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ACPNS Legal Case Notes Series: 2022-81 PCL Trustees (No.2) Limited v Pub Charity Limited.

[Working Paper]

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<https://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2022/888.html>

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.



PCL Trustees (No.2) Limited v Pub Charity Limited [2022] NZHC 888

High Court of New Zealand, Gendall J, 22 April 2022

Applications to resolve a deadlock between companies involved in a charitable enterprise.

Key words: Charity, New Zealand, Board, Internal Dispute, Deadlock, Oppressive Conduct, Injunction

1. Pub Charity Limited (Pub Charity) is an incorporated company, and a charity, which distributes donations to community organisations in New Zealand through funds raised from gaming machines hosted in member hotels and taverns.
2. Pub Charity operated approximately 1600 gaming machines in 120 venues across New Zealand and, in 2019, generated \$98.2 million in gaming revenue and distributed over 3500 grants worth \$34.9 million.
3. Pub Charity has two equal shareholders being:
 - a) PCL Trustees (No. 2) Limited (PCLT 2), controlled by Maurice Hayes (Hayes); and
 - b) PCL Trustees Limited (PCLT), which is owned 50 per cent by Hayes and 50 per cent by Rodney Lingard (Lingard).
4. The second shareholder was required by the gaming regulator, and so PCLT was incorporated.
5. The current directors of Pub Charity are, its chair Mr Lingard, and Mr Counihan, Mr McLean, Mr Norrie, and Hayes' son, Carter Hayes.
6. Hayes was chair of Pub Charity for many years from the date of its incorporation. He became concerned about revitalising the board by introducing younger directors by a planned retirement of older directors by rotation.
7. Hayes and another director retired, with Hayes' son and another person were appointed to the board. However, the other directors failed to retire by rotation as planned. Further, there was considerable friction between board members and Hayes' son.

8. Hayes initially believed his shareholding gave him the ability to influence the appointment and removal of the directors of Pub Charity, but this was, in fact, not the case, and Lingard was effectively able to veto this through his 50 per cent shareholding in PCLT.
9. Hayes claimed Lingard was a prejudiced shareholder in PCLT under s. 174 of the Companies Act,¹ and also through his shareholding company interest in Pub Charity. He argued that the Lingard shares ought to be transferred to himself or to an independent person.
10. Hayes further sought an injunction under s164 of the Companies Act² to restrain Pub Charity from certain actions and to replace the board with independent directors.
11. The current Pub Charity directors (except Hayes' son) opposed this and argued that Hayes's shares should be transferred to the majority of current Pub Charity directors to enable reform of the company structure.
12. It was common ground that the shareholders of PCLT (and therefore Pub Charity) were deadlocked.
13. The Court found little in Hayes's unfair prejudice claims in terms of s. 174 of the Companies Act after reviewing the evidence.
14. The Court then reviewed the evidence in relation to allegations supporting the claim for injunctions.

Taking instructions from venue operators as to the approval and payment of grants to community groups

15. It was alleged that one of the Pub Charity directors acted in serious breach of his duties as a director and member of a subcommittee of Pub Charity, by unlawfully taking instructions from a venue operator as to the allocation of grants to community organisations.
16. The Court concluded that the allegation of misconduct was without any proper foundation.

Inappropriate setting of honoraria for Board members

17. It was alleged that the Pub Charity Board, in setting honoraria, was acting unlawfully or in breach of the constitution. There was evidence that the current chair was receiving \$50,000 per annum, the same amount as the previous chair.

¹ 174 (1) - A shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to him or her in that capacity or in any other capacity, may apply to the Court for an order under this section.

² 164(1) - The Court may on an application under this section, make an order restraining a company that or a director of a company who, proposes to engage in conduct that would contravene the constitution of the company or this Act from engaging in that conduct.

18. The Court found no evidence to support the allegation of excessive honoraria being paid to board members.

Use of Pub Charity funds for payment of personal legal expenses

19. The Court found no evidence that the legal costs incurred by the Pub Charity Board, even insofar as they may have been tangentially related to the dispute between Hayes and Lingard, together with their respective shareholder companies, were in any way an improper or unauthorised expenditure of the company's funds.

Pub Charity's allegedly poor running and financial performance

20. The allegation was that Pub Charity was being poorly run and its performance had declined since Hayes had left the chair. Again, the Court found that the allegation was not made out on the evidence.

21. On this basis, the Court refused to grant an injunction.

Decision

22. The Court decided that some resolution of matters by way of court orders was desirable and that s. 174(2) of the Companies Act gave the Court full discretion to grant relief if it was considered just and equitable to do so.

23. There was evidence given that the board of Pub Charity had retained an acknowledged expert (the Expert) in the area to produce a revised fit-for-purpose constitution and restructured shareholding for Pub Charity, along with a new Code of Practice, Board Charter and Code of Ethics.

24. The Court found that this provided the basis for an acceptable proposal to resolve the shareholders' deadlock relating to PCLT, PCLT 2 and Pub Charity.

25. The Court ordered that the shares in PCL Trustees and PCL Trustees (No. 2) be transferred to the Expert and for the directors of each company to resign.

26. The Expert was then to facilitate Pub Charity to adopt its new constitution, its new Code of Ethics and its new Code of Practice and Board Charter for directors (in place of the previous constitution and documents of this kind held by the company) to ensure the future direction and governance of Pub Charity.

27. The Expert was then to transfer all shares in PCL Trustees (No.2) Limited and PCL Trustees Limited (effectively resulting in shareholding ownership of Pub Charity) in equal shares to each of the current directors of Pub Charity, who would then be in a position to determine by a majority vote who were to be the ongoing directors of Pub Charity.

IMPLICATIONS



This is a sensible outcome to the deadlock between the shareholders that flowed on to the charity board.

Gambling in New Zealand is regulated by the [Gambling Act 2003](#), the [Gambling \(Harm Prevention and Minimisation\) Regulations 2004](#) and [Gambling \(Class 4 Net Proceeds\) Regulations 2004](#).

Class 4 gaming (as in this case) includes any activity that involves the use of a gaming machine (pokies) outside a casino. The specific rules that govern Class 4 gaming include that the net proceeds from gambling are either applied to, or wholly and mainly distributed for authorised purposes, which are identified as (i) a charitable purpose and (ii) a non-commercial purpose that is beneficial to the whole or a section of the community.

As of June 2020, there are 32 trusts and societies in New Zealand which hold licences for 14, 847 Class 4 machines. The two types of class 4 operators are:

1. Gaming Trusts (also known as Corporate Societies or non-club societies, gaming machine societies, and Class 4 societies) operate gaming machines in commercial venues such as bars. Gaming trusts wholly or mainly distribute the generated revenue to communities via contestable grant processes.
2. Clubs are societies that operate gaming machines in their own premises. These include chartered clubs, Returned and Services' Associations and sports clubs (such as bowling and squash clubs). They are considered to apply the profits to authorised purposes within their organisations (but also beyond).
- 3.

In the year ended 31 December 2019, returns to the community from all gaming machines totalled around \$345.5 million. Non-club societies and trusts distributed \$304.3 million of these funds (given they generate around 90% of revenue)

Refer Philanthropy New Zealand: [Overview of gaming machine sector and community funding September 2020](#).

VIEW THE CASE



This case may be viewed at <https://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZHC/2022/888.html>

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