

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.



IN THE MATTER OF MAITLAND BENEVOLENT SOCIETY LIMITED (IN LIQUIDATION) [2020] NSWSC 1284

Supreme Court of New South Wales, Rees J, 21 September 2020

Determination of the proper distribution of surplus in the winding up of a not for profit company

Key words: Nonprofit Company, New South Wales, Winding Up, Distribution of Surplus

1. The Maitland Benevolent Society Ltd was a nonprofit company which owned and operated an aged care facility in Maitland and also provided home care services and respite places. In 2019, The Maitland Benevolent Society sold its land and business to the Royal Freemasons' Benevolent Institution Ltd.
2. The Maitland Benevolent Society has since been wound up and the liquidator sought an order under section 23 of the *Supreme Court Act 1970* (NSW) or a direction under [section 90-15](#) of Schedule 2 of the *Corporations Act 2001* (Cth) (Insolvency Practice Schedule (Corporations)) to pay the surplus of \$8.15 million to the Royal Freemasons Benevolent Institution. However, another claimant, United Protestant Association of NSW Limited, also appeared and sought half or, alternatively, a quarter of the surplus.
3. The mission of The Maitland Benevolent Society was to enhance the quality of life of aged and frail people by providing care to its residents and clients. The objects in its [Constitution](#) reflected that mission. Winding up was dealt with in clause 105 of the constitution, which provided that the surplus must be directed to another company, association or institution that had similar objects, did not allow its directors to be paid a fee, was a public benevolent institution, and a DGR.
4. If the company's members failed to make a determination under clause 105 within 20 business days of the winding up of the company, the liquidator was required to make an application to the Supreme Court in the relevant jurisdiction. The members made no determination under clause 105, and this application resulted.
5. The sale of the aged care facility and related business to the Royal Freemasons' Benevolent Institution was completed on 1 May 2019. There was conflicting correspondence in relation to the surplus from the winding up of The Maitland Benevolent Society. Some correspondence seemed to promise all of the surplus to the Royal Freemasons' Benevolent Institution, on the basis that it be spent entirely on improvements to the facility, which had been agreed to, and some was more equivocal.

6. The liquidator had contacted various charities concerning the surplus distribution, and five had replied. The Royal Freemasons' Benevolent Institution indicated in its reply that it would reconsider its 'commitment' to the aged care facility without the surplus it understood was to be part of the sale arrangements. The liquidator conferred with the board of The Maitland Benevolent Society as to its intentions. The board stated that it intended the surplus to go to the Royal Freemasons' Benevolent Institution with an indemnity as to its application.
7. The liquidator was of the opinion that the surplus could only go to the Royal Freemasons' Benevolent Institution because it was now the owner of the aged care facility. The price paid had had the surplus factored into it. He carefully compared all the constitutions of the five responding charities, and concluded that the only two other contenders were Anglican Care and PACE Aged Care. Both these charities were informed of these proceedings but did not participate.
8. There was no dispute that the Royal Freemasons' Benevolent Institution satisfied each of the criteria in clause 105 of The Maitland Benevolent Society constitution. Thus the issue was whether the United Protestant Association did so. The court said that the United Protestant Association of NSW Limited did not. This was because its constitution permitted its directors to be paid a fee (though these were not paid in practice), which was prohibited under clause 105 (c) of The Maitland Benevolent Society constitution.
9. As the United Protestants Association's constitution did not meet the criteria in clause 105(c) of The Maitland Benevolent Society constitution, the United Protestant Association was not eligible to be considered by the members of The Maitland Benevolent Society to receive the surplus upon winding up. The Court directed the liquidator to pay the surplus from the winding up to the Royal Freemasons' Benevolent Institution. Costs were ordered to be part of the winding up.

IMPLICATIONS



Given the manner in which the constitution of The Maitland Benevolent Society was framed, the liquidator in this case could not proceed to distribute the surplus without either an order or direction from the Court. Directions to liquidators of companies are given under [section 90-15\(1\)](#) of the Insolvency Practice Schedule, which provides that the Court may make such orders as it thinks fit in relation to the external administration of a company, including determining any question arising in the external administration: [section 90-15\(3\)\(a\)](#).

The Court will not generally give a direction where the matter relates to the making or implementation of a business or commercial decision, when no legal issue is raised or where there is no attack on the propriety or reasonableness of the liquidator's decision, but may do so where there is the prospect of such an attack. A direction protects the liquidator from liability for breach of duty or unreasonable behaviour if full disclosure is made to the Court.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2020/1284.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: September 2020

Number of case: 2020-130

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: CC BY-NC-ND

[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