

In the High Court of New Zealand
Masterton Registry

CIV-2024-435-

I te Kōti Matua o Aotearoa
Whakaoriori Rohe

Under Part 3 of the Charitable Trusts Act 1957 and Part 19 of the High Court Rules 2016

In the matter of a Scheme under Part 3 of the Charitable Trusts Act 1957 in respect of the Estate of **ARTHUR POWYS WHATMAN** late of Masterton, Retired Sheepfarmer, deceased

Between **MASTERTON DISTRICT COUNCIL** a territorial authority under the Local Government Act 2002

Applicant

**MEMORANDUM OF COUNSEL IN SUPPORT OF ORIGINATING APPLICATION FOR
ORDERS APPROVING A SCHEME REPLACING AN EXISTING SCHEME UNDER PART 3
OF THE CHARITABLE TRUSTS ACT 1957**

Dated 16th April 2024

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MAY IT PLEASE THE COURT:

1. This is an originating application under Part 3 of the Charitable Trusts Act 1957 (**the Act**) for orders approving a proposed scheme (**Proposed Scheme**) replacing an existing 1966 scheme approved by the then Supreme Court by order dated 7 June 1966 (**1966 Scheme**) and authorising the Masterton District Council (**Council**) as the Applicant to take all steps necessary to give effect to it.¹
2. Part 19 of the High Court Rules 2016 applies to this application.²
3. The background to this application is complex and is covered in some detail in the affidavit of the Council's Chief Executive, Kym Albert Fell, filed in these proceedings on behalf of the Council.
4. To summarise the position however, the Council currently holds a property known as Panama Village in Ngaumutawa Road, Masterton (**Panama Village**), upon charitable trusts under the 1966 Scheme for accommodation of the aged or needy.
5. The 1966 Scheme in turn related to charitable trusts established by the will of Arthur Powys Whatman who died in 1938.
6. Panama Village currently has 44 accommodation units and a community centre, together with a separately tenanted house held on its own record of title, and finally an area of vacant land. The separate house site and the vacant land are together described below as the **Vacant Land**.
7. There is no material impact on the existing village and its residents. The existing trusts that apply to the existing village will remain unchanged. The relevant focus of the Proposed Scheme is on the Vacant Land.

1 The Council also relies on the inherent jurisdiction of the Court to the extent that this may be necessary.
2 See Rule 19.2(b).

8. There is an urgent demand for public housing in Masterton. The Council is not in a financial position to construct further public housing on the Vacant Land using ratepayer funding or borrowing. The charitable trusts subject to the 1966 Scheme equally have insufficient funds for this purpose.
9. Apart from the Council not being able to fund the capital cost of the construction of new units on the Vacant land, it is not able to access the Income Related Rent Subsidy as neither it nor a related entity is able to become a registered community housing provider. These matters are covered in the affidavit of Mr Fell filed in support of the originating application.³
10. As a result of the Council's consultation on its 2021-31 Long-Term Plan, the Council decided to pursue a proposal to make the Vacant Land available to another entity for public housing. This led to the Council initiating a Long-Term Plan Amendment which was in turn subject to public consultation as described in Mr Fell's affidavit.
11. As part of the adoption of the Council's Long-Term Plan Amendment, the Council decided to advance the Proposed Scheme by making an application to this Court.⁴
12. The Proposed Scheme seeks to:
 - (i) provide for the sale or lease of the Vacant Land subject to it being used for public housing (as defined in the Proposed Scheme) with an appropriate encumbrance or covenant to that effect being placed on the record(s) of title to the Vacant Land;
 - (ii) authorise the Council to apply the proceeds of the sale or lease of the Vacant Land to the costs of funding the necessary infrastructure works to enable the development of public housing

3 At [18]–[32].

4 Fell affidavit at [33]–[47].

on the Vacant Land, and for any balance funds to be used for investment in the Council's existing public housing stock, with priority for those balance funds to be applied to the existing Panama Village housing;

- (iii) modernise aspects of the 1966 Scheme and remove those provisions that are no longer relevant; and
- (iv) retain the existing charitable trusts in respect of the existing Panama Village with some minor wording amendments.

13. This application is brought primarily under ss 32 and 33 of the Act.
14. In terms of s 32, the Applicant's position is that it is impractical and inexpedient (if not impossible given the lack of funding) for it to carry out the existing trust purposes in the 1966 Scheme in respect of the Vacant Land at Panama Village, that the amounts available for that purpose are inadequate, and that the Proposed Scheme respects, to the extent possible, the scope of the original trusts established under the will of Mr Whatman, and his wishes as are otherwise evident from that will.⁵
15. It is submitted that the expressions "impossible" and "impractical" should be given their plain meaning.⁶ "Inexpedient" has the connotation of the purposes having been unsuitable, inadvisable or inapt.⁷ It involves a measure of value judgment rather than simply an assessment of feasibility.
16. The High Court in *The Merton Trust*⁸ summarised the principles in respect of s 32 applications:

5 See *Re University of Canterbury (Erskine Trust)* [2018] NZHC 2259 at [33]. Also see *Re Whatman* Supreme Court Wellington, 16 July 1965 at 193. (This case concerned an earlier 1965 scheme in respect of Mr Whatman's will that was not approved by the Supreme Court. The Supreme Court subsequently approved the 1966 Scheme.)

6 *Re Public Trusts* [2018] NZHC 3422 at [23].

7 *Re McElroy* [2003] 2 NZLR 289 (CA) at [14].

8 HC Auckland, CIV-2006-404-3327, 6 September 2006 at [31] referring to *Re Tenant* [1996] 2 NZLR 633 (HC) at 631. The *Re Tenant* case was referred to in the *Estate of James Gammack* [2021] NZHC 86 at [21], and *Re Public Trust in respect of the Ahimsa Trust* [2022] NZHC 2758.

- (i) The application must come within the statutory jurisdiction (which includes a necessity for the purposes to have been charitable at the date of settlement).
- (ii) The substituted arrangements must be charitable as that term is understood in law.
- (iii) In deciding whether to approve the substituted arrangements, the new scheme should accord as closely as is reasonably possible in the changed circumstances to the terms of the original trust.
- (iv) The Court will dispose of the property in such a way as will best serve the interests of those intended to be beneficiaries and the public.

17. As already mentioned, and as is evident from the affidavit of Mr Fell,⁹ the starting point is that the Council does not have the finances to construct and operate further public housing at Panama Village within current budgets, without rates increases, or without deferring other important projects.

18. As it is, the Council to some extent “subsidises” the operation of the existing Panama Village and other accommodation¹⁰ and there is no prospect of funding further public housing from the limited charitable trust funds held by the Council under the 1966 Scheme.¹¹

19. A further factor (again already mentioned) is that the Applicant is a local authority and cannot access the Income-Related Rent Subsidy in terms of delivery of public housing, as neither it nor a related entity (such as a council-controlled organisation) is eligible to be a community housing provider under the Public and Community Housing Management Act 1992.¹²

⁹ Fell affidavit at [20]–[22].

¹⁰ Fell affidavit at [17] and [23].

¹¹ Fell affidavit at [24].

¹² Fell affidavit at [27]–[29].

20. Mr Fell in his affidavit describes the shortage of public housing in the Masterton District. While Kainga Ora has recently opened community housing on two sites with another three expected to be completed in 2014, these proposals will not fully meet the current demand.¹³
21. As is evident from the Long-Term Plan Amendment, the Council views its proposals to sell or lease the Vacant Land and financially assist with upgrading the infrastructure required for new public housing, as the most appropriate way of fulfilling, in respect of the Vacant Land, the charitable trusts under the 1966 Scheme and in turn Mr Whatman’s original will trusts.
22. The Proposed Scheme will ensure that public housing will ultimately be able to be provided on the Vacant Land, although not provided by the Council. The contribution of infrastructure funding from the sale proceeds will assist with and expedite such public housing, which again involves a charitable purpose.
23. In summary, it is submitted that the Proposed Scheme satisfies s 32 and also meets the principles applicable to approving a scheme under that provision.
24. In terms of s 33, the Council has sought the opportunity to:
- (i) remove provisions in the 1966 Scheme that are no longer applicable;
 - (ii) modernise the language of the 1966 Scheme and in particular to use the expression “public housing” (as defined in the Proposed Scheme) for trust purposes, rather than the trusts relating to housing the “aged or needy”;

13 Fell affidavit at [18]–[19].

- (iii) make provision for the continued use of the original dwellinghouse on the property as a community space and for its replacement if necessary; and
- (iv) confirm the rights of occupancy of the existing residents at Panama Village.

25. In *Re Auckland Observatory and Planetarium Trust Board*,¹⁴ the High Court observed that under s 33, an applicant must demonstrate that the proposed changes will facilitate the administration of the trust property or the overall operation of the trust. In this respect, “facilitate” means make easier, promote, or help forward.¹⁵ The purpose behind s 33 is to enable trustees to remedy administrative problems that they encounter because of changed circumstances.¹⁶ The threshold test is not high.¹⁷

26. In the present case, there is clearly overlap between ss 32 and 33 and the Council relies on both sections as necessary. However in terms of s 33 itself, it is submitted that the changes outlined in paragraph 24 above allow the administration and overall operation of the trust in circumstances which have changed since 1966.

27. Under s 56 of the Act, the Court cannot approve a scheme unless:

- (i) the scheme is a proper one and should carry out the desired purpose or proposal;
- (ii) the scheme is not contrary to law or public policy or good morals;
- (iii) the scheme can be approved under the Part of the Act under which approval is sought;

14 [2017] NZAR 962. See also *Re Melanesian Mission Trust Board* HC Auckland, M1140/98, 24 September 1998 at page 7.

15 At [10].

16 Ibid.

17 *Dilworth Old Boys Benevolent Trust* [2022] NZHC 2755 at [19].

- (iv) every proposed purpose is charitable within the meaning of that Part of the Act and can be carried out; and
 - (v) the requirements of that Part of the Act have been complied with in respect of the scheme.
- 28.** If the tests in s 56 are met, the Court can approve the scheme under s 53.
- 29.** The Council submits that the Proposed Scheme is a proper one given that it facilitates further public housing in Masterton using existing trust land that the Council is not in a position to develop. The particular proposals in the Proposed Scheme, subject to reaching agreement with an appropriate public housing provider, advance this purpose.
- 30.** There is nothing in the Proposed Scheme that is contrary to law, public policy, or good morals, and the Proposed Scheme can be approved under ss 32 and 33 of the Act for the reasons already outlined above.
- 31.** All of the purposes of the Proposed Scheme are charitable. The continuing provision of public housing (previously “aged or needy” under the 1966 Scheme) at Panama Village is clearly charitable as relieving poverty,¹⁸ or for the relief of the aged¹⁹ as is the proposal to assist with the infrastructure needed for further public housing on the Vacant Land with the application of any surplus funds being used to benefit the Council’s existing housing stock.
- 32.** There is no doubt the Proposed Scheme is capable of being carried out by the Council as trustee of the trust property.
- 33.** The requirements of Part 3 of the Act have been satisfied to date and will continue to be complied with.

¹⁸ The relief of poverty is first head of charity outlined in *The Commissioners for the Special Purpose of Income Tax v Pemsel* [1891] AC 531 (Pemsel's Case).

¹⁹ See *D V Bryant Trust Board v Hamilton City Council* [1997] 3 NZLR 342 at 348.

34. The Attorney-General has reported on the Proposed Scheme as required by s 35 of the Act and a copy of her report is annexed together with her Addendum Report dated 29 February 2024. The Proposed Scheme is attached to the originating application filed in these proceedings.

Dated this 16th day of April 2024



D J S Laing
Counsel for the Applicant

Annexure: Attorney-General report and addendum

**IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHAKAORIORI ROHE**

CIV-2023- -

UNDER THE

Charitable Trusts Act 1957

IN THE MATTER OF

**a scheme under Part 3 of the Charitable
Trusts Act 1957 in respect a charitable trust
created by the Will of the late Arthur Powys
Whatman**

MASTERTON DISTRICT COUNCIL

Applicant

REPORT OF THE ATTORNEY-GENERAL

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Introduction

1. This is an application by the Masterton District Council (**the Council**) (formerly Masterton Borough Council) as trustee of a charitable trust, the Panama Village Charitable Trust (**the Trust**) set out in the will of Arthur Powys Whatman, to vary the charitable purpose and mode of administration of the trust under ss 32 and 33 of the Charitable Trusts Act 1957 (**Act**).
2. The Trust was subject to substantial variation in 1996. In considering this application for a further variation, it has been necessary to refer primarily to the trust, as it was amended in 1966, but I have also considered the will of the settlor in order to understand his original intention in settling the trust.
3. I have considered the following documents submitted to me in draft pursuant to s 35 of the Charitable Trusts Act 1957:
 - 3.1 Draft scheme under part 3 of the Charitable Trusts Act 1957;
 - 3.2 Draft memorandum of counsel in support of originating application;
 - 3.3 Draft notice of originating application for approval of scheme replacing an existing scheme under Part 3 of the Charitable Trusts Act 1957;
 - 3.4 Draft affidavit of David Richard Hopman, Manager of Assets and Operations at the Council, in support of an originating application for orders approving a scheme replacing an existing scheme under Part 3 of the Charitable Trusts Act 1957, with new paragraphs 56 to 58: and
 - 3.5 The original will and 1966 Scheme, appended to the affidavit of David Richard Hopman.

Report Conclusions

4. Pursuant to ss 35 and 56 of the Act and for the purposes of assisting this Court, as to the matters in which it is required to be satisfied under s 56(1)(a) of the Act, I report that I am satisfied that the scheme is a proper one and should carry out the desired purpose or proposal, and it is not contrary to law or policy or good morals; that the scheme can be approved by this Court under Part 3 of the Act; that every proposed purpose is charitable within the meaning of the Part 3 and can be carried out; and that the requirements of the said part have been complied with in respect of the scheme up to the giving of this report.

Background

5. The evidence filed in support of this application is contained in the affidavit of David Richard Hopman, the Chief Executive of the Council.

Will of Arthur Powys Whatman

6. Arthur Powys Whatman owned and lived on a property on Ngaumutawa Road, Masterton until his death in 1938. It was referred to as the Whatman Block and on it he built a large homestead known as the Panama Homestead.
7. In an original will dated 25 January 1938, Mr Whatman provided for a number of legacies and for the division of the Whatman Block, transfers of land and the establishment of charitable trusts as set out below:
 - 7.1 An area of land that became Lot 1 was devised to the Salvation Army to become part of the land associated with the Cecelia Whatman Home.
 - 7.2 The Public Trustee was directed to erect a house on an area of land for Edmund Buckeridge and Violet Buckeridge for their occupation during their lifetimes. This land (**the House Site**) became Lot 2 and is now part of the Trust Land described below, having been transferred to the Wairarapa Hospital Board (**the Board**) in 1963.

- 7.3 Mr Whatman left his “trust realty” to the Board on charitable trusts set out in clause 10 of his will. The “trust realty” was divided into an area of land on which the Panama Homestead was located and some balance areas described as “my non-residential realty”. After the subdivision of the House Site, the balance of the “trust realty” became Lot 3 and was transferred to the Board in 1940. I refer to the House Site (Lot 2) and Lot 3 which now comprises Panama Village as “**the Trust Land**”.
- 7.4 The charitable trusts under clause 10 primarily involved the use of the Panama Homestead as a convalescent or rest home for the aged or needy or those who are convalescent or recovering from sickness and secondly, subject to the funds being available, the erection on his non-residential trust realty of a further charitable institution(s) for similar charitable purposes.
- 7.5 The will provided that no part of the trust realty should at any time be sold, let or leased.¹
- 7.6 The residue of the estate was devised and bequeathed to the Public Trustee, subject to the clause directing the erection of the House Site, to pay the income to the Board for the upkeep of Panama Homestead and any institution erected on the non-residential realty.
8. The Board gave effect to the trusts affecting the Trust Land in 1958 by making the Panama Homestead available for occupation by aged or needy persons. The Board does not appear to have carried out any further development of the Trust Land and by 1963 had incurred 5 years of losses in respect of the accommodation facilities in the Panama Homestead.

¹ cl 11, Will of Mr Whatman.

Prior variation – the 1966 Scheme

9. By 1965 it had become impractical to use the Panama dwellinghouse as a convalescent home for the sick and needy and *In the matter of Estate of Arthur Powys Whatman*² the Board and Council presented rival schemes to the Supreme Court for the variation of the trust under the Act.
10. In preferring the Council’s scheme, Justice Tomkins found that the evidence established that it was impractical and inexpedient for the Panama dwellinghouse to be used as a convalescent home for the aged and needy but:

It does not show that it is impractical or inexpedient to use the Panama property for some of the charitable purposes set out in the will. The Council scheme, in my view, shows that it can so be used. The terms of the will are that the whole of the land is to be made available for the purposes set out. These purposes are alternative. The will says “sick, aged, or needy or who are convalescent or recovering from sickness or ill-health”. Accordingly, the use of the land to allow persons who fall within any of these classes, to reside there, though not in the Panama dwellinghouse complies partly with the terms of the trust. **The land can be used for the personal residence of aged or needy persons in pensioner flats or villas** with the dwellinghouse set apart for their recreation.³ [emphasis added]

11. The Court approved the Council’s Scheme under Part 3 of the Act.⁴
12. The Scheme relevantly provided for the following:
- 12.1 The Trust Land (referred to as the “trust realty” in the Scheme) and all improvements on that land to be transferred to the Council (then the Masterton Borough Council) upon trust for the accommodation of the aged and needy, subject to paragraphs 5 to 16 of the Scheme.
- 12.2 The Council was required within 2 years of the transfer to erect on the Trust Land 10 housing units suitable for the accommodation of aged or needy persons and thereafter to administer the units.

² The Supreme Court of New Zealand, 16 July 1965.

³ *Ibid*, page 6.

⁴ Exhibits F, G and H to affidavit of David Richard Hopman.

- 12.3 Further parts of the Trust Land were to be used by the Council for additional accommodation for aged or needy persons.
 - 12.4 The Council to convert the Panama Homestead into a recreational centre for use of the residents and for the Council to use other parts of the Trust Land for other recreational facilities.
 - 12.5 Any other portion of the Trust Land as necessary could be used by the Council for recreational facilities for the Borough.
 - 12.6 The Council did not have the power to sell or exchange the Trust Land without the consent of the (then) Supreme Court.
 - 12.7 The income from the Trust Land was to be used for the maintenance, improvement or development of the Trust Land, or the repayment of liabilities.
 - 12.8 The income derived from the residue of the estate was to be paid by the Public Trustee to the Council for the maintenance, improvement or development of the trust property or the repayment of liabilities.
13. Following the transfer of the Trust Land to the Council, it erected 44 senior units on part of the Trust Land. This left the House Site (which is currently tenanted until 2023) and a large vacant area of Trust Land (**the Vacant Land**).

Proposed variation

The need for a new scheme

14. The Council has 74 senior housing units that it rents at below market rates, made up of the 44 units at Panama Village and 30 other units.
15. The Trustee's evidence is that there is an urgent need for more public housing in the Masterton District. There are significant waitlists for community housing. There is currently no Kāinga Ora presence in the Wairarapa. Although new initiatives have recently been announced, these will not fully meet the unmet needs.

16. The Council does not have the resources to construct and operate further public housing, within its current budgets, without rate increases or deferring other important projects. The trust funds held under the 1966 Scheme are insufficient to be used for further public housing and there is no prospect of the trust funds increasing to the extent that it would be viable to fund further public housing in the future.
17. As part of the development of its 2021-31 Long-Term Plan, the Council proposed developing more senior housing on the Vacant Land at Panama Village. Feedback from the consultation process was that new housing on the Vacant Land should be a priority and that any new housing should not be solely for seniors. On the basis that the Council, as trustee, does not have the resources to develop the land for public housing purposes, its intention is to make the Vacant Land at Panama Village available for someone else to develop public housing, either through sale or lease, with a preference for sale.

Proposed variation to the Trust's purpose

18. The proposed scheme changes the purpose from:

4. THE council shall...hold the trust property upon trust for the benefit of the aged or needy subject however to the restrictions and provisions appearing in paragraphs 5 to 16...

.....

6. THEREAFTER the Council shall use such further portions of the trust realty as shall from time to time prove necessary for the erection thereon of further houses or villas suitable for the accommodation of aged or needy persons...

To:

1. This Scheme is for: (a) the management and ownership of the Trust Property...including the retention and use of the Existing Village for public housing and the sale or lease of the Vacant Land for public housing...

.....

3. The Council will hold and administer the Existing Village upon trust for the purpose of providing and facilitating public housing at such rentals, and subject to such terms and conditions, as the Council from time to time determines.

19. “Public housing” is defined in the proposed scheme as “housing for people who by reason of age, infirmity, disability, and/or personal or financial circumstances are unable to meet their own accommodation needs in a safe and healthy manner provided or subsidised by central or local government, a community housing provider, a charitable entity or a Wairarapa iwi entity”.
20. The change from benefitting the “aged or needy” via housing, to benefitting “people who by reason of age, infirmity, disability, and/or personal or financial circumstances are unable to meet their own accommodation needs” via housing is not intended to be a substantive change to the charitable purpose⁵ of the Trust. Rather, it is intended simply to modernise of language in which the purpose is described.⁶
21. The Council’s position is that it is impracticable and inexpedient for it to carry out the charitable purpose in the 1966 Scheme (the accommodation of aged or needy persons) in respect of the Vacant Land.⁷ This is because the trust has insufficient funds to develop more housing on that land, and there is no foreseeable prospect of it gaining sufficient funds in future. It therefore proposes to amend the purposes of the Trust to allow for the sale or lease of the vacant land for the purposes of public housing, whilst continuing to hold and administer the existing village.
22. The Council seeks to apply the proceeds of any sale or lease of the Vacant Land to fund the necessary infrastructure works to enable the development of public housing on the Vacant Land, with any remainder being used for the maintenance, upkeep, repair, improvement or development of the Panama Village and if there is any remainder following such expenditure, to be deployed in investment in the Council’s general public housing stock.

⁵ The original will set out the charitable purpose at cl 10(a) as being the benefit of the “sick aged or needy or [those] who are convalescent or recovering from sickness or ill-health”.

⁶ Paragraph 44 of Affidavit of David Richard Hopman.

⁷ It remains able to carry out the charitable purpose in respect of the Existing Village.

Proposed variation to the Trustee's powers and mode of administration

23. The proposed scheme seeks:

23.1 The removal of a number of provisions concerning the transfer of the trust property from the original trust Board to Masterton Borough Council, that were included in the 1996 Scheme and which are no longer relevant.⁸

General principles governing applications under Part 3 of the Act

24. The application invokes the Court's jurisdiction under Part 3 of the Act, in particular ss 32 and 33.

25. Pursuant to s 56(1)(a) of the Act, the Court may approve a scheme under Part 3 if it satisfied that the scheme is a proper one; it is not contrary to law of public policy or good morals; that the scheme can be approved under the Part of the Act under which approval has been sought; that every proposed purpose is charitable and can be carried out, and that the requirements of the relevant Part of the Act have been complied with.

General principles relating to the variation of trust purposes (s 32)

26. Section 32 of the Act provides for the variation of charitable trusts where their purposes have become "impossible or impracticable or inexpedient" to carry out.

⁸ Clauses 3, 5, 7-9, 12, 15, and 16 of the 1966 Scheme have been removed. Those provisions provide, as summarised:

cl. 3 – The Board was to transfer the trust property to the Masterton Borough Council

cl. 5 – within 2 years of transfer the Masterton Borough Council was to build 10 housing or villa units suitable for the accommodation of the aged or needy.

cl. 7 – The Trust Board was to maintain the residents of Panama between the transfer of property to the Masterton Borough Council and the establishment of the residence.

cl. 8 – At the time of transfer the Masterton Borough Council was to offer any residence at one of the units at rent fixed by the government's pensioner housing policy.

cl. 9 – If on the date of settlement, residence had not been accommodated elsewhere, the Masterton Borough Council was to lease the Panama buildings on certain terms to the Friends of Senior Citizens Incorporated.

cl. 12 – trust realty not in current use was to be deployed by the Masterton Borough Council for local amenities.

cl. 15 – the name of the housing development must have a suitable name, which should include the words "Whatman" or "Panama".

27. In varying trusts under s 32, the Court is exercising a statutory jurisdiction and is not bound by the common law doctrine of *cy-près*.⁹ However, the courts have held that those promoting a scheme should nonetheless seek to substitute beneficiaries or purposes resembling as closely as possible in the changed circumstances those specified by the original settlor (see, for example, *Re Twigger*¹⁰).
28. In *Re Tennant* Hammond J summarised the principles that govern an application for variation of charitable trusts as follows:¹¹
- 28.1 the application must come within the statutory jurisdiction (which includes a necessity for the purposes to have been charitable at the date of settlement);
- 28.2 the substituted arrangements must be charitable as that term is understood in law;
- 28.3 in deciding whether to approve the substituted arrangements, the new scheme should accord as closely as is reasonably possible in the changed circumstances to the terms of the original trust; and
- 28.4 the Court will dispose of the property in such a way as will best serve the interests of those intended to be beneficiaries and the public.
29. Inexpedience is a lower threshold than “impracticable”. In *Trustees of the McElroy Trust v Objectors*, the Court of Appeal held that inexpedient “... in its present context is of the original charitable purpose or purposes having become unsuitable, inadvisable or inapt”.¹² Accordingly, inexpedience embodies a value judgment rather than simply an assessment of

⁹ *Public Trustee v Attorney-General* [1923] NZLR 433 (SC).

¹⁰ *Re Twigger* [1989] 3 NZLR 329 (HC) at 342.

¹¹ *Re Tennant* [1996] 2 NZLR 633 (HC) at 636. The courts have adopted and applied this framework on several occasions: see for example, *Re YMCA New Zealand Soldiers Great War Memorial Trust* [2013] NZHC 2516 at [17] per Kòs J; *Re Frank Sydenham Scholarship Trust* [2012] NZHC 654 at [37] per Lang J; and *Re Tikipunga Protestant Children's Home* [2012] NZHC 3078 at [16] per Lang J.

¹² *Trustees of the McElroy Trust v Objectors* [2003] 2 NZLR 289 (CA) at [14].

feasibility. It may remain possible or practicable to carry out the original purpose of a trust, but it may nonetheless have become inexpedient to do so. In addition, more recently, in the context of the replacement of trustees, this Court accepted that “expediency” (in the context of the Court’s power to replace trustees under s 51 of the Trustee Act 1957) “is a lower threshold than necessity and imports considerations of suitability, practicality and efficiency”.¹³ This observation might equally be applied to s 32 of the Act.

Jurisdiction under section 33

30. Section 33 of the Act provides:

In any case where it is made to appear that any property or income is given or held upon trust, or is to be applied, for any charitable purpose, and the administration of the property or incumbent with the carrying out of the Trust could be facilitated by extending or varying the powers of the Trustees or by prescribing or varying the mode of administering the trust, the powers of the Trustees may be extended or varied, and the mode of administering the Trust may be prescribed or varied, in the manner and subject to the provisions hereafter contained in this part of this Act.

31. The jurisdiction under s 33 of the Act is intended to deal with problems of administration faced by charitable trustees in giving effect to the intended purpose.

32. As noted by Paterson J in *re Melanesian Mission Trust Board* (HC, Auckland, M1140/98, 24 September 1998), the threshold for a scheme submitted under s 33 is that:

It is necessary for this Court to be satisfied that the administration of the property or the carrying out of the Trust “*could be facilitated*” by the variation sought. The ordinary dictionary meaning of “*facilitate*” is “*made easier, promoted, or helped forward*”.

¹³ *Peng & Ors v Rothschild Trust (Schweiz) AG & Ors* [2017] NZHC 25 at [38].

COMMENT

Variation of purposes

Proposed change in the language used to describe the purpose of the Trust

33. I do not regard the proposed change from the provision of housing for the ‘aged or needy’ to the provision of ‘public housing’ as a defined within the scheme, a change of purpose. I agree with the trustees that it is simply a modernisation of language.
34. A person may be regarded as ‘needy’ if they are ‘poor, destitute, without necessities.’¹⁴ Therefore, the ‘needy’ may be understood as those “in poverty”. The operative definition of public housing within the scheme provides that those who would benefit are those who could not afford their own accommodation needs ‘by reason of infirmity, disability, and/or personal or financial circumstances’. Those who are unable to afford their own accommodation may also be understood as those in poverty. There is no single fixed criterion for what constitutes poverty for the purposes of establishing a charitable purpose¹⁵. ‘It does not involve destitution; it is a word of wide and someone indefinite import’.¹⁶ The inability to afford necessities, including accommodation, is a widely understood definition of poverty. Therefore, the charitable purpose of the trust is currently the relief of poverty through the provision of housing for the poor and would remain so following the proposed amendment.
35. This purpose can be contrasted with that of the trust in *Re Queenstown Lakes Community Housing Trust*¹⁷ which was to assist people who were not in any meaningful sense poor but who were unable to afford a particular type of accommodation in an area with particularly high property prices, a purpose that the Court found did not fall within the ‘relief of poverty’.

¹⁴ OED definition of ‘needy’.

¹⁵ *Re Queenstown Lakes Community Housing Trust* [2011] 3 NZLR 502.

¹⁶ *Re Coulthurst* [1951] CH 661.

¹⁷ *Ibid.*

Proposed variation to enable the Trustees to sell or lease the Vacant Land

36. The proposed variation contained in clause 8 of the scheme, which would enable the Council to sell or lease the vacant land for public housing purposes, is plainly a change of substance, since the original trust deed provided that “no part of my trust realty shall at any time be sold let or leased”.¹⁸
37. The Council has drafted the application on the basis that this variation would involve a change of charitable purpose and must therefore satisfy the test in s 32. However, it is at least arguable that it involves no change in charitable purpose but simply a change in the mode of administering the trust and the powers of the trust, under s 33. Given the significance of the proposed amendment, I have proceeded to consider this aspect of the scheme on the s 32 grounds upon which it has been advanced. For the reasons below, I agree that it is inexpedient and impracticable for the Council to continue to hold the land. Had I considered this proposed variation under s 33, it would have been my opinion that the variation sought is likely to facilitate the administration of the trust and is therefore a proper one within the terms of s 33.
38. The evidence presented on behalf of the Council sets out why it is inexpedient and impracticable for it to continue to hold the vacant land. In brief, the Trust does not have, nor is likely to have, sufficient funds to build public housing on the land. By continuing to hold this land in trust, instead of leasing or selling it, the Council is unable to use it for public housing. By leasing or selling it with a covenant requiring that it is used for public housing, the Council will be in a position to facilitate the use it for public housing, in line with the charitable purpose of the Trust. However, it would cease to hold the land (in the case of sale) to achieve this.
39. The variation sought is in accordance with the fundamental purpose of the trust. Accordingly, in my view, the proposed variation would accord as closely as reasonably possible to the original purposes of the trust.

¹⁸ cl 11, Will of Mr Whatman.

40. Further, the proposed scheme does not allow the sale of the Existing Village, so the trust itself will continue to exist and operate for its charitable purpose and will remain perpetual, in accordance with the intentions of the settlor.
41. This office has discussed with the Council whether public housing might be provided through a variation that would allow only for the leasing of the land, thereby ensuring the property remains in the ownership of the Trust. The Council's position¹⁹, is that whilst it is willing to explore leasing options, its preference is for a sale that will yield 'sufficient funding to be applied in the upgrading of local infrastructure necessary for the development of the Vacant Land, as well as being a more attractive development proposition for a public housing provider.'²⁰
42. On the basis of this evidence, it appears that sale, subject to a covenant for the ongoing provision of public housing, may be more likely to give effect to the purpose of the trust than leasing. I therefore endorse the proposal to authorise the Council to amend the purposes of the Trust to allow for the lease or sale of the Vacant Land subject to a covenant that it be used for public housing. I am satisfied that this aspect of the proposed variation may be approved by the Court.

Proceeds from sale or lease applied for non-Trust public housing

43. Clause 9 of the proposed scheme authorises the Council to apply the proceeds of the sale or lease of the Vacant Land to funding the necessary infrastructure works to enable the development of public housing on the Vacant Land, then on the existing village on the Panama Block, with any balance used for future investment in the Council's existing public housing stock. As such, the proposed scheme would authorise a transfer of the charitable funds to a non-charitable entity (the Council), for the purpose of public housing.

¹⁹ Set out in the additional paragraphs 56 to 60 of the affidavit of David Richard Hopman.

²⁰ New paragraphs 56 to 58 of the draft affidavit of David Richard Hopman.

44. Section 56 of the Trusts Act 2019 sets out the general powers of trustees (including those of charitable trusts), which include, in relation to trust property, all the powers of an absolute owner of the property. This allows the trustees to transfer ownership of property (including money).²¹ However, any scheme to dispose of trust property 'for some other charitable purpose' than the purpose of the Trust must meet the requirements of s32. It is necessary to consider whether the transfer of funds to the Council in its capacity as Council, for expenditure on its general public housing stock amounts to expenditure for some other charitable purpose.
45. The Council is not a charitable entity, but nor is it a private or commercial entity; it is a local authority accountable to the public. The money would be put towards public housing which, since the Council's existing portfolio of public housing appears to be exclusively for the elderly who fit broad criteria of poverty²², is consistent with the charitable purpose of the trust. Further, it appears that transfer of funds to the Council would be conditional on its being spent on public housing, as defined by cl10, which provides the definition of public housing for the purpose of the scheme. However, because the purpose of the trust is to provide public housing at a particular location (on the trust land) as opposed to elsewhere in Masterton, it may be objected that the transfer is for a different charitable purpose. Although I do not regard this argument as well founded (it was surely the intention of the settlor to provide public housing in Masterton and his property was the only property which was in his power to dispose of), I have gone on to consider whether such transfer would be permissible under s32, on the basis that it did amount to transfer for another charitable purpose.
46. In my view such a transfer would be consistent with s32 which provides that such transfers may occur if the original charitable purpose 'has been

²¹ Although the Trust Act 2019 does not define "property", it is clear it includes money – see for example s 30 "Duty to invest prudently" which relates to the exercise of any power to invest trust property and s 45 requiring the trustee to keep records of the trust property that identify the assets and income.

²² As detailed at paragraphs 15 to 16 of the Draft Affidavit of David Richard Hopman.

effected already'. This transfer would only take place once the Council, as trustee, had undertaken expenditure on the infrastructure necessary to develop the vacant land and then any reasonable improvements to the existing village on the Panama Block. Further, the expenditure of trust funds on public housing in the Masterton District, is a purpose closely aligned with the original intentions of the settlor and the purposes of the trust, as redefined by the Court in 1966.

47. I therefore consider that cl 9 (c) of the proposed scheme authorising the transfer of charitable funds to the Council (in its non-trustee capacity) for the purpose of providing public housing, is lawful and does not undermine the propriety of the scheme or its charitable purpose. Therefore, this proposed amendment is a proper one and may be approved by the Court.

Variation of powers and mode of administration of the Trust

48. The proposed amendments to the mode of administration of the trust (set out above at paragraph 23) fall to be considered under s 33.

The removal of certain clauses incorporated in the 1966 Scheme

49. The effect of the replacement of the 1996 scheme with the proposed scheme would be to remove a number of clauses contained in the 1996 scheme which imposed obligations on the Board, the Council and another organisation²³ in relation to the rights of residence in the period following the transfer of the property from the trustees to that council. These clauses no longer appear to be relevant. I do not consider that their removal would be contrary to purposes of the settlor nor indeed affect the rights of those who are currently resident at trust property, whose rights under their existing tenancy agreements are expressly preserved by

²³ Friends of Senior Citizens Incorporated.

cl.6 of the proposed scheme. Therefore, these proposed amendments are proper ones and may be approved by the Court.

DATED at Wellington this 20th day of December 2023



Virginia Hardy
Deputy Solicitor-General
(pursuant to s 9C of the Constitution Act
1986)

**IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHAKAORIORI ROHE**

CIV-2023-

UNDER THE

Charitable Trusts Act 1957

IN THE MATTER OF

**a scheme under Part 3 of the Charitable
Trusts Act 1957 in respect of a charitable
trust created by the Will of the late Arthur
Powys Whatman**

MASTERTON DISTRICT COUNCIL

Applicant

ADDENDUM REPORT OF THE ATTORNEY-GENERAL

**CROWN LAW
TE TARI TURE O TE KARAUNA
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Wellington 6140
Tel: 04 472 1719**

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Introduction

1. On the 20 December 2023, the Attorney-General's report, made pursuant to ss 35 and 36 of the Charitable Trusts Act 1957, was signed by the then Deputy Solicitor-General, Virginia Hardy, and was provided to the Solicitors for the Trustee, who makes this application for a variation of the under ss 32 and 33 of the Act.
2. I have since been informed by the Trustee's solicitors that there have been two changes to the evidence supporting the application. They are:
 - 2.1 Whilst the affidavit in support of the application had originally been sworn by David Richard Hopman, who was then the Chief Executive of the Masterton District Council, the affidavit will now be sworn by the current Chief Executive, Kym Albert Fell.
 - 2.2 I have been provided with a draft affidavit of Kym Albert Fell and am satisfied that the contents of the affidavit remain unchanged from those of the affidavit of David Richard Hopman, save for the following change. Whilst, as noted at paragraph 15 of the Report of the Attorney-General, the affidavit of David Richard Hopman, stated that there was no Kainga Ora presence in Wairarapa, paragraph 19 of the draft affidavit of Kym Albert Fell details how Kainga Ora now has limited presence in Wairarapa, but that its activities in Wairarapa will not be sufficient to meet local public housing needs.
3. I have considered whether these amendments would make any material difference to the conclusions set out in the Attorney-General's report and consider that they do not do so.
4. In addition, whilst paragraph 13 of the report of the Attorney-General stated that the 'House Site' (as defined in paragraph 7 (b) of the draft affidavit of Kym Albert Fell) was tenanted until 2023, the Trustee's solicitors have since indicated that the House Site remains tenanted as of 29 February 2024.

5. I have considered whether this information makes any material difference to the conclusions set out in the Attorney-General's report and consider that it does not do so.
6. The Court is therefore invited to consider the Report of the Attorney-General in light of the changes set out above.

DATED at Wellington this 29th day of February 2024



Liesle Theron
Acting Deputy Solicitor-General
(pursuant to s 9C of the Constitution Act
1986)