and could be accumulated from year to year and ultimately paid over for a non-charitable purpose. The potential for abuse would exist even if in such a case the moneys were, in some future year, to be taxable in the hands of the trustees or of the ultimate recipient.

[Headnote by the CCH Tax Editors]

L McKay and KS Feint for the taxpayers

BWF Brown QC and JH Coleman for the Commissioner

Before: Richardson P, Gault and Blanchard JJ

**[17739]**

**Judgment of the court delivered by Blanchard J:**

[1] The issue on this appeal is whether certain income of the Crown Forestry Rental Trust (the trust), namely interest on invested moneys, is exempt from taxation under ss 61(25) of the *Income Tax Act* 1976 and CB 4(1)(c) of the *Income Tax Act* 1994 (which are in identical terms) as "income derived by trustees in trust for charitable purposes".

[2] The judgment of *O'Regan* J in the High Court against which the appeal has been brought is reported at (2001) 20 NZTC 17,311; [2002] 1 NZLR 535. As it contains a full statement of the facts, it is unnecessary to give more than the following summary.

[3] In 1989 the Crown was encountering difficulty in disposing of certain very substantial forestry assets, comprising, *inter alia*, tree crops and fixtures, because a number of Maori had asserted claims to the

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land on which the assets were located. Applications to the Waitangi Tribunal had been made. An agreement to resolve the situation was reached on 20 July 1989 between the Crown and the New Zealand Maori Council and the Federation of Maori Authorities Inc. The Crown then enacted the *Crown Forest Assets Act*

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1989 which, in broad terms, enabled the Crown pending determinations on the claims by the Tribunal to grant forestry licences in respect of the affected lands for a specified period and to transfer the forest assets thereon to the licensees. Licence fees were to be payable by the licensees but the Crown was to establish by deed a forestry rental trust and those licence fees (called the rental proceeds) would be paid over by the Crown to the trust, acting effectively as a stakeholder, and invested by it until such time as the Tribunal made a recommendation in respect of the land under s 8HB of the *Treaty of Waitangi Act* 1975.

[4] The trust was duly formed by execution of a trust deed on 30 April 1990. The present appellants are its trustees.

[5] Clause 2.1 of the deed provides:

> 2.1 A trust is hereby established under this Deed, to be a forestry rental trust referred to in Section 34 of the Crown Forest Assets Act 1989, to be known as the "CROWN FORESTRY RENTAL TRUST". The Trust is established to:
>
> > (a) receive the Rental Proceeds from Licences; and
> > (b) make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.

[6] The trustees (three appointed by the Crown and three by the Maori parties to the agreement of 20 July 1989) are empowered to invest the rental proceeds in government securities or interest bearing bank deposits (cl 7.11.1).

[7] By cl 9.1 the rental proceeds are declared to be the capital of the trust. It is then provided:

> 9.2 Interest earned from investment of the Trust Fund shall be accumulated by the Trustees to be applied at the Trustees' sole discretion;
>
> > 9.2.1 to pay the expenses of the Trustees and of the Trust, including the remuneration of the Trustees and all taxes and other levies on income or assets of the Trust; then
> > 9.2.2 subject to Clause 10, to assist any Claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.
>
> 9.3 The Trustees need not distribute in any one year the whole or any part of the income for that year but may at their discretion retain the whole or any part of the income.
> 9.4 Any surplus income may be distributed in a later year, or accumulated from year to year. Any surplus income remaining upon winding up the Trust shall be paid to the Crown, free from the Trust.

[8] Clause 11 deals with allocation and distribution of trust funds and says, in part:

> 11.1 If the Waitangi Tribunal recommends under Section 8HB(1)(a) of the Treaty of Waitangi Act 1975 that any particular Licensed Land be returned to Maori ownership, then:
>
> > (a) the person or persons to whom ownership of that Licensed Land is to be returned shall from the date of that recommendation be Confirmed Beneficiaries of the Trust;
> > (b) those Confirmed Beneficiaries shall be entitled to receive from the capital of the Trust the amount of the Rental Proceeds received by the Trustees in respect of that Licensed Land since the commencement of the Licence;
> > (c) those Confirmed Beneficiaries shall be entitled to receive the Rental Proceeds in respect of that Licensed Land directly from the licensee for the remaining term of the Licence.
>
> 11.2 If the Waitangi Tribunal recommends under section 8HB(1)(b) or



> (c) that any particular Licensed Land be not liable to return to Maori ownership, then:
>
> > (a) the Crown shall from the date of that recommendation be a Confirmed Beneficiary of the Trust;

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(b) the Crown shall be entitled to receive from the capital of the Trust the amount of the Rental Proceeds received by the Trustees in respect of that Licensed Land since the commencement of the Licence;
(c) the Crown shall be released from the obligation under Clause 2.2 to hold any Rental Proceeds in respect of that Licensed Land for the Trustees. The Crown shall be fully entitled to the benefit of those Rental Proceeds in its own right.

[9] Clause 12 contains the procedure on winding-up and directs:

> 12.2 The Trustees shall, upon completion of any realisation of the Trust and after any retentions pursuant to Clause 12.1, distribute the net proceeds, together with all other cash forming part of the Trust Fund:
>
> (a) in respect of any capital to be distributed pursuant to Clauses 11.1 or 11.2, to the Confirmed Beneficiaries or legal representatives of the Confirmed Beneficiaries: and
> (b) in respect of any other money, to the Crown.

[10] The Commissioner of Inland Revenue has taken the position that the trust is taxable as a Maori authority under the special tax regime applicable to such bodies. He contends that the purposes of the trust are not charitable and that the exemption in ss 61(25) and CB 4(1)(c) does not apply because the trust was not established exclusively for charitable purposes.

[11] For convenience we will refer from this point onwards, as counsel did in argument, only to s 61(25), which provides for an exemption from income tax for:

> (25) Income derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where that income so derived is income to which paragraph (27) of this section applies:

It is not suggested that the income of the trust falls within para (27).

***The High Court judgment***

[12] *O'Regan* J accepted an argument from counsel for the Commissioner that in s 61(25) the phrase "trustees in trust for charitable purposes" is indivisible; that the correct interpretation is that it applies to income which is derived by a trust *established* for charitable purposes, the focus being on the purposes of the trust, not on the purposes to which the income derived by the trust is directed. The Judge found that the stakeholder role, namely the receipt and holding of the rental proceeds pending the recommendation of the Waitangi Tribunal, was performed as an integral part of the scheme pursuant to which the trust was established. He accepted the Commissioner's contention that the stakeholder purpose was a purpose of the trust "sitting alongside the purpose of assisting the defined class of Maori claimants" — a separate standalone purpose, which he found not to be merely ancillary. It was, the Judge said, a trust set up for two distinct purposes, one of which related specifically to capital and the other to interest earned from the investment of the capital. He found that the stakeholder purpose had no charitable characteristic and that the linkage between the two purposes did not give it a charitable purpose. The trust was therefore not within s 61(25).

[13] *O'Regan* J then moved to the question of whether the assisting of the defined class of Maori claimants (which has been called the assistance purpose) was a charitable purpose. He noted the acceptance by Mr Brown QC, counsel for the Commissioner, that there were benefits to the public from:

> [a] The Crown's honouring its Treaty of Waitangi obligations and settling historical grievances;
> [b] The operations of the Waitangi Tribunal as a facilitator of such settlements;
> [c] The promotion of racial harmony; and
> [d]
>
> [17742]
>
> The provision of a mechanism for the resolution of historical grievances through a constitutional process.

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The Judge concluded that there was a purpose of providing a wide public benefit. He rejected the Commissioner's position that, although public benefits may result from the trust's assistance activities, that was not the trust's purpose. The Judge followed, as he was bound to do, the approach of the majority in this Court in *C of IR* v *Medical Council of New Zealand* (1997) 18 NZTC 13,088; [1997] 2 NZLR 297 that a purpose which is beneficial to the public is prima facie charitable unless there is a reason put forward for holding that it is not. No such reason having been advanced by the Commissioner, the Judge found that the benefits of the assistance activities were charitable in character. But, lest he be wrong in adopting that approach, the Judge also considered whether the purpose fell within the spirit and intendment of the preamble to the *Statute of Elizabeth*. He found that the case was broadly analogous to cases concerning trusts for Australian aborigines (*In re Mathew, deceased; The Trustees Executors and Agency Co Ltd v Mathew* [1951] VLR 226 and *Flynn v Mamarika* (1996) 130 FLR 218) and the Privy Council decision in *Verge v Somerville* [1924] AC 496, involving a trust for the benefit of returned soldiers in New South Wales. *O'Regan* J distinguished the decision of this Court in *New Zealand Society of Accountants v C of IR* [1986] 1 NZLR 147 [ also reported as *New Zealand Society of Accountants* v *C of IR*; *New Zealand Law Society* v *C of IR* (1986) 8 NZTC 5,205], on which the Commissioner had relied, saying that in this case there was indirect benefit arising from the effective operation of the Treaty of Waitangi claims settlement process. There was also benefit in the assistance in bringing a claim and having it properly considered and ruled on. That benefit arose regardless of the eventual outcome. The beneficiaries were, the Judge found, a section of the public.

[14] The Judge said that the potential for the Crown to receive some income at the termination of the trust was “irrelevant to the present issues”. The provision to that effect was “essentially a declaration of what would occur anyway, even if the explicit provision to that effect was not included in the trust deed”.

[15] Thus the Judge was of the view that the assistance purpose was charitable, and if it had been the trust's exclusive purpose the s 61(25) exemption would have applied.

[16] From that judgment the trust appealed against the conclusion that s 61(25) does not apply and the Commissioner cross-appealed against the finding that the assistance purpose is charitable.

[17] After judgment had been reserved following written and oral argument which had traversed the effect of the provision for payment to the Crown of surplus income remaining upon the winding up of the trust, it came to our attention that the Commissioner's cross appeal did not actually address this question, which seemed to us to be of some importance. We raised the matter with counsel in a telephone conference. The Commissioner, although taking the position that it was unnecessary, prudently elected to make application for leave to amend his cross-appeal to include the findings of the Judge on this point (summarised at para [14] above). Although formally opposing the application, Mr McKay, for the appellants, realistically accepted that the point had been fully engaged both in the High Court and in the submissions in this Court and that, if there would otherwise have been any prejudice to his clients, it would be removed by a further oral hearing. At his request, this occurred by telephone on 21 May when we heard the Commissioner's application and proceeded to hear further argument on the substantive point. Prior to that hearing a further written submission on the subject had been received from Mr McKay to which Mr Brown properly made no objection. In the circumstances we grant leave for the amendment to the cross-appeal.

***The trust's appeal***

[18] It was submitted by Mr McKay that s 61(25) contains no prerequisite to the charitable exemption it confers requiring that a trust must be established exclusively for charitable purposes. All that is required, on the first limb of the paragraph, is that the income derived by the trustees must, pursuant to the terms of the trust deed, be capable of being applied only for purposes which are charitable in character. Further,

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the phrase “by trustees in trust for charitable purposes” ought to be interpreted as incorporating no more than the requirements established under general law for a charitable trust. The trust was charitable on this basis because its income must be applied exclusively for the charitable purpose of assisting Maori claimants before the Waitangi Tribunal. Alternatively, if it were the case that the trust must be established for charitable purposes in order to qualify for the s 61(25) exemption, then it met that requirement because the receipt and holding of the rental proceeds, if a purpose, is a secondary or subordinate purpose and may on that basis

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be disregarded. Or, it was submitted, the receipt and holding of the trust corpus is to enable the assistance to be given to the Maori claimants from the income of the corpus and accordingly the trust is established for charitable purposes only.

[19] Mr McKay emphasised that the appellant was not saying that the mere fact of the application of income for a charitable purpose would be enough for the claiming of the exemption. But in this case, he said, the income of the trust could not be used or applied for anything except the purpose of assisting the claimants.

[20] Counsel for the Commissioner asked the Court to read into s 61(25)'s first limb a requirement, as in the second limb, that the trust deriving the income must have been established exclusively for charitable purposes. Mr Brown suggested that in this respect there was no good reason for distinguishing between a trust and a society or institution. That construction was said to be consistent with the position at common law which, counsel submitted, was that charitable status depended upon the nature of the body, not upon the dedication of its income. Parliament had not intended to enable an exemption to be granted to a trust with some non-charitable purpose. The stakeholder purpose was non-charitable.

[21] What have been called the two limbs of s 61(25) differ significantly in their language. The first limb, applicable to trusts, exempts income “derived by trustees in trust for charitable purposes”. It says nothing about the establishment of the trust. In contrast, the second limb expressly limits the exemption in relation to a society or institution to one “established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual”. The argument advanced on behalf of the Commissioner would require that the express second limb limitation be implied into the first limb as if it read

> Income derived by trustees *of a* trust *established exclusively* for charitable purposes ...

Instead, the first limb is concerned not with the reason for the establishment of a trust but with the purpose for which particular income is derived — by trustees in trust, not by trustees of a trust.

[22] It appears from the ordinary language of the provision, which in a taxing statute should not lightly be given a strained interpretation, that the legislature was recognising that trusts are very different from societies and institutions, both in their structures and their purposes. The terms and circumstances of creation of trusts may vary very considerably. They may well mix charitable and other purposes. In contrast, societies and institutions are almost always established for one particular purpose and are not as likely to mix charitable and non-charitable objects. Trusts, including charitable trusts, may be time limited; and separation of interests (choses) in capital and income is a feature of the law of trusts. (They are very different in this respect also from societies and institutions.) Both of these features are reflected in s 96 of the 1976 Act (which incidentally required seven years minimum shift of income for purposes of trusts) and now in s FC 11 of the 1994 Act. They are recognised in numerous cases, including *Williams v C of IR* [1965] NZLR 395 (an assignment/trust of income in favour of a charity) and *Public Trustee v C of IR* [1971] NZLR 77, which will shortly be referred to. So it could make sense for the legislature to treat trusts differently and less restrictively when it came to the exemption of their income from taxation.

[23] That conclusion from a reading of the language of s 61(25) is confirmed when the origins of the provision, in 1916, are considered. The consolidated *Land and Income Assessment Act* 1908, in s 14(a)(v), had given an exemption for land owned and income received by or on behalf of:

> (v)
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> [17744]
>
> Any public charitable or public educational institution, howsoever formed or constituted, if carried on for any public charitable or public educational purpose and not for pecuniary profit.

The emphasis was not on the formation or establishment of an institution but upon its public character and the public purpose for which it was carried on. Although a distinction was drawn in the 1908 Act between public charitable purpose and public educational purpose, there can be no doubt that the latter purpose could also have been classified as charitable. Trusts were not mentioned in relation to exempt income.

[24] However, s 84 of the *Land and Income Tax Act* 1916 included in the list of income exempt from taxation:

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> (k) Income derived by trustees in trust for charitable, religious, educational, or scientific purposes of a public nature within New Zealand, or derived by any society or institution established exclusively for such purposes and not carried on for private pecuniary profit:

This exemption for certain trusts was related to their purposes, which were not necessarily charitable, as very restrictively defined in s 2 of the 1916 Act (the relief of poverty, illness or other disability), but those purposes were required to be of a public nature. It would, if intended, have been simple enough to put such trusts on the same basis as societies and institutions and require them to have been established exclusively for the stipulated purposes. The drafter, Sir John Salmond, introduced a qualification for societies or institutions relating to their purpose of establishment. In this respect a slight change was made — from the purpose for which a society or institution was carried on to the purpose for which it was established. But for trusts the drafter chose to focus on the purpose for which the income was derived by the trustees; and that significant distinction has been maintained to the present day.

[25] Counsel for the Commissioner suggested that there was a pattern or context in s 61 whereby an exemption was related to the status of the recipient of income, not to the purpose for which the income was received. Particular reference was made, by way of comparison, to s 61(27) which exempts income derived from a business carried on by trustees for charitable purposes or carried on for the benefit of any society or institution exclusively for such purposes and not for private pecuniary purposes. No doubt there is a general concentration on the particular recipient of income — on the reason why that person was the recipient — but so variable are the subjects of the subsections of s 61 that we can see no overall pattern of such strength that it requires a gloss to be put on the language of the first limb of s 61(25). As for s 61(27), because it deals with the income of the operation of a business it naturally requires that those operations must have been wholly devoted to making money for charitable purposes. It would be difficult, if not impossible, to treat part of the income as having been earned for one purpose and part for another. For that reason s 61(25) itself provides that business income falling within subs (27) does not come within subs (25).

[26] We can readily accept, and Mr McKay did too, that when s 61(25) refers to the charitable purpose for which income is derived it means that the income must have been derived for such a purpose exclusively. That is inherent in the expression “derived ... for charitable purposes”. Income which can be applied for charity or not, at the option or discretion of the trustees, cannot be said to be derived for a charitable purpose. The Commissioner's argument would, however, refuse an exemption merely because the trust had an entirely separate income stream not dedicated to charitable application. It is well established in the law that charitable status is not afforded to a body, including a trust, which also has non-charitable objects. But, although a trust may not itself be exclusively charitable in its establishment, it may still have a separate charitable function, and if a segregated part of its income is received and must be applied exclusively for charitable purposes, there is no reason why that income stream should be refused an exemption under s 61(25). Counsel for the Commissioner was unable to provide us with any logical basis for denying it. As Mr McKay pointed out, the Commissioner's argument would also refuse the exemption to any trust whose income had to be applied to charity but whose capital would or might in the future vest in a non-charity. Yet instances were able to be cited to us of charitable

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trusts of non-perpetual character: *In re Randell; Randell v Dixon* (1888) 38 Ch D 213, *In re Blunt's Trust; Wigan v Clinch* [1904] 2 Ch 767, *Gibson v South American Stores (Gath & Chaves) Ltd* [1950] Ch 177, and *In re Sir Robert Peel's School at Tamworth ex p The Charity Commissioners* (1868) 3 Ch App 543. It is enough to refer to the last of these cases in which there was a fund held by trustees to apply the income to supporting a school founded by the testator. There was a power of revocation exercisable by the person entitled under the will to certain estates should he be dissatisfied with the management, regulation or discipline of the school or should he be of the opinion that it was not of public utility or if for any reason he should be desirous of altering the management, regulations, objects and purposes of the school. The fund could then be applied “either for the purpose of some public charity or otherwise”. The power of revocation had not been exercised but was still available. The question was whether the fund was, until that occurred, “devoted to charity”, and it was held that it was.

[27] This Court has in fact previously recognised that a trust which is required to apply its income to both a non-charitable and a charitable purpose is entitled to an exemption for the income which must be applied to the latter purpose. In *Public Trustee v C of IR*, also cited to us by Mr McKay, certain annuities for members

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of the testator's family were a first charge on the income of the residuary estate in each year (as well as being charged on the capital in the event of a deficiency). As soon as the income in any year was more than sufficient to meet the claims of the annuitants for that year the balance of the income was to be applied to the charitable purpose of providing educational scholarships. Notwithstanding that the first application of the annual income was for the non-charitable annuities, the balance of the income was held to qualify for the tax exemption under the first limb of s 86(1)(n) of the *Land and Income Tax Act* 1954, which was the immediate, and for present purposes, identical, predecessor of s 61(25). There was of course, on these facts, no question of any argument that the fund had been established exclusively for charitable purposes. The Court reached its conclusions having also had its attention directed to the predecessor of s 61(27).

[28] We have accordingly concluded that the first limb of s 61(25) does not require that the trust be established for charitable purposes, merely that the income in question be received for such purposes, in the sense that the trustees are not empowered to hold or apply it for any other purpose. Thus upon receipt the gross income is dedicated to such purposes (subject to normal expenses of the trust) and at the end of each financial year it will be possible to say that the net income has been so applied or will at some future time definitely be so applied.

[29] It is, as we have indicated, possible to say this in circumstances where the capital by means of which the income is derived can itself be applied to a non-charitable purpose either at a particular time or on the happening of a particular event or in the discretion of the trustees, so long as the income already generated must still be utilised for the charitable purpose. In this case, it therefore cannot matter that the rental proceeds are held for eventual distribution to Maori or the Crown depending upon the recommendations of the Waitangi Tribunal or the outcome of negotiations. The important question is whether the income stream produced by the investment of the rental proceeds is dedicated at all times to charitable purposes. On the assumption that the purpose of assisting the claimants is charitable, as found by the High Court and the subject of the cross-appeal, that will be the position unless a non-charitable purpose is introduced by the clause relating to the winding up of the trust whereby, after the capital distribution, any other money is to go to the Crown. This is a matter which is discussed below in connection with the cross-appeal.

***The Commissioner's cross-appeal***

(a) The assistance purpose

[30] The first issue on the cross-appeal is whether a purpose of assisting Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involves or could involve Crown forest land subject to a licence under s 14 of the *Crown Forest Act* (cl 2.1 of the trust deed read with the definitions of Licensed Land and Licence) is a charitable purpose.

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[31] The parties are agreed that it is necessary to determine whether the case comes within the fourth division of “charity” in its legal sense, as described by Lord *Macnaghten* in *The Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at p 583 namely “trusts for other purposes beneficial to the community, not falling under any of the preceding heads”. The definition of “charitable purpose” in s 2 of the 1976 Act and s OB 1 of the 1994 Act, which has been said to conform with the position stated in *Pemsel* (*Molloy* v *C of IR* (1981) 5 NZTC 61,070; [1981] 1 NZLR 688), “includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community”. In respect of this last head Lord *Macnaghten* commented:

> The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed, every charity that deserves the name must do either directly or indirectly.

[32] It is also common ground that there must be a two step inquiry: first, whether the purpose is for the public benefit and, if so, secondly, whether the purpose is charitable in the sense of coming within the spirit and intendment of the preamble to the *Statute of Charitable Uses* 1601 (43 Eliz c 4).

[33] In support of this part of the cross-appeal, Mr Coleman submitted that the Judge had been wrong to follow the approach of the majority in the *Medical Council* case. He had focused on indirect or second-

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hand outcomes, namely the public benefit arising from the determination of grievances by the Waitangi Tribunal, rather than on the assistance purpose of the trust. Instead, it was said that the Judge ought to have concentrated on the immediate objects and functions of the trust, in particular on the assistance purpose itself rather than on the broad general motives of the Crown in establishing the Waitangi Tribunal. The Commissioner said that the terms of the trust are clear and there is no need to inquire into its activities in order to ascertain its purpose. To look at the matter more broadly, as the majority of this Court is said to have done in the *Medical Council* case, would be to treat as relevant, impermissibly in the view of the Commissioner, the motives of the legislature in authorising creation of the trust, whereas motives are said to be irrelevant in the context of determining whether an activity of a trust is charitable. The Judge had also been wrong to conclude that there was an exclusively public purpose in providing assistance where there was in fact private benefit to the claimant groups. The Judge was said further to have erred in adopting, at the second step of the inquiry, the presumptive approach referred to in the *Medical Council* case. Counsel suggested that in that case *McKay* J, although discussing the presumptive approach, had not in fact followed it and had actually proceeded by reference to analogy. In the present case, *O'Regan* J was said to have erred in concluding that assistance to claimants was within the spirit and intendment of the *Statute of Elizabeth*. On the proper approach, it was said, no analogy to any recognised charitable purpose can be found.

[34] In response, Mr McKay made reference to a number of ministerial statements in and out of Parliament concerning the vital importance for the future of New Zealand in resolving Treaty claims and ensuring harmonious race relations. He noted that the 1983 report of the Charity Commissioners for England and Wales had said that the promotion of good relations was a purpose beneficial to the community. It was submitted that the workings of the Waitangi Tribunal were themselves beneficial to the community. That submission too was supported by reference to ministerial statements in Parliament during debates on the *Treaty of Waitangi Bill* in 1975 and the amending Bill in 1985. Mr McKay pointed also to the evidence of the director of the Waitangi Tribunal concerning the material contribution made by the trust to the working of the Tribunal and in particular the assistance derived by the Tribunal from the production by the trust of high quality historical reports. The director had said that financial assistance in preparing claimant groups for the presentation of oral evidence, and the contribution to hearing costs, freed up the Tribunal's own funds and thereby permitted it to hold more hearings. Funding of claimants after Tribunal recommendations were made also assisted in the eventual

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settlement of claims. Mr Love had said that: “The work of the trust and the Tribunal is now so inter-linked that the trust's successes are in very large part our successes, and vice-versa”.

[35] Mr McKay submitted that it must be shown in respect of every charitable trust that it benefits individuals less than the public at large. The correct test was whether there was proof of benefit to the community or a section of the community. The Maori claimants were said to be a section of the community. According to the evidence, there are some 300,000 of them. Approximately 70,000 Maori have already benefited through Crown forest licensed land being vested in groups to which they are affiliated. The nexus joining the beneficiaries was said to be impersonal and unrelated to relationships with named individuals or employment or contractual relationships, which was the disqualifying feature in *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297. Mr McKay said that the trust had enormous public benefit for New Zealand society and, in accordance with the *Medical Council* case, was presumptively charitable. No good reason to the contrary had been put forward and there were in fact analogies with the existing case law mentioned in the High Court judgment (see para [13] above).

[36] We do not consider that the Judge erred in concluding that the assistance purpose is of public benefit, nor that he looked at that matter too widely. Even if, on the first step of the inquiry, a narrower view should ordinarily be taken than was approved in the *Medical Council* case, as the Commissioner urges, this unusual trust deed must be read along with the agreement of 20 July 1989 which it implements and the *Crown Forest Assets Act* which authorised its creation and established the framework within which the trust was to work. It cannot sensibly be read in isolation. It is, we think, not only permissible but required in determining the nature of the purpose of the trust to consider the full legislative background, including the statutes and documents referred to in the trust deed. The deed itself and its purposes cannot otherwise be properly understood. It makes reference in its preamble to the applications to the Waitangi Tribunal under the *Treaty of Waitangi*

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*Act* 1975 and to the provision in the *Crown Forest Assets Act* for the establishment of a forestry rental trust. To understand the nature of the purpose of the assistance to be given to Maori claimants it is necessary to understand the Waitangi Tribunal process. When that process is understood, it is apparent that the assistance purpose is not a mere matter of funding litigants in the preparation, presentation and negotiation of their case. If that were all, it could have been achieved through normal legal aid arrangements, which apply to Waitangi Tribunal claims (s 19(f) of the *Legal Services Act* 1991, now replaced by s 7(f) of the *Legal Services Act* 2000).

[37] The evidence confirms that what is involved in the preparation of a case before the Waitangi Tribunal in relation to the land in question, and the intended product of the assistance to claimants is high-quality historical research. So the purpose in cl 2(b) is the funding or assistance of research of that kind, the results of which will better enable the Tribunal to assess the historical record of what happened to the tribal group claimants — in particular, the circumstances in which the Crown came into possession of the land — so that any breach of the Treaty suffered by the claimants can be given recognition and, if appropriate, the land returned. The research funded by the trust is a means of finally determining the truth about grievances long held by a significant section of New Zealand society (on the figures given to us, up to nearly 10% of the population) for the benefit of all members of New Zealand society. Without such research being properly conducted the Tribunal's findings might not be seen as having a sound basis and therefore might not be accepted either by Crown or Maori or, very importantly, by the general public. Settlements might not be achieved or might not be regarded as truly full and final. If research is not properly conducted then, whether or not the parties purport to reach a settlement, grievances are likely to continue and will be bound to lead to social ferment at a future time. The public benefit in a successful resolution of the claims is therefore very considerable. The historical research to be conducted with the funding provided by the trust is an essential element in that resolution. There is undoubtedly, therefore, a large public benefit in the

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assistance purpose. The same can be said in relation to the proper presentation of the research to the Tribunal and its utilisation during the negotiation process by which, it is hoped, comprehensive and lasting settlements can be achieved.

[38] Of course there is also a benefit to the claimant groups in having their research funded, but they themselves are, as we have said, a section of the public. It is true that there is a relationship of common descent for each claimant group but not, apart from the fact that they are Maori, for all beneficiaries of the trust taken together. In any event, the common descent of claimant groups is a relationship poles away from the kind of connection which the House of Lords must have been thinking of in the *Oppenheim* case when it said that no class of beneficiaries could constitute a section of the public for the purpose of the law of charity if the distinguishing quality which linked them together was a relationship to a particular individual either through common descent or through common employment. There is no indication that the House of Lords had in its contemplation tribal or clan groups of ancient origin. Indeed, it is more likely that the Law Lords had in mind the paradigmatic English approach to family relations. Lord *Normand* exemplified this approach in his observation that “there is no public element in the relationship of parent and child” (p 310). Such an approach might be thought insufficiently responsive to values emanating from outside the mainstream of the English common law, in particular as a response to the Maori view of the importance of whakapapa and whanau to identity, social organisation and spirituality. Lord *Normand* also remarked (at p 309) that “the law of charity has been built up, not logically, but empirically.” Furthermore, in *Dingle v Turner* [1972] AC 601 *Oppenheim* was itself subjected to criticism and the approach of the *Oppenheim* dissentient, Lord *MacDermott*, who also sat, no doubt to his great satisfaction, in *Dingle*, was generally preferred. In the leading judgment Lord *Cross of Chelsea* said (at p 624):

> In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable, will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.

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In the New Zealand context it is, we think, impossible not to regard the Maori beneficiaries of this trust, both together and in their separate iwi or hapu groupings, as a section of the public for the purposes of a trust established by the Crown and Maori in terms of a compact between them and fulfilling the functions of the Crown Forestry Rental Trust.

[39] On the second step in the inquiry, whether that purpose of public benefit is charitable in its nature, we find it unnecessary to reach any view on whether, as might appear, all of the majority in the *Medical Council* case adopted the approach that objects beneficial to the public or of public utility are presumed to be within the spirit and intendment of the preamble to the *Statute of Elizabeth* in the absence of any ground for holding otherwise. Certainly *Thomas* J took that position. *McKay* J referred with apparent approval to a passage in *Halsbury* to that effect and *Keith* J concurred with both *McKay* J and *Thomas* J. But Mr Coleman urged upon us the view that *McKay* J, in the end, proceeded in the traditional way to find a charitable purpose by analogy. We need do no more than note that *McKay* J said (at p 314) that in applying the spirit and intendment of the preamble it is important to be guided by principle rather than by a detailed analysis of decisions on particular cases, a view with which we entirely agree.

[40] We have no doubt that in this case the public benefit which we have described is, in the context of New Zealand society at this time, of a charitable character. The assistance purpose of providing the Waitangi Tribunal with additional material which will help it produce more informed

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recommendations, leading in turn to the settlement of long standing disputes between Maori and the Crown, is of that character. It is directed towards racial harmony in New Zealand for the general benefit of the community. That is not an object which can legitimately be regarded as political in nature and thus disqualified.

[41] The evidence suggests, as well, that the historical research will also be likely to fulfil an educational role. We think that is very probable, particularly when and if it is endorsed in the Tribunal's reports. There is some analogy also with the cases mentioned by *O'Regan* J (see para [13]) concerning trusts for the benefit of aboriginal people (although these appear to have been in part at least for the relief of poverty) and a trust for the benefiting of a class of the community (returned servicemen) by restoring them to their native land and giving them a fresh start in life. In the last of these cases, *Verge v Somerville*, the Privy Council made it clear that it was not resting its decision upon the relief of poverty. It had noted earlier Lord *Macnaghten*'s observation in *Pemsel* that the fourth head of trusts may incidentally benefit the rich as well as the poor. So it will be in the present case. But it is notorious, and confirmed by the evidence of Mr Love, that many (if not most) Maori who are members of groups directly benefiting from the assistance of the trust and from settlement of grievances are likely to be at the lower end of the socio-economic scale.

(b) The payment of the surplus to the Crown

[42] The second issue on the (amended) cross-appeal is whether, contrary to the view of *O'Regan* J, the provisions of the trust deed requiring the payment of surplus (unused) income to the Crown on a winding up, free from the trust, is a non-charitable purpose, with the result that although, as we have held, the assistance purpose is wholly charitable, an exemption is nevertheless not available under s 61(25) because the income is not derived in trust for charitable purposes, in the sense of being dedicated at all times exclusively to charitable purposes.

[43] It was the submission for the Commissioner that this question could not depend on the trustees' current projections that all of the anticipated income will be utilised for the assistance of claimants so that there would, at the end of the life of the trust, now expected in 2008, be no surplus or a minimal surplus only. Such a subjective view was said by Mr Brown to be impermissible. He said that the matter must be examined objectively as at the time of receipt of the income in question. Such is the size of the annual income (now in the range of $17–20 million per annum) and such is the uncertainty over the timing and destination of the vesting of particular forests, that it seems unlikely, counsel said, that all of the money will actually be required for assistance purposes falling within the terms of the trust deed. No-one can be certain about that. It would not be proper to proceed on the assumptions made in the appellants' preferred factual scenario. Mr Brown submitted also that the obligation to pay over the surplus to the Crown is in this setting not properly characterised as a mere ancillary or incidental power. He said there is significance in the fact that the

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deed expressly requires the surplus to go to the Crown, instead of providing for it to go to Maori. Counsel added that to treat such a provision as charitable would be to create the potential for abuse of the charitable exemption by a settlor, enabling the utilisation of an accumulation power coupled with a reversion or payment over to the settlor as a means of escaping or deferring taxation on income which ultimately reverts to the settlor.

[44] Counsel for the trustees, in his response, drew attention to the evidence of current and proposed levels of trust expenditures, saying that they apply all or substantially all of their current income to the assistance purpose. As a matter of evidence, Mr McKay said, the expectation is that all income derived over the anticipated life of the trust will be applied to that purpose. The trust has been advised by a Queen's Counsel that the Crown is not a beneficiary of the trust and that the plain intention of the trust deed is that all income will be expended on the assistance purpose. It would be incongruous, Mr McKay said, if the fact of the payment of surplus income to the Crown, a comparatively small sum, were to provide the basis for the imposition of a tax liability on all of the income derived by the trust over its 18 year (or longer) life.

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[45] It was submitted for the trustees that the payment of surplus income to the Crown is not a purpose for which income is derived by the trust. Rather, it was said to be merely an incidental power of a machinery character, like the power to apply income to meet winding up expenses. It could not seriously be said that the “end in view” of the trust deed was a payment of surplus income to the Crown.

[46] The position taken by the Commissioner was also said to be contrary to case law establishing the charitability of certain limited life trusts where there is provision for the fund to revert to an individual or a corporate settlor, instancing, in particular, *Gibson v South American Stores (Gath & Chaves) Ltd* [1950] Ch 177. It was further submitted, by way of comparison, that a society or institution qualifying for charitable status under the second limb of s 61(25) would not be at risk in relation to its income merely because of the possibility that upon a winding up surplus income might be payable to a third party. It should be the same for trusts under the first limb of the sub-section.

[47] In an argument put to us as an alternative, Mr McKay said that the application of any surplus income by payment to the Crown is of relevance only in the income year in which a winding up of the trust occurs; prior to such event no income could or would be applied to the Crown. Exemptions ought to be determined on an annual basis. In each of the years prior to the year of winding up, all income derived by the appellants is derived for charitable purposes since no such income can in those years be applied by way of payment to the Crown. The issue of the charitable status of income derived in the year of winding up would, Mr McKay suggested, be different.

[48] Finally, it was submitted that if no explicit provision had been made in the deed for any surplus income on a winding up, it would have been treated as held on a resulting trust in favour of the Crown as the contributor of the capital sums which produced the income. Therefore there was sufficient connection between the contribution of the capital and the surplus income to justify treating the direction for payment to the Crown as occurring under an express equivalent of a resulting trust. It would be held on a separate trust arising only at the point at which the winding up was completed and a surplus identified. Viewed in this way, Mr McKay said, the Crown Forestry Rental Trust would satisfy s 61(25) because all the income arising until the point at which the new trust came into effect would have to be applied for the charitable assistance purpose.

[49] For the sake of completeness we should mention that at the earlier hearing Mr McKay had also suggested the possibility that the payment of accumulated income to the Crown was either a reflection of *bona vacantia* or was equivalent to a gift to the Crown and as such itself a charitable disposition (*In re Smith; Public Trustee v Smith* [1932] Ch 153).

[50] It will be remembered that cl 9.4 of the trust deed stipulates that any surplus income remaining upon the winding up of the trust is to be paid to the Crown “free from the Trust”. And cl 12.2 requires that after completion of any realisation of the trust the net proceeds are to be distributed “together with all other cash forming part of the Trust Fund”:

- in respect of any capital, to the Confirmed Beneficiaries or their legal representatives; and

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• "in respect of any other moneys, to the Crown".

The trust deed therefore contemplates that accumulated and unspent income may in this way come to be held for and ultimately paid over to the Crown if not required to defray the expenses of the trust, including its liquidation expenses. In our view, that is a purpose for which the income is, potentially, derived as from the time of its receipt by the trustees. It is entirely possible that, contrary to the present expectations of the trustees, a very large sum may be built up by accumulations over the life of the trust. We note, for example, that $1.7 million was carried forward to the next year in 1994, at a time when the annual income was much lower than the present $17–20 million. That sum was soon expended, but that was because of increasing requests for assistance. It cannot be assumed that requests for eligible assistance will continue to increase or even continue at the present level and that the assistance with preparation, presentation

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and negotiation of claims will necessarily consume sums of the considerable magnitude now generated by investment of rental proceeds (themselves increasing periodically) throughout the remaining estimated life of the trust, and that the trustees will therefore be left with, at most, a minimal surplus. It is not at all difficult to conceive of circumstances, which may very well occur, in which settlements of remaining forest claims are achieved with much less complication and expense than is now envisaged, with the result that a considerable quantity of accumulated and/or current income is left in the hands of the trustees. Whatever the assumptions of the trustees and those who appointed them may have been when the trust was established or whatever they may now be, that surplus, no matter what its size, would in terms of the trust deed have to be paid over to the Crown. We should add that we have seen no evidence supporting the view that when the trust was established there was in fact any intention on the part of the Crown that all or almost all the income would be utilised for the assistance purpose so that the "return" to the Crown would at best be minimal.

[51] In any event, the taxation exemption for income under s 61(25) depends upon what purposes in law it *can* be used for by the trustees, not upon the subjective intentions of the settlor in that regard. And obviously if there were to be a situation in which the trust were being wound up, no further assistance of Maori claimants would be legally justified. The trustees would be obliged to apply the surplus in terms of the winding up provisions of the deed, regardless of what may earlier have been intended. Nor can the existence of any such intention at a particular time mean that the requirement for payment of surplus income for the Crown is *as a matter of law* to be regarded as so minor that it is properly to be considered to be merely ancillary to the assistance purpose. We think that a reader of the whole of the trust deed and the documents and statutes referred to in it would conclude that the purposes of the trust relating to its income are twofold, namely to assist Maori claimants to the extent necessary to achieve the desired settlements and then to pay surplus moneys to the Crown, which was the source of the capital from which the income was derived.

[52] The cases on limited life trusts to which Mr McKay referred us in argument, *Gibson v South American Stores* and the earlier decision in *In re Sir Robert Peel's School at Tamworth*, dealt with the charitable status of a trust before it was rescinded or modified under an express power. They were not tax cases and did not address the issue with which we are now concerned of the application of accrued income. In *Gibson* the first question of present relevance was whether the trust was charitable in character pending a resolution of the company to bring it to an end; and the second such question was whether, if that event were to occur, there was a general charitable intention so that the fund would then have to be applied *cy-près*. In contrast, in the present case the question is whether a certain income stream derived by a trust not necessarily established exclusively for charitable purposes must be applied only for charitable purposes under *existing* provisions of a trust deed. In *Peel*, it will be recalled, the issue was whether the trust was a charity notwithstanding the contingency that it could be revoked. *Selwyn* LJ commented (at p 553) that until the power to put an end to the charity was exercised the fund remained devoted to, or held exclusively for, charitable purposes. In the present case if, as we think, the requirement for payment of surplus (accumulated and current) income to the Crown is not a charitable purpose, and is not a mere ancillary power, the income as and when derived in each year cannot be said to be devoted to, or held exclusively for, charitable purposes. That requirement already exists as an operative provision of the trust deed which already binds the trustees, and does not depend on a future exercise of legal power by the settlor. We would wish to reserve the question of whether the existence of a power such as was found in *Gibson* and *Peel* would compromise the ability of a trust to claim an exemption under s 61(25) if it could be used to enable accrued income to be applied for a purpose which was not charitable.

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[53] We are not persuaded by the argument that the surplus is to be likened to *bona vacantia* or can be treated either as held and paid upon the equivalent of a resulting trust or as paid to the Crown as a gift for charitable purposes. The essence of *bona vacantia*

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is the vesting in the Crown of property which has no owner. Payment of surplus income in this case is to be made by the trustees to the Crown pursuant to the terms of the deed agreed as part of the settlement. It is not something unclaimed or indisposed of. The essence of a resulting trust in this class of case is that a trust is imputed either (i) because the trusts declared, although expected to do so, do not in the event exhaust the fund and the unexpended balance reverts to the settlor; or (ii) because, from the absence of consideration or from a presumption of advancement, a person is presumed to hold the beneficial interest in property for the person from whom that property came (see *Megarry* J's broad propositions *In Re Vandervell's Trusts (No 2); White v Vandervell Trustees Ltd* [1974] Ch 269 at p 294). There is no room for the former (reversion to the settlor) where, as here, the unexpended balance of income is paid to the Crown pursuant to the trust deed. It is not a refund or return to the Crown of the property it constituted. The rental proceeds constituting the corpus of the trust go on winding up under a separate provision to the Confirmed Beneficiary (either the Crown or Maori). The right to interest is an interest in property which is separate from the rights in relation to the corpus. The unspent interest does not “result” to the Crown. Nor is there any absence of consideration or room for operation of a presumption of advancement to the trust. There is simply an express provision to deal with unexpended moneys. That provision does not operate as or give rise to a separate trust, as Mr McKay also argued; and, even if it did, the existence of the requirement to transfer surplus moneys to such a trust would itself mean that they were not received by the Crown Forestry Rentals Trust exclusively for charitable purposes.

[54] The accumulated interest is not given to the Crown for a charitable purpose. It is not a gift from the trustees, nor has the Crown ever committed itself to using it for charitable objects. It is not the equivalent of the fund in *In re Smith* where, in the case of a gift to “my country, England”, a charitable purpose could be regarded as implicit in the context (see *Williams' Trusts Trustees v IR Commrs* [1947] AC 447 at p 459). Nor is it like Lord *Macnaghten*'s example in *Pemsel* (at p 584) of a gift to the Chancellor of the Exchequer for the benefit of the nation. It could not be argued that all sums received beneficially by the Crown are, without more, derived for charitable purposes. The general rules governing Crown property are the same as for the property of private persons (*Halsbury* vol 12(1), para 201 and 202). The particular transaction must stamp the property with a charitable purpose. The deed here provides for payment of the unexpended surplus income on winding up without restricting or specifying the purposes of that receipt. It might be different if the payment were earmarked, expressly or impliedly, for the relief of the community from taxation, but there is nothing of this kind which directs or restricts the Crown's use of the surplus.

[55] Nor do we accept Mr McKay's alternative argument that the application of surplus income is of relevance only in the income year in which a winding up of the trust occurs because prior to that event no income could or would be applied to the Crown. Although the charge to tax is an annual one, it cannot be said that in the years preceding the year of a winding up the income from the investment of the rental proceeds will be derived for charitable purposes exclusively. If not immediately needed for the assistance purpose it will be accumulated and if not subsequently so applied it will be carried forward until winding up and then paid to the Crown. There is no obligation on the trustees to apply it all to the assistance purpose in the year in which it is derived or in any future year. Quite the contrary, the trustees must not expend the trust's income except to the extent that is proper for the assistance of claimants as provided for in the deed. It is not the case that, as counsel suggested, because the trust is continuing beyond the year of receipt of particular income, which accordingly cannot be paid to the Crown in that year, therefore the purposes for which the income is received are to be regarded as exclusively charitable in that year, notwithstanding that in a future year in which a winding up eventually occurs the net accumulated moneys can be and must be paid to the Crown. Mr McKay relied upon *Public Trustee v C of IR* in relation to his

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alternative argument, but it was actually the converse situation. As income was derived in each year it was immediately known whether it would go in payment of the annuities (the first £575 pa) or to the charitable purpose (the balance, if any). Once an amount sufficient to pay the annuities had been derived in any year

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the remainder of that year's income could not be applied except for the residuary charitable purpose (see *Turner* J at p 81, *Haslam* J at pp 87–8 and *North* P at p 89).

[56] Although we are naturally reluctant to reach a conclusion which, as we are told and as affidavit evidence suggests, may indirectly have an adverse impact on the funding of the Waitangi Tribunal processes, we are also conscious of the obvious potential for abuse of the charitable exemption in s 61(25) in other cases if we were to uphold a tax exemption for income of a trust which need not be applied in the year of receipt for charitable purposes and could be accumulated from year to year and ultimately paid over for a non-charitable purpose. The potential for abuse would exist even if in such a case the moneys were in some future year to be taxable in the hands of the trustees or of the ultimate recipient.

***Result***

[57] The appeal is allowed, but so is the cross-appeal, with the consequence that the judgment for the Commissioner in the High Court is confirmed. There will, however, be no costs order in this Court.

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