

# 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.



## NEW LANARK TRADING LIMITED V OFFICE OF THE SCOTTISH CHARITY REGULATOR [2020] UT 10

**Upper Tribunal for Scotland, Lord Tyre, 2 February 2020**

Appeal by a company managing a World Heritage Site from an earlier decision that upheld the decision of the Office of the Scottish Charity Regulator not to register the company on the charity register

**Key words: Charity Trading, Upper Tribunal for Scotland, Charitable Purpose, Unrelated Business Income, Public Benefit**

1. This was an appeal from the decision of the First-tier Tribunal for Scotland against the refusal of the Office of the Scottish Charity Regulator (OSCR) to register New Lanark Trading Limited (Lanark) as a charity. New Lanark Village is a World Heritage Site operated as a 'living' 18th-century historical village in a preserved environmental position on the River Clyde, one hour from both Glasgow and Edinburgh. It is a large site with many buildings rented and operated by the appellant from the New Lanark Trust, and some other buildings rented by commercial tenants.
2. Lanark is a company limited by shares registered in 1970, operating as a large commercial enterprise. It updated its Articles of Association in 2018 with the object of becoming registered as a charity in Scotland. However, none of its activities was changed.
3. Lanark's principal activity is the operation of a visitor attraction with related trading activities, including hydro-electric power generation and textile production, a mill shop, a cafe and ice cream production. Payment is required by visitors to the Visitor Centre's exhibits and interpretation of New Lanark, periodic exhibitions about New Lanark related themes, as well as external events and goods and services sold from the cafe and shop.
4. Lanark's turnover is derived from entry to the Visitor Centre, hydro-electric power income, textile sales and spinning commissions, retail shop sales, some (but not all) tours, and the manufacture and wholesaling of ice cream. All net profits are donated to the New Lanark Trust by Gift Aid (a scheme enabling registered charities to reclaim tax on a donation made by a UK taxpayer, effectively increasing the amount of the donation).
5. It was accepted by all parties that the appellant's purposes were charitable, being purposes which fell within the advancement of education and the advancement of the arts, heritage, culture or science: section 7(1)(a) of the Charities and Trustee Investment (Scotland) Act 2005 (the Act). However, Lanark accepted that a commercial enterprise could not pass the charity test solely on the basis that it donated all its proceeds to one or more

charitable purposes. Lanark could not be a charity unless it provided (or intended to provide) public benefit in Scotland or elsewhere in terms of section 7(1)(b) of the Act. Thus, Lanark's purposes were charitable, but this did not automatically satisfy the public benefit requirement under the Act.

6. The lower Tribunal found that some of the activities at New Lanark Village were directed towards charitable purposes, but not all of them were, and those that were directed to charitable purposes were outweighed by those that were wholly commercial.
7. The ground of appeal to this Tribunal was that the lower Tribunal had failed to provide proper, adequate and intelligible reasons for its decision.
8. The Upper Tribunal had the power to re-make the decision, rather than remit the case back to the lower Tribunal, and further evidence was taken on the substantive issues. OSCR drew a distinction between (a) activities which directly advance charitable purposes and (b) activities undertaken with the aim of generating profits to be applied for charitable purposes.
9. The additional findings of facts were that the facility is offered to the public as 'an inhabited, economically active settlement' where its trading facilities in the original mill buildings contributed to the objectives of maintaining the village as a living entity. The provision of facilities for visitors was necessitated by the remote location of the village.
10. The Tribunal summed up the argument made by Lanark as [at 41]:

In conclusion, OSCR's reasoning was flawed by its failure to consider the application further than noting that Trading was a company engaged in commercial activities. There was more to the activities than making money, albeit the fact that they made money was helpful to the project and allowed NLT [Lanark] to offer the public an interpretation of the historic village largely at no cost to them.

11. The OSCR submission was summarised as [at 46]:

OSCR accepted that some of Trading's commercial activities were in furtherance of its charitable purposes, but considered that others were not. The question was whether and if so to what extent commercial activities could be said to further a charity's charitable purposes and thereby provide a public benefit. If they did, an assessment required to be made as to whether the trading aspect could be disregarded or outweighed by Trading's contribution to the advancement of heritage.

12. The Upper Tribunal found that [at 49]:

The statutory question is whether the organisation is providing public benefit. If that question is answered in the affirmative, then, in my opinion, it is irrelevant that at the same time it raises funds intended to be applied either for its own benefit or for the benefit of another charitable body.

13. The Upper Tribunal was satisfied that the commercial business, such as the shop and ice cream production business contributed to the furtherance of Lanark's charitable purpose. The ice cream shop included direct viewing of the process of making ice cream providing a dual purpose of education and the promotion of agriculture.

## IMPLICATIONS



This is an appeal from a case reported at ACPNS Legal Case Notes Series: 2019-104 New Lanark Trading Limited v Office of the Scottish Charity Regulator available at <https://eprints.gut.edu.au/200143/>

This case may well have come to the same result but on different reasoning if it arose in Australia given the High Court's decision in Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd [2008] HCA 55.

<https://wiki.gut.edu.au/display/CPNS/Commissioner+of+Taxation+of+the+Commonwealth+of+Australia+v+Word+Investments+Ltd>

In Australia, the focus is on the purpose of the organisation being charitable, rather than whether the activities are in themselves charitable or merely incidental to the charitable purpose.

OSCR was granted leave to appeal the decision of the Upper Tribunal on 11 March 2020.

## VIEW THE CASE



This case may be viewed at: <https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2020ut010.pdf?sfvrsn=0>

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