

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



SOUTHERN CROSS CARE (TASMANIA) INCORPORATED V PAUL [2018] TASFC 9

Supreme Court of Tasmania, Full Court, Blow CJ, Estcourt J, Geason J, 12 November 2018

Whether Tasmanian retirement villages are exempt from local rates due to being used exclusively for charitable purposes.

Key words: Charity, Tasmania, Rates, Exclusively for Charitable Purposes, Independent Living Units

1. This appeal concerned whether retirement villages in Tasmania, owned by the appellant, were subject to council rates charges. On 23 February 2018 it had been held by the Administrative Appeals Division of the Magistrates Court of Tasmania that, while certain lands identified in rates notices issued to the appellant by each of the four respondents were owned by the appellant exclusively for charitable purposes, such land was not **both** owned and occupied exclusively for charitable purposes within the meaning of [section 87\(1\)\(d\)](#) of the [Local Government Act 1993](#) (Tas) (the Act).
2. The respondents were the Hobart, Clarence, Kingborough and Meander Valley councils. The notices of appeal asserted that the magistrate had erred in construing the residents' agreements as leases rather than licences to occupy, but the Court of Appeal held that the real issue for determination was whether it was correct to say that the subject land was both owned and occupied by the appellant exclusively for charitable purposes **at all times**, notwithstanding that the appellant parted with possession of the independent living units on the land to an aged person or persons each time a unit became vacant.
3. The magistrate took the view that a resident of one of the independent living units did not occupy that unit for the appellant's charitable purpose but rather used it as a home, which was the resident's purpose. His Honour reasoned that the appellant's charitable purpose was to provide aged care accommodation, and that "the critical point" was that such particular purpose was "fulfilled" once a particular unit was occupied and the purpose was thus "perfected" with respect to that unit until it became vacant again. From this reasoning the magistrate concluded that while the subject land was owned by the appellant exclusively for charitable purposes, it was not also **occupied** for those purposes. Charitable purpose ownership and occupation were both required for the exemption under section 87(1)(d) to operate in the appellant's favour.
4. The appellant's submission was that an elderly person living in a home provided to him or her by a charity is not incidentally, but essentially and directly, carrying out a charitable purpose, and that makes the occupation exclusively for charitable purposes within the meaning of section 87(1)(d). The respondent councils contended that

an occupier must be distinguished from an owner. This is clearly so from the wording of section 87(1)(d): “land or part of land owned and occupied exclusively for charitable purposes”. The respondent argued that section 87 requires the determination of who the occupier of each and every relevant parcel of land is and then the determination of whether each occupation is exclusively for charitable purposes. If the occupier is not the applicant then the exemption is not engaged, as occupation by an individual as a place of residence is not an exclusively charitable purpose.

5. The court agreed with the appellant (at [25]-[26] per Estcourt J, with whom Blow CJ agreed; Geason J concurring in a separate judgement):

I accept the appellant's submission that an elderly person living in a home provided to them by a charity is not incidentally, but essentially directly carrying out a charitable purpose, and that makes the character, quality and nature of the occupation exclusively for charitable purposes within the meaning of s 87(1)(d) of the Act. While there is no issue here of the appellant's status as a charitable institution, I nonetheless note in passing that relief of the aged has been central to the concept of charity since the *Statute of Charitable Uses* 1601 (43 Eliz I, c 4). It would, to my mind, be distinctly odd to assert that a charity caring for the aged could build accommodation for elderly residents on land that it owned and which attracted rate relief, but yet must lose that exemption the moment it housed the objects of its charity in the built fabric. Quite obviously charitable accommodation must be lived in by someone other than the charity provider. The respondent's approach to the construction of the subsection, focussing as it does on the aged residents' usage and enjoyment of the unit as a home merely begs the question of the character, quality and nature of that residents' occupation of the unit made available by a charity owning the land for exclusively charitable purposes, and making the buildings available to such residents in pursuit of such purposes.

6. Geason J, in a separate judgement, concurred even more directly with these conclusions. The appellant was a charitable institution. The provision of housing for the aged fell within a recognised category of charitable purpose, which had been so recognised since the *Statute of Charitable Uses* 1601. Purposes incidental to the charitable purpose did not derogate from that character but were ancillary to the charitable purpose. The purpose of section 87 is to provide financial relief from rates when land is owned and occupied for one of the prescribed reasons, or on one of the stated bases. [Section 87\(1\)\(d\)](#) conferred that benefit on charities in recognition of the public benefit which accrues from the charitable work undertaken (at [41]-[42]):

This is not a complicated prerequisite to comprehend but in its application, confusion has arisen because a right of occupation has been conferred upon the residents under terms of written agreements. The learned magistrate concluded that the appellant's charitable purpose ceases upon a resident going into occupation; that the resident's occupation extinguishes a claim that the occupation is exclusively for a charitable purpose. He expressed his view in terms of the charitable purpose being perfected at that point. This involved a finding that coincidence of ownership and occupation by the same entity- the charitable entity, was necessary to sustain the conclusion that "occupation was exclusively for charitable purposes". It was in this respect that the learned magistrate erred.

7. Therefore, the appeal was allowed, and the rates already paid by the appellant were ordered to be refunded.

IMPLICATIONS



There was discussion in the case of the nature of the occupation of the independent living units in question. They were in fact occupied under licences to occupy, as is common in the retirement village industry. The councils argued, incorrectly, that the occupation was under lease. The Court of Appeal said that whether there were licences to occupy or leases was irrelevant. The only issue was the charitable purpose involved. The learned magistrate erred when he determined that the occupation of the appellant's independent living units by its residents supplanted the appellant's charitable purpose such that occupation was not exclusively for that purpose.

This decision meant that retirement villages operated by charities in Tasmania will be exempt from rates, but those operated by commercial operators will not be. It should also be noted that each state's local government legislation is different, and the finding may not extend to other jurisdictions.

An application for special leave to appeal to the High Court of Australia by the four councils involved, was dismissed with costs on 13 March 2019: *Paul v Southern Cross Care (Tasmania) Incorporated* [2019] HCASL 45. Therefore, Tasmanian councils cannot levy rates on retirement villages which are operated by charities.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASFC//2018/9.html>

The dismissal by the High Court of the special leave to appeal may be viewed at:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCASL/2019/45.html>

Read more notable cases in [The Australian Nonprofit Sector Legal and Accounting Almanac series](#).

Author: McGregor-Lowndes, Myles & Hannah, Frances M.

Email: acpns@qut.edu.au

Date of creation: May 2020

Number of case: 2018-57

Disclaimer: The material included in this document is produced by QUT's [Australian Centre for Philanthropy and Nonprofit Studies](#) (ACPNS) with contribution from some authors outside QUT. It is designed and intended to provide general information in summary form for general informational purposes only. The material may not apply to all jurisdictions. The contents do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

Commons licence: 

[This work is licenced under a Creative Attribution 4.0 International Non Commercial and No Derivatives licence \(CC BY-NC-ND 4.0\).](#)



ACPNS SUPPORTING THE SECTOR

QUT's Australian Centre for Philanthropy and Nonprofit Studies is a small centre with BIG impact. Since 2001 it has taken a leading role in nonprofit teaching and research, benefiting the sector here in Australia and beyond.

RESEARCH

COURSES

RESOURCES

EVENTS

QUT Business School
The Australian Centre for Philanthropy
and Nonprofit Studies

qut.edu.au/business/acpns