

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.



AUSTRALIAN LEGION OF EX-SERVICEMEN & WOMEN [2021] NSWSC 149

Supreme Court of New South Wales, Robb J, 25 February 2021

Trustee sought judicial advice on historical property transactions

Key words: Trustee, New South Wales, Director's Duty, Ultra Vires, Sub-Branch, Judicial Advice

1. The Australian Legion of Ex-Servicemen & Women (the Legion) was incorporated in 1944 under the *Companies Act 1936* (NSW) (Companies Act) and is currently registered under the *Corporations Act 2001* (Cth) (Corporations Act). It is a charity registered with the Australian Charities and Not-for-profits Commission (ACNC).
2. The 1950s constitution had the primary object of the Legion as:

To combine into an Association members and ex-members of any naval, military or air force or merchant naval service or similar force or serve (sic), and all persons who have at any time been attached thereto (all of whom whether men or women are hereinafter referred to as "servicemen").
3. As the company was granted a licence to be registered without using the word "limited" in its name, its constitution had to contain provisions applying its profits to promoting its objects and prohibiting the payment of any dividend to its members.
4. The Legion could also establish local branches, sub-branches, councils or other bodies for the management of the affairs of the Legion, execute trusts and deal with real and personal property.
5. The constitution provided for a state council that could establish sub-branches to "exercise the powers authorities and discretions conferred on it and be subject to the conditions imposed on it by these Articles and the By-laws made from time to time". By laws provided that the real property of the sub-branch was to be vested in the Legion and "dealt with by it on behalf of the Sub-Branch upon such trusts as it shall declare."
6. The Legion sought the Court's opinion, advice or direction pursuant to s 63(1) of the *Trustee Act 1925* (NSW) (Trustee Act) about the nature of the earlier sale of real property (the property) in 2015-6 to the Willoughby Legion Ex-Services Club Ltd (Licensed Club) for \$10. In 2015 the Legion had entered into a deed with the Licensed Club where it granted a call option to acquire the property for a price of \$4 million, which was vacated.

7. The directors of the Legion took a disinterested position in relation to what opinion, advice or direction might be provided by the Court because they were not the same directors who made the decisions.
8. Judicial advice enables the trustee to ascertain in advance whether particular conduct that they contemplate will be in accordance with their duties as trustees. If the judicial advice is that the trustee is authorised to prosecute or defend legal proceedings, then the trustee will be entitled to recoup the trustee's legal costs from the trust fund. The Legion put the following questions to the Court (at [42]-[43]):

Would the Legion be justified in instructing its solicitors and counsel to consider, and initiate and prosecute legal proceedings against the Licensed Club, former directors of the Legion and/or members of the Willoughby Sub-Branch to allege (a) that the Deed was invalid, whether as ultra vires the Legion's constitutional documents or otherwise; and then (b) that the Legion should either have the Property returned to it or be compensated in respect of its disposal?

Would the Legion be justified in applying to have part (a) of the potential proceeding just identified heard separately and in advance of part (b)?

9. The Court decided the matter as an application on the papers to assist the Legion to consider its position and to provide any further response to the Court. It cautioned that its finding of facts was only based on the material provided to it and that further proceedings may be necessary to fully resolve the matter.
10. The trust deed concerning the property in 1951 provided:

WHEREAS it the said Company is the Registered Proprietor of the land situated in [...]NOW THIS DEED WITNESSETH that the said Australian Legion of Ex-Servicemen and Women DOTH HEREBY DECLARE ACKNOWLEDGE AND ADMIT that it is and shall be possessed of and interested in the said land UPON TRUST for the members for the time being of the Australian Legion of Ex-Servicemen and Women constituted by and associated as the Chatswood-Willoughby Sub-Branch subject to the rules regulations and by-laws and its Memorandum and Articles of Association PROVIDED HOWEVER that in the event of the liquidation of the said Australian Legion of Ex-Servicemen and Women then and in that event the said lands shall be deemed to be held and to always have been held upon trust for the members of the Australian Legion of Ex-Servicemen and Women at the date of such liquidation who are resident in the suburbs of Chatswood and Willoughby beneficially.

11. The Court noted that (at [34]):

This wording gives rise to uncertainty as to the validity of the Deed. On the one hand, the memorandum of association of the Legion prohibits the income and property of the Legion being transferred to its members, including on the winding up of the Legion. By-law 74(40) seems to contemplate that sub-branches cannot hold property separately, and such property must be vested in the Legion. The by-law permits the Legion to hold the property of sub-branches "upon such trusts as it shall declare". There is thus a question about whether the Legion's own property is intended by its constituent documents to be treated differently from the property of sub-branches vested in the Legion, but held on various trusts for the members of sub-branches. It is arguable that the Deed was inconsistent with the constitution of the Legion.

12. After entering into the 2015 option arrangement, an issue arose as to whether the Legion was entitled to sell the property or whether the property should have been given to the Licensed Club at the request of the members of the Willoughby Sub-Branch.

13. The Legion received legal advice in 1999 and again in 2016 that raised concerns about the validity of the 1951 trust deed. If the deed was invalid, then it references the intended beneficiaries as being the members of the Chatswood-Willoughby Sub-Branch. Apparently, a sub-branch by that name has never existed.

14. Further, the Legion took these steps at the request of members of the Willoughby Sub-Branch, but there was a question about whether that request was made in accordance with a proper resolution of members following a duly constituted general meeting of members, and particularly as to whether due notice was given of the intention to put the resolution.

15. The Court found on the basis of the information before it that:

- The Legion is not a trustee for its own property, only that of the sub-branch. The Legion may act as it sees fit and it is not a matter for section 63 trustee advice.
- Before the Court could advise on challenging the 1951 trust deed:
 - o It would require consideration as to whether such advice would be inconsistent with the duty imposed upon trustees not to impeach the validity of the trust instrument or the title of the beneficiary.
 - o As the property was acquired over 60 years ago, there were complicated questions of fact as there was some evidence that the Legion acquired land including the property from its own funds and then, by means of the deed, sought to declare a trust over the property in favour of the members of the Chatswood-Willoughby Sub-Branch. If that was correct, then there was an argument that the deed was void, as it was ultra vires because it was inconsistent with the Legion's memorandum of association in that it provided for the property on a particular contingency to be held for members.¹
 - o Further, it is possible that because the Property was acquired with funds generated by the members of the sub-branch, it became vested in the Legion because of the operation of Legion's by-laws.
- The trust fund value at present appears to be \$10 and the Court remarked (at [48]):

While the value of the trust fund does not limit the propriety of a trustee deciding what should be done to protect the fund, and for that purpose to seek judicial advice in an appropriate case, the value of the trust fund will be a fundamental consideration to the reasonableness of any particular conduct that may be contemplated in performing the trustee's duties.

¹ Refer to paragraphs [12]-[13]. When the Legion was incorporated, and when the deed referred to in the questions was executed, the doctrine of ultra vires applied in Australian company law. Consequently, the validity of the Legion's acts depended upon compliance by the Legion with its objects, as stated in its memorandum and articles of association. The validity of the acts of the Legion at relevant times depends upon whether, on the true construction of its memorandum of association, the particular transaction is objectively capable of falling within the Legion's objects, or is reasonably incidental thereto. The doctrine of ultra vires was abolished in Australia with effect from 1 January 1984. The abolition of the doctrine is now given effect by s 125 of the Corporations Act. The abolition of the ultra vires doctrine did not have the effect of retrospectively validating acts of corporations that were ultra vires when done.

- If the 2016 property transfer was set aside, then it might involve a breach of trust by the Legion. Where a defaulting trustee seeks to set aside the sale of trust property to a third party on the ground that the circumstances in which the sale took place involved a breach of trust, then often the original trustee would retire because of a conflict of interest. The new trustee would bring the action, but given that the trust fund stands at \$10, this would not meet litigation costs and would be likely to generate a cross claim by the purchaser against the trustee.
- The Legion should ensure, before the commencement of any proceedings, that a constitutionally valid meeting of members of the sub-branch has been called for the purpose of giving the members the opportunity to decide, after full and fair disclosure of the circumstances, whether or not they should ratify the sale that has already taken place.

16. As to the Legion bringing proceedings against the former directors, the Court said (at [69]):

Directors (assuming they take the place of members of State Council) could only be liable for breaching their duties as directors to the Legion. The question of their potential liability to the Legion could only be given proper consideration after it is ascertained that the Legion itself is liable for some breach of duty and the basis for that liability is identified.

IMPLICATIONS



This proceeding is not a final decision and no orders were made. It illustrates the complex legal situation that can arise where historical club property is held in multi-tiered organisations and its legal significance is not recognised by those involved in the administration and governance of the organisation.

As the Court pointed out, the legal costs in setting aside the property transfer might result in the property needing to be sold in order to fund the costs (at [59]).

The issues that arose in this case have been addressed by statute in *Queensland by the Returned & Services League of Australia (Queensland Branch) Act 1956*. It provides a scheme for branches to hold property through trustees and also as incorporated associations or a company under the Corporations Act.

VIEW THE CASE



This case may be viewed at <http://www.austlii.edu.au/au/cases/nsw/NSWSC/2021/149.html>

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