



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number: H2/2021
File Title: Hobart International Airport Pty Ltd v. Clarence City Council
Registry: Hobart
Document filed: Form 27D - Respondent's submissions-Supplementary Submi
Filing party: Respondents
Date filed: 18 Oct 2021

Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H2/2021

BETWEEN:

HOBART INTERNATIONAL AIRPORT PTY LTD
Appellant

and

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CLARENCE CITY COUNCIL
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

H3/2021

BETWEEN:

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AUSTRALIA PACIFIC AIRPORTS (LAUNCESTON) PTY LTD
(ACN 081 578 903)
Appellant

and

NORTHERN MIDLANDS COUNCIL
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

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**SUPPLEMENTARY SUBMISSIONS OF THE FIRST
RESPONDENT IN EACH APPEAL**

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

Preliminary issues

2. The Councils address the matter raised by the Court in oral argument: does clause 26.2(a) in each lease give rise to a trust of the benefit of the promise made by the lessees until an agreement is entered into by them with the Councils?
- 10 3. At the outset the Councils acknowledge that they did not plead or advance that contention in the courts below. However, the lessees asserted that the Councils did not have standing because, inter alia, they are not the beneficiaries of a trust of the contractual promise. In an identical pleading in each further amended defence¹, the lessees asserted that *'neither the First or Second Respondent are the trustees of a contractual promise made for the benefit of the Applicant in the Lease'*² and that the Councils did not have standing to seek and obtain declaratory relief.³
4. Upon appeal to the Full Court, on 30 October 2019, the lessees filed a notice of contention in each appeal. In those notices, the lessees contended that the claims of the Councils did not involve a justiciable controversy such as to constitute a matter because,

20 inter alia, the Councils do *'not enjoy the benefit of any contractual promise held on trust'*.⁴
5. In each of these appeals, the lessees gave notice of a constitutional matter on 26 February 2021⁵ and asserted that there is no matter because, inter alia, the Councils do not *'assert or rely upon any statutory, common law or other right, duty or liability to be established by the Court'*.

¹ Each filed on 5 March 2019 in TAD 25/2018 and TAD 27/2018.

² Paragraph 6(f) in TAD 25/2018; paragraph 8(f) in TAD 27/2018.

³ Paragraph 27(a) in TAD 25/2018; paragraph 31(a) in TAD 27/2018.

⁴ Paragraph 1(f)(i) in each notice of contention. Those notices are reproduced in the Appeal Book at pages 69 and 75.

⁵ Appeal Book pages 249 and 268.

6. The Councils accept that leave is required to advance arguments that, upon a proper construction of clause 26.2(a) of the leases, there is a trust of the benefit of the promise made by the lessees to the Commonwealth which it holds as trustee for the Councils.⁶
7. The Councils also accept the elementary principle that they are bound by the conduct of their cases below: *Coulton v Holcombe* (1986) 162 CLR 1. In civil cases there are well recognised exceptions to that general position: *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319; *University of Wollongong v Metwally (No. 2)* (1985) 59 ALJR 481 and *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598. The principle framed by Mason J in *O'Brien v Komesaroff* is directly applicable to these appeals. Whether clause 26.2(a) of the leases gives rise to a trust is a question of law that is wholly confined to the documents. There are no external controversial facts. Should the lessees dispute either of those propositions and point to ambiguity in the contractual text, it is open to draw to the attention of the Court which of the many background factual matrix documents are relevant to the present question (which were before the primary judge) and to explain why. The councils could not (and do not) object to that course.⁷
8. It is expedient in the interests of justice to permit this new argument to be agitated in answer to the contentions of the lessees that the Councils lack standing. The argument does not require the claims of the Councils to be reformulated or amended and nor does it alter the character of the declaratory relief that is claimed. Declaring the meaning of the contract will also settle the terms of the trust. In that way, the trust relationship supports the Councils' arguments that they have standing to seek the declaratory relief that is central to these appeals and is a further answer to the standing question that the lessees have put in issue.
9. Accordingly, leave to agitate the trust argument should in these circumstances be granted.

⁶ Whether leave is also required to withdraw the concession made below, to the effect that the Councils do not rely upon a trust, is of no practical relevance in that the same factors that inform a grant of leave to withdraw a concession apply: *Lafranchi v Transport Accident Commission* [2006] VSCA 81 at [17-21]; *Bradford v Devlot 17 Pty Ltd* [2020] VSC 792 at [49-51]; cf. *Zang v Zemin* (2010) 79 NSWLR 513 at [8-9] where the Court did not find it necessary to determine whether leave to withdraw a concession is required on appeal.

⁷ Nor do the Councils object to the filing of any supplementary Appeal Book that contains the material. Before the primary judge, the Commonwealth and the lessees relied on hundreds of pages of documentary material that was available to the contracting parties before the leases were signed.

A trust of the benefit of the promise

10. In these cases, there is property that may be the subject of a trust in the form of the benefit of the promise made by the lessees to the Commonwealth to promptly pay the equivalent rate amount: *Trident General Insurance Co. Ltd v McNiece Bros. Pty Ltd* (1988) 165 CLR 107 (**Trident**) at 120, Mason CJ and Wilson J; 146, Deane J; 156, Dawson J.⁸

11. Whether clause 26.2(a) manifests an intention by the contracting parties to create an express trust turns upon the drawing of the inference that Mason CJ and Dawson J identified in *Bahr v Nicolay (No. 2)* (1988) 164 CLR 604 at 618 where, by reference to what Fullagar J had said in *Wilson v Darling Island Stevedoring & Lighterage Co. Ltd*,⁹ their Honours observed:

‘His Honour was referring to contracts whereby the benefit is promised to a third party. We agree with his Honour’s comment. If the inference to be drawn is that the parties intended to create or protect an interest in a third party and the trust relationship is the appropriate means of creating or protecting that interest or of giving effect to the intention, then there is no reason why in a given case an intention to create a trust should not be inferred.’

12. Mason CJ and Wilson J in *Trident* at page 121 refer to the drawing of that inference by reference to the language employed, the matrix of surrounding circumstances and the nature of the transaction in order to determine what the promisee intended which, as explained in *Byrnes v Kendle* (2011) 243 CLR 253 at [114], is not a subjective process.

13. Deane J in *Trident* at 147 observed that:

‘In the context of such a contractual promise, the requisite intention should be inferred if it clearly appears that it was the intention of the promisee that the third party should himself be entitled to insist upon performance of the promise and receipt of the benefit and if a trust is, in the circumstances, the appropriate legal mechanism for giving effect to that intention.’

14. As explained in *Heydon on Contract* (2019) at [12.480] the promisee need not universally be the trustee. In these cases, the lessees have promised the Commonwealth

⁸ See further: Furmston & Tolhurst, *Privity of Contract* (OUP 2015) at [3.33]; Jacobs’ *Law of Trusts in Australia* (8th ed) (Lexis-Nexis Butterworths 2016) at [2-21]; J D Heydon, *Heydon on Contract* (Thomson Reuters 2019) at [12.380].

⁹ (1956) 95 CLR 43 at 67: *‘It is difficult to understand the reluctance which courts have sometimes shown to infer a trust in such cases.’*

to promptly pay the equivalent rate amount notified by the Councils in each rating year and to use all reasonable endeavours to enter into an agreement with the Councils to confer an enforceable contractual right to receive the amounts. The objective inference that is to be drawn is that the contracting parties intended to create an interest in favour of the Councils, being the benefit of the promise to pay, unless and until the lessees enter into separate contracts with the Councils. That interest is redolent of a trust in that the Commonwealth acts in the interests of the Councils in ensuring performance of the obligation.

10 15. Correspondingly, the lessees accepted an obligation to make a payment that is required to be made conformably with long-standing policy of the Commonwealth and to give effect to competitive neutrality. The contracting parties did not reserve for themselves the methodology of calculating the payment. Rather, the Councils, as invitees, perform that function. They do so to derive the financial benefit that is provided for in the clause.¹⁰ The contracting parties intended that the Councils would financially benefit by receiving payment in each financial year of the notified amounts and ultimately would most likely benefit from securing the advantage of a contract with the lessees. Additionally, the lessees accepted the obligation to use all reasonable endeavours to enter into agreements with the Councils. Objectively viewed, the contracting parties must be taken to have intended that the Councils would derive the benefits provided for, determined in accordance with the true meaning and effect of clause 26.2(a), and ultimately directly enforceable rights pursuant to an agreement with the lessees. 20 Similarly, the Commonwealth must be taken to have accepted the function of ensuring the lessees '*promptly pay*' the equivalent amounts as and when notified by the Councils in each rating year.¹¹ The benefit to the Commonwealth in this arrangement is that if the lessees do enter into agreements with the Councils, then it need no longer be concerned to ensure that the lessees comply with the payment obligation. These cases extend beyond the acknowledgment of prior rights in *Bahr v Nicolay*, that Mason CJ and Dawson J reasoned were sufficient to evidence the intention to create a trust in that case.

¹⁰ See *Trident* per Deane J at 147.

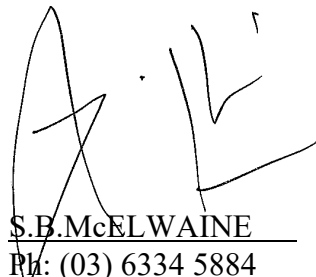
¹¹ See for example clauses 8, 11.2, and 23 which contemplate and provide mechanisms to support the role of the Commonwealth in monitoring the lessee's compliance with the lessee's covenants.

- 16. This is not a case where the Commonwealth, as trustee, holds money for the benefit of the Councils. Rather, it is the trustee of the benefit of the promise made by the lessees from which it must follow that its obligation is to ensure that clause 26.2(a) is complied with until the Councils become contracting parties with the lessees.
- 17. This analysis is consistent with the reasoning of Mason CJ and Dawson J in *Bahr v Nicolay* at 618-619, Mason CJ and Wilson J in *Trident* at 121 and Deane J in *Trident* at 147. The drawing of the trust inference is not defeated by the fact that it is open to the contracting parties to vary the contract to the detriment of the Councils: a revocable trust of this character *'is always enforceable in equity while it subsists'*: *Wilson v Darling Island Stevedoring & Lighterage Co. Ltd* at 68, Fullagar J.
- 18. A beneficiary of a trust, almost universally, has standing to seek various forms of relief, including declaratory relief as to the meaning or effect of a trust: *McLean v Burns Philp Trustee Co. Pty Ltd* (1985) 2 NSWLR 623 at 633-653; Jacobs' Law of Trusts in Australia (8th ed) at [23-06 – 23-07].

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DATED: 18 October 2021

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