HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 04 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	H2/2021
File Title:	Hobart International Airport Pty Ltd v. Clarence City Council
Registry:	Hobart
Document filed:	Form 27E - Reply to submissions of first respondent
Filing party:	Appellant
Date filed:	04 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: **HOBART INTERNATIONAL AIRPORT PTY LTD**
Appellant
and
CLARENCE CITY COUNCIL
First Respondent
THE COMMONWEALTH OF AUSTRALIA
Second Respondent

APPELLANT'S REPLY TO THE SUBMISSIONS OF THE FIRST RESPONDENT

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

Standing and privity of contract

2. The First Respondent (**Council**) relies principally upon a "right of participation" purportedly created by the parties to the Lease in support of its submission that the relief sought in this proceeding involves "no incursion upon the privity principle" (Council's Submissions (**RS**) [20], [46]). That contention misapprehends both the legal effect of cl 26.2(a) of the Lease and the doctrine of privity more broadly.
3. As to the former, the Council concedes that it is not privy to the Lease, and it does not claim that it enjoys the benefit of any contractual promise held on trust: FC [35] (AB 101-2). It is therefore common ground that cl 26.2(a) does not create any contractual right of participation by the Council (cf. RS [46]). In those circumstances the Council's claimed status as a "contractual participant" (RS [24], [27], [32]) simply does not advance the analysis. The Council's position is equivalent to that of, for example, a valuer who under a contract is described as undertaking some mechanistic or evaluative role. As to the latter, the Council's argument ultimately reduces to the proposition that the privity doctrine does not operate in respect of any person who the contract describes or contemplates as undertaking some mechanistic or other task. The authorities stand firmly against acceptance of such a proposition (see HIAPL's submissions in chief (**AS**) [17]).
4. The Council's claimed "right of participation" under cl 26.2(a) mischaracterises its interest. The mechanism by which the Lease contemplates that the Council will be given enforceable rights is by way of an agreement as between HIAPL and the Council as provided for in the final sentence of cl 26.2(a) (AFM 35), and not otherwise. The Council has declined

HIAPL's repeated invitations since 2014 to enter into such an agreement. Contrary to the Council's assertion, cl 26.2(a) is not "incapable of operating unless the Council calculates and notifies the equivalent amount correctly" (RS [40]; RS [10]). That assertion is belied by the events summarised at AS [11]-[12]. Thus, the Commonwealth has confirmed that HIAPL has complied with its obligations under cl 26.2(a) on the basis that the correct sum has been calculated by HTW and paid by HIAPL. As is clear from that chronology, the parties to the Lease are well able to ensure that any sum required to be paid by HIAPL is calculated, and paid, consistently with the terms of cl 26.2(a) irrespective of whether any notification by the Council correctly reflected those terms.

5. Similarly, the Council's submission that they are not "outsiders" to the contract cannot be sustained. Whilst the Council is described as undertaking a mechanistic role in cl 26.2(a), that does not constitute it as anything other than an "outsider" to the extent that that characterisation might suggest some exception to the doctrine of privity is, or should be, engaged. The reality here is that the Council brings this application to seek, on the basis of a contract to which it is not a party, to compel HIAPL to confer upon it a financial benefit. The objective theory of contract (which goes only to the question of construction) does not in any way subvert the anterior doctrine of privity (cf. RS [10]).

6. The Council's contention that this case "raise[s] no question of direct enforcement" of cl 26.2(a) (RS [13]) is wrong for the reasons advanced at AS [23]-[24], [28]-[29]. Indeed, the Council itself appears to resile from that contention through its concession that "one or more of the declarations [sought by the Council] may have gone that far" (fn 28). That concession is properly made. That a grant of the relief sought would entail enforcement of cl 26.2(a) provides a powerful reason for rejecting the Full Court's conclusion that the privity doctrine is not engaged.

7. Clause 26.2(a) was introduced in order to create a "level playing field" between trading enterprises operating on the Airport Site and their actual or potential competitors off-site: PJ [2]-[3] (AB 11), FC [12]-[13], [177] (AB 95, 156). That object of competitive neutrality has as its focus not the position of the Council (cf. RS [30]) but the comparative position of businesses which are respectively liable to, and exempt from, payment of local government rates. The financial benefit accruing to the Council is no more than a by-product of that undisputed contractual object and does not in any event constitute an exceptional circumstance sufficient to confer standing upon the Council or to constitute some exception to the doctrine of privity of contract.

Declaratory relief

8. The Council resists the conclusion that the declaratory relief it seeks would be capable of enforcement as against HIAPL on the basis that it asserts no enforceable legal right in this proceeding: RS [16]-[17], [19]. That submission is misconceived. Contrary to its premise, an applicant's entitlement to seek coercive relief to secure compliance with a declaration of right does not depend on the existence of any enforceable right independent of the declaration. The cases cited at RS [16], [19] provide no support for such a proposition.

9. Rather, the finding of Isaacs J (with the concurrence of Knox CJ and Starke J) in *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 was that on a proper application a court may enforce *every* order for declaration of right if the defendant acts contrary to it (at 497). To similar effect, Barrett AJA (with whom Meagher and Gleeson JJA agreed) found in *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889 that where a binding declaration of right alone is made, the successful applicant is entitled to invoke the court's assistance in compelling the defendant to fulfil its terms (at [39]). That compulsion is achieved through the grant of subsequent executory relief (AS [23] fn 11) (and *not* by way of a suit for specific performance, contrary to the Council's misplaced reliance on the rule in *Tasker v Small* (1837) 3 My & Cr 63 at RS [19]). The judgment of Kiefel CJ, Bell and Keane JJ in *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at [76], going to the availability of injunctive relief, has nothing to say about that issue (cf. RS [19]). That a further order of the Court is required in order to enforce the terms of a declaration provides no cogent basis in logic or principle for the novel limitation imposed by the Full Court on the privity doctrine (cf. RS [14]).

Matter and justiciable controversy

10. The Council submits that the moving party need not assert or claim some right, duty or liability in order for a "matter" to arise in the context of private law rights and obligations, on the asserted basis that any such requirement was "specifically rejected" by the plurality in *CGU* at [42] (RS [33], [37]). That contention fails to grapple with the precise legal context in which the remarks of the plurality at [42] of *CGU* arose. Those observations were explicitly directed to the evaluation of the interest of a plaintiff "in bringing the claim against the insurer", which "in such claims … was not to be confined by a requirement that the plaintiff demonstrate a claim for vindication of an existing legal right against the insurer": *CGU* at [42] (emphasis added). That is because the interest upon which the plaintiff's claim for relief is based in such a case is one sourced in the legal consequences

created by statute: *CGU* at [67], [96], [109]. For the reasons set out at AS [27]-[28] and [34], *CGU* and other authorities within the insurance context are readily distinguishable for the purpose of determining whether the Council's claim in this proceeding gives rise to a justiciable controversy. Nor, in any event, did this Court in *CGU* purport to address a circumstance in which the only rights, duties or liabilities for determination concern those of two co-defendants who share a contractual relationship and between whom there is no dispute regarding their contractual rights and obligations.

11. The Council asserts that in *CGU* this Court approved of the proposition from *Ashmere Cove* that "a single justiciable controversy can involve a controversy involving one of the contracting parties and a third party even where the contracting parties are not in dispute" (RS [36], referring to *CGU* at [43]-[44] and [89]-[90]). That assertion finds no support in the cited paragraphs of the judgment of the plurality or the separate reasons of Nettle J (or otherwise) and should be rejected. The corresponding challenge to AS [51] falls away.

The Council's Notice of Contention

12. By Notice of Contention dated 15 March 2021 (**NOC**), the Council argues that it has standing to seek a declaration about the meaning and effect of cl 26.2(a) on the basis that the present case involves "exceptional circumstances" as enumerated at RS [40]. None of those circumstances (even if accepted as accurate), whether alone or in combination, suffices to give the Council standing.

13. Conspicuous for its absence from the circumstances identified at RS [40] is that HIAPL and the Commonwealth, as the only two parties to the Lease, are in positive agreement as to the meaning and effect of cl 26.2(a), HIAPL's compliance with that provision for the financial years in issue, and the basis upon which HIAPL is required to make payment to the Council in the future. Any analysis of the Council's standing in this proceeding must take account of that critical circumstance in which the parties to the Lease have "chosen … not to raise an issue" as to its construction: *CGU* at [96] (Nettle J).

14. To that end, the Council has not identified a single case in which an applicant has obtained declaratory relief as regards the meaning and effect of a contract to which it is not a party in circumstances where the contracting parties were not in dispute about their rights and obligations. Whether or not the law in the United Kingdom has "moved on" since *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland Plc* [1989] 2 Lloyd's Rep 298 (***Meadows***) at 309 (see RS [28]), the law in Australia largely accords with *Meadows*: *CGU* [96] (Nettle J). Consistent with that, the learned authors of *Meagher, Gummow and*

Lehane's Equity Doctrines and Remedies (5th ed, 2015) identify that "a plaintiff who seeks a declaration in respect of a contract to which the plaintiff is not party and which the plaintiff has no right to enforce can in an appropriate case be refused relief on the ground that the plaintiff lacks standing and the court accordingly lacks power" to make the declaration (at [19-210]). Later, the authors identify that the "Australian authorities implicitly support the proposition that exceptional circumstances are needed" before a court will conclude that such a plaintiff has standing, describing that as a "sound principle" that ought to be adopted "explicitly" with controlled exceptions recognised in due course (at [19-215]). That is entirely consistent with HIAPL's case: see PJ [62] (AB 27).

15. In any event, subsequent decisions in the United Kingdom confirm that there has been "no case in relation to an ordinary commercial situation, where a third party has been found entitled to a declaration as to the meaning or performance of a contract to which he is not a party, in circumstances where the parties to that contract are not in dispute".[1] Such an outcome would "still be exceptional" in the United Kingdom.[2]

16. The Council's invitation for this Court to confine the doctrine of privity in the manner articulated at [4(b)] of the NOC should be rejected. As advocated by the Council at RS [45], the doctrine of privity gives expression to the legal conception of a contract pursuant to which a promisor (HIAPL) is accountable at law to the person to whom the promise is made (the Commonwealth) and not to anyone else. That legal conception cannot be reconciled with the assertion that a grant of the relief sought by the Council would do "no harm" to the doctrine of privity: RS [47]. The implications of the reformulation proposed by the Council are extensive, carrying with it a ready invitation for third party intervention in the contractual relations of others by way of declaration in a conceivably limitless range of circumstances. To redefine the privity doctrine in the manner proposed by the Council would be to denude that doctrine of any meaningful content.

Dated: 4 June 2021

Kristina Stern
Sixth Floor Selborne Wentworth Chambers
(02) 9232 4012
kstern@sixthfloor.com.au

Louise Coleman
Sixth Floor Selborne Wentworth Chambers
(02) 8915 2617
lcoleman@sixthfloor.com.au

[1] *Federal-Mogul Asbestos Personal Injury Trust v Federal-Mogul Ltd* [2014] EWHC 2002 (Comm), [93]-[94], [100]; see also *Day v Barclays Bank Plc* [2018] EWHC 394 (QB), [38]-[39], [42].
[2] Ibid.