HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, CALLINAN AND HEYDON JJ

PETER TAO ZHU APPELLANT

AND

THE TREASURER OF THE STATE OF
NEW SOUTH WALES RESPONDENT

Zhu v The Treasurer of the State of New South Wales [2004] HCA 56
17 November 2004
S616/2003

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 20 December 2002 and, in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of New South Wales

Representation:

J C Kelly SC with S A Benson and M F Galvin for the appellant (instructed by Walker Hedges & Co)

B W Walker SC with M B J Lee for the respondent (instructed by Corrs Chambers Westgarth)

CATCHWORDS

Zhu v The Treasurer of the State of New South Wales

Tort – Interference with contractual relations – Contract between the plaintiff and TOC Management Services Pty Ltd ("TOC") authorised and obliged the plaintiff to sell memberships in an "Olympic Club" to residents of China – Sydney Organising Committee for the Olympic Games ("SOCOG") interfered with the plaintiff's contract – Whether SOCOG had obligations to protect intellectual property under the Olympic Charter and the contract by which Sydney hosted the 2000 Olympic Games – Whether the plaintiff contravened the *Sydney 2000 Games (Indicia and Images) Protection Act* 1996 (Cth), s 12 – Whether SOCOG's interference with the plaintiff's contract was justified.

Tort – Interference with contractual relations – Defence of justification – TOC owed contractual obligations to SOCOG not to engage in certain conduct – Contract between TOC and the plaintiff obliged the plaintiff to engage in conduct contrary to the contract between TOC and SOCOG – Whether SOCOG held "proprietary" or "quasi-proprietary" rights – Whether SOCOG held an "actually existing superior legal right" – Whether SOCOG's conduct was "reasonably necessary" – Whether SOCOG was justified in interfering with the contract between TOC and the plaintiff.

Contract – Deed Poll – Plaintiff executed Deed Poll in favour of SOCOG – Plaintiff was required to execute Deed Poll pursuant to contract between the plaintiff and TOC – Plaintiff did not know there was a separate contract between SOCOG and TOC – Whether Deed Poll and contracts inconsistent – Construction of Deed Poll and contracts – Whether the plaintiff's activities required SOCOG's prior written consent – Whether the plaintiff breached the Deed Poll or his contract.

Words and phrases – "interference with contractual relations", "justification", "proprietary right", "quasi-proprietary right", "superior legal right", "reasonably necessary".

Sydney 2000 Games (Indicia and Images) Protection Act 1996 (Cth), s 12.
Sydney Organising Committee for the Olympic Games Act 1993 (NSW).

1 GLEESON CJ, GUMMOW, KIRBY, CALLINAN AND HEYDON JJ. It is a truth almost universally acknowledged – a truth unpatriotic to question – that the period from 15 September 2000 to 1 October 2000, when the Olympic Games were held in Sydney, was one of the happiest in the history of that city. The evidence in this case, however, reveals that the preparations for that event had a darker side.

2 Mr Peter Tao Zhu ("the plaintiff") was born in the People's Republic of China ("China") in 1962. He migrated to Australia in 1989 and became an Australian citizen on 16 April 1997.

3 On 11 March 1999, the plaintiff entered an agreement ("the Agency Agreement") with TOC Management Services Pty Ltd, the second defendant ("TOC"). It authorised and obliged him to sell memberships in an "Olympic Club" ("the Club") to residents of China. It is now not controversial that the Agency Agreement was breached when TOC purported to terminate it on 5 November 1999. Nor is it now controversial that TOC was persuaded to commit that breach by the first defendant, the Sydney Organising Committee for the Olympic Games ("SOCOG"). SOCOG also interfered with the Agency Agreement in two other ways – by preventing TOC from performing it, and then by causing the New South Wales police to arrest the plaintiff.

4 In December 1999, the plaintiff sued for interference with contract. Bergin J, sitting in the Equity Division of the Supreme Court of New South Wales, conducted a 20 day trial between 30 July and 11 September 2001. On 23 November 2001, she gave judgment for the plaintiff against SOCOG in the sum of $4,234,319. That figure included $95,000 in aggravated damages for injury to the plaintiff's feelings as a result of the arrest and $200,000 in exemplary damages by reason of SOCOG's "high-handed and reprehensible" behaviour in relation to all three interferences[1].

5 After hearing argument on 29 and 30 October 2002, the New South Wales Court of Appeal (Sheller, Giles and Hodgson JJA) allowed an appeal on 20 December 2002[2]. It found that SOCOG had established the defence of justification. It said that SOCOG had a right and duty under the *Sydney 2000*

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1 *Zhu v Sydney Organising Committee for the Olympic Games* [2001] NSWSC 989 at [446].

2 *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380.

Games (Indicia and Images) Protection Act 1996 (Cth) ("the Indicia Act") and the *Sydney Organising Committee for the Olympic Games Act* 1993 (NSW) ("the SOCOG Act") to interfere with the Agency Agreement, because the plaintiff had allegedly made unauthorised use of the name "The Olympic Club", the "Games Logo" and a "Club Logo". The Games Logo depicted, below lines suggesting the roof of the Sydney Opera House in silhouette, a figure of a runner above the words "Sydney 2000" and five interlinked rings well known as a symbol of the Olympic movement (the "Olympic Symbol"). The Club Logo incorporated the Games Logo in conjunction with the words "The Olympic Club". The name "The Olympic Club", the Games Logo and the Club Logo are referred to below as "the intellectual property rights".

6 By special leave granted on 2 December 2003, the plaintiff has appealed to this Court. Various questions arise about the legislative, contractual and other arrangements pursuant to which the Olympic Games were conducted in Sydney in 2000, and about the defence of justification in the tort of interference with contract. These questions should be answered favourably to the plaintiff and the appeal should be allowed.

7 The issues in the appeal were numerous and complex. Discussion of them below is organised as follows.

Background events

8 *SOCOG.* SOCOG was constituted by the SOCOG Act. Section 6(1) of the SOCOG Act gave SOCOG the same legal capacity and powers as a company under the Corporations Law, and hence the legal capacity and powers of a natural

person. Section 9(1) of the SOCOG Act provided that the primary objective of SOCOG was to organise and stage the Games of the XXVII Olympiad, as the Act grandly called them, in Sydney in the year 2000, in accordance with the rights and obligations conferred and imposed under the Host City Contract. That contract was a contract between the International Olympic Committee ("IOC"), the Council of the City of Sydney and the Australian Olympic Committee Inc ("AOC") dated 23 September 1993. SOCOG became a party to the Host City Contract on 4 February 1994.

9 Section 10(2)(d) of the SOCOG Act provided that one of SOCOG's functions was "establishing a marketing program in consultation with" the IOC and the AOC. Section 10(2A) provided that SOCOG "has and always has had power to enter into agreements … for the granting of sponsorship or licence rights or rights relating to the manufacture, distribution, marketing or sale of goods or services associated with the Games". Section 11(a) and (b) provided that in exercising its functions SOCOG was to take into account, to the fullest extent practicable, the Olympic Charter and the Host City Contract. Under a "Bye-law" to rr 12-17 of Ch 1 of the Olympic Charter ("the Olympic Charter Bye-law"), SOCOG was obliged by par 10 to secure compliance by third parties with the Bye-law, par 11.2 of which forbad the use of rights (including the intellectual property rights) in China or Australia without the written approval of the Chinese Olympic Committee and itself respectively[3]. Clause 48(iii) of the Host City Contract conferred an entitlement on the IOC Executive Board to terminate that contract and withdraw the Games from Sydney if SOCOG violated that contract, the Olympic Charter or the applicable law[4].

10 *The Olympic Club Trust.* On 26 September 1997, a trust deed was executed establishing the Olympic Club Trust. The trustee was TOC. The unit holders were the AOC, SOCOG and Synthesis Consulting Pty Ltd ("Synthesis"). Synthesis was a company the directors of which included two directors of TOC, namely Mr William Sherbon ("Mr Sherbon") and Mr Stefan Wisniowski ("Mr Wisniowski"). Among the shareholders of both Synthesis and TOC were Mr Sherbon and companies associated with Mr Sherbon and Mr Wisniowski, Sherbon and Associates Pty Ltd and Bipolar Group Pty Ltd. From 17 September 1997, Mr Keith Wyness ("Mr Wyness") began serving as Managing Director of TOC.

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3 See [55] below.

4 See [56] below.

11 *The Olympic Club Establishment Agreement.* On 5 December 1997, TOC, SOCOG, AOC and Synthesis entered into The Olympic Club Establishment Agreement ("the Establishment Agreement"). In essence, the Club was to comprise a series of contractual relationships between TOC and individual members through which members could obtain various advantages, particularly "the Olympic Benefits". The Olympic Benefits included tickets, or the chance of obtaining tickets, to events at, and related to, the Olympic Games, and rights to participate in other activities related to the Olympic Games.

12 *The Club Committee.* The Establishment Agreement made provision for the establishment of the Club Committee. The Committee was to have seven members. SOCOG appointed two, one being Mr Paul Reading ("Mr Reading"), the Commercial Director of SOCOG. The AOC appointed two. Synthesis appointed two – Mr Sherbon and Mr Wisniowski. The seventh member was Mr Wyness, as "chief executive officer" of TOC. While the role of TOC was to manage the Trust and the Club from day to day, the role of the members of the Club Committee was to oversee TOC and the Club in a manner akin to that of directors in a company.

13 *The Olympic Club Licence Agreement.* On 14 May 1998, SOCOG and TOC entered an Olympic Club Licence Agreement ("the Licence Agreement") by which SOCOG recognised TOC's right to use, inter alia, the intellectual property rights in conjunction with the operation of the Club. The Licence Agreement also contained provisions permitting TOC to license others to use them.

14 *The emergence of the plaintiff.* In December 1997, Mr Angus Noble ("Mr Noble") began acting as the Commercial Director of TOC. Through a company engaged by TOC to sell Club memberships to the general public, Mr Noble was introduced to the plaintiff, who thought there would be a market for selling memberships to residents of China as part of an accommodation and travel package for the Olympic Games. Negotiations between the plaintiff and Mr Noble culminated in the execution of five important documents on 8, 10 and 11 March 1999.

15 *The letter of clarification dated 8 March 1999.* On 8 March 1999, Mr Noble signed a letter to the plaintiff which the plaintiff also signed. The document set out the principles to be embodied in the Agency Agreement between the plaintiff and TOC, executed on 11 March 1999.

16 *The first letter of authority.* Also on 8 March 1999, Mr Wyness signed a letter as Managing Director of TOC over the common seal of TOC in the following terms:

> "To whom it may concern.
>
> Mr Peter T Zhu is an Authorised Agent of The Olympic Club and is hereby Authorised on an exclusive basis in the territory of the [People's] Republic of China to sell Olympic Club international memberships to Chinese residents travelling to Australia for the Sydney 2000 Olympic Games as a component of a travel and accommodation package, for the period 1 April 1999 to 30 June 1999."

That letter was typed on the letterhead of the Club, which included the Club Logo.

17 *The letter to the Chinese Olympic Committee.* On 10 March 1999, the plaintiff was supplied by Mr Noble as Commercial Director of TOC with a letter in the following terms:

> "Chairman
> Chinese Olympic Committee
>
> Dear Sir,
>
> The Olympic Club of the Sydney 2000 Olympic Games is pleased to advise that Mr Peter Tao Zhu has been chosen as the Exclusive Authorised Agent of the Club to market International Memberships to residents of the [People's] Republic of China in China.
>
> The Olympic Club has chosen Mr Zhu as its first exclusive Authorised Agent for Overseas Memberships after lengthy consultations, discussions and investigations. We are therefore pleased to introduce Mr Zhu to your Committee.
>
> We respectfully request you provide such assistance as your Committee deems appropriate to Mr Zhu in his work of enlisting People's Republic of China residents to join The Club via these International Memberships."

That letter too was typed on the letterhead of the Club and displayed the Club Logo.

18 *The Agency Agreement.* On 11 March 1999, the plaintiff and TOC executed the Agency Agreement. It appointed the plaintiff as exclusive "Agent" for an "Initial Term" from 1 April 1999 to 30 June 1999, with an "Option" for a "Further Term" from 1 July 1999 to 30 September 2000. The plaintiff was obliged to sell 2,000 International Memberships to "Mainland Chinese" in the Initial Term, ie by 30 June 1999. That was a condition precedent to the exercise of the Option. The plaintiff was obliged to sell a further 8,000 International Memberships in the Further Term, ie by 30 September 2000. In consideration of his appointment as Agent, the plaintiff had paid TOC A$30,000 on 8 March 1999. Mr Noble handed the plaintiff the original of the letter of authority dated 8 March 1999, pursuant to cl 7.1(b) of the Agency Agreement.

19 *The Deed Poll.* Pursuant to a promise to do so in cl 9.1(b) of the Agency Agreement, the plaintiff signed a Marketing Restriction Deed Poll ("the Deed Poll") in favour of SOCOG which restricted his right to use the intellectual property rights without SOCOG's written consent.

20 *The plaintiff's activities*. Mr Noble supplied the plaintiff with Club letterhead, Club satchels and other merchandising material for use in his agency, which included material bearing the Club Logo. The plaintiff began to endeavour to attract Club members. He appointed various sub-agents, including Mr Zhang Zhao Ming. He met senior Chinese officials both in Sydney and in China, and obtained from them oral but not written approval to solicit memberships in China.

21 *The exercise of the Option and the second letter of authority.* The plaintiff informed Mr Noble that he was having trouble meeting the target of selling 2,000 memberships by 30 June 1999, which would mean that he could not satisfy one of the conditions precedent to exercising the Option. Mr Noble agreed to allow its exercise and extend the term to 31 December 2000, provided the plaintiff paid a further $200,000. In fact, the plaintiff paid $230,006 on or about 31 May or 1 June 1999, and the Agency Agreement was extended to 31 December 2000. The plaintiff was given a letter of authority, dated 4 June 1999, and signed by Mr Wyness, which was in identical terms to that dated 8 March 1999, save that the term was changed to the period 1 April 1999 to 31 December 2000. The trial judge found that, within SOCOG, Mr Reading was "well aware" of that letter. The plaintiff was also given credit for 743 International Memberships, which were available for placement among his customers. Thereafter, assisted by Mr Zhang Zhao Ming, he continued to work to attract members.

22 *The transfer of the Club to SOCOG.* Unknown to the plaintiff, by July 1999 the Club was encountering serious financial difficulties. The money it had

obtained from the plaintiff was one of the few things keeping it alive. The trial judge found that the exercise of the Option and the extension of the Agency Agreement on 4 June 1999 took place "in circumstances of pressing financial need in TOC", and, like the entry into the Agency Agreement on 11 March 1999, was attended "with some sense of urgency". The trial judge also found that "pressure was placed on the plaintiff to sell as many memberships as possible up to a maximum 10,000 as quickly as possible so that TOC would receive funds from the plaintiff to ease its pressing financial burden."

23 On 22 July 1999, Mr Sherbon informed SOCOG representatives and the six other members of the Club Committee that Ernst & Young had advised that TOC should be put into administration immediately. He said he was gravely concerned that such "regrettable action" would create public controversy and have a significant negative impact on the Club members; that it would further seriously erode "the general public's perception of SOCOG and the Olympic Movement" and that it would "reflect poorly on the Government".

24 *SOCOG takes over the Club.* As a result of a mediation on 30 July 1999, it was agreed by AOC, SOCOG, TOC and Synthesis that SOCOG should take over responsibility for running the Club. This was announced in a press release on 3 August 1999. Although it contained some terminological inexactitudes, such as saying that the purpose of the transfer was to achieve "synergistic benefits", it did truthfully say that SOCOG was to "assume sole control of the Olympic Club". That process was overseen by Mr Reading. Ms Moiya Ford ("Ms Ford") was seconded from the ACT Government to work for SOCOG as Program Manager of the Club. She exerted SOCOG's control by giving directions to Mr Wyness, who reported to her. Counsel for SOCOG conceded that thereafter the Club and TOC were in all respects acting in accordance with the wishes of SOCOG.

25 On 24 August 1999, Mr Reading asked Mr Wyness: "Who is Peter Zhu – I have seen some documents in which you refer to him as being an agent of the Olympic Club?" Those documents were the second letter of authority dated 4 June 1999 and the letter of clarification of 8 March 1999 setting out key aspects of the relationship contemplated by the Agency Agreement. Mr Wyness replied: "Some sort of arrangement has been reached with Peter Zhu regarding the Olympic Club in China". This was an extraordinary reply, in view of: the fact that Mr Wyness had signed the first letter of authority, dated 8 March 1999, and the second letter of authority dated 4 June 1999; the fact that he must have been well aware of TOC's execution of the Agency Agreement (which had been contemplated in the letter of clarification of 8 March 1999 and cl 7.1(b) of which required the first letter of authority to be provided to the plaintiff); and

conversations which the plaintiff had had with Mr Wyness and Mr Noble in the previous months.

26 The trial judge found that towards the end of that conversation, Mr Reading said: "Well it's a bit of a worry[,] I don't want loose cannons running around – I know we want to try to make this thing work but you know the position regarding getting approvals – the Police are looking at this fellow – my advice to you is that you protect yourself by [reining] him in – if you had plans for China I suggest you had better do what you can to stop them. I don't want [TOC] or SOCOG to be exposed."

27 *SOCOG assures the Chinese Government that the Club is genuine.* The day after that conversation, on 25 August 1999, Mr Wang Zhiang, Cultural Consul of the People's Republic of China on the Consul General's staff in Sydney, sought and received assurances from SOCOG officers at SOCOG's premises in the absence of the plaintiff that the Club was "genuine". One of those officers sent Mr Reading a written report on the meeting, expressing disquiet about the "deal" to bring 10,000 Chinese members of the Club to Sydney. Mr Reading wrote on that message: "Please tell Wang that no deal is in place." The trial judge found that there was no evidence that Mr Wang Zhiang was so informed; had he been, the information would not have been correct, since the Agency Agreement was still on foot.

28 *The Deed of Release and Termination.* On 13 September 1999, TOC, SOCOG, AOC and Synthesis executed a Deed of Release and Termination. SOCOG agreed to take over the obligations of TOC under the member contracts. It was agreed that the Trust would terminate from 20 September 1999. That Deed thus purported to effect a novation of the member contracts, though without the necessary consent of the members. Of more immediate importance, it also made no valid provision for the interests of other persons who had contracts with TOC as trustee, such as the plaintiff. The existence and terms of the Deed were to be kept confidential.

29 *Mr Reading's direction to Mr Wyness to terminate the Agency Agreement.* In mid-September 1999, Mr Reading telephoned Mr Wyness and asked him to terminate the relationship with the plaintiff.

30 *The breach of the Agency Agreement.* The plaintiff was not informed of the events just described until he had a conversation with Mr Wyness on 21 October 1999. The plaintiff protested about SOCOG's wish to terminate the Agency Agreement and Mr Wyness undertook to see whether he could help.

Mr Wyness, after some paltering, wrote the following letter to the plaintiff on 5 November 1999:

> "We refer to the agency agreement executed in March 1999, for the Territory of the People's Republic of China (the agreement).
>
> We further refer to our meeting of Tuesday October 19 [scil October 21] 1999 at which time we notified you that your appointment as an agent of the Olympic Club had terminated on the following grounds:
>
> 1. The term of appointment was stated in the agreement to terminate on 30 June 1999 subject to you exercising your option to extend that term, and you failed to exercise your option.
>
> 2. In any event, you failed to perform the preconditions to exercising your option which are set out in clause 5 of the agreement, in that you
>
> (a) only sold 743 memberships as at October 19 1999 in breach of your agreement to sell 2000 memberships.
>
> (b) you failed to pay AUD$700,000 by 30 June 1999 or at all.
>
> At our meeting you agreed your appointment had been terminated.
>
> The Olympic Club will of course fulfil its contractual obligations with respect to the memberships sold by you and we await notification from you as to when you require delivery of the membership kits.
>
> We otherwise call upon you to return all property which belongs to or was supplied to you by the Olympic Club and you should cease to associate yourself with or represent yourself as having any form of association with the Olympic Club.
>
> We thank you for your assistance and cooperation."

On 18 November 1999, the plaintiff replied to that letter, took issue with its allegations and maintained that the Agency Agreement was "still in full force and effect".

31 *The arrest and prosecution of the plaintiff.* On 6 December 1999, the plaintiff was arrested on his arrival at Sydney Airport from China. He was detained for 12 hours and in that period his house was searched. His passport

and all the documents relevant to the conduct of the Agency Agreement were seized and retained for some months. On 26 April 2000, the plaintiff was charged with obtaining money by deception and attempting to obtain money by deception. On 16 October 2000, the Director of Public Prosecutions advised the plaintiff's solicitor that all charges would be withdrawn.

Parties

32 On 22 December 1999, the plaintiff commenced proceedings against SOCOG, TOC and Mr Wyness. Later, he arrived at a settlement with Mr Wyness. His case against TOC was stayed when a liquidator was appointed to TOC in August 2000. The trial judge gave judgment against the only remaining defendant, SOCOG. By the time the Court of Appeal allowed the appeal, the present respondent had been substituted for SOCOG[5]. It is convenient to refer to the party opposing the plaintiff at all material times as "SOCOG".

The trial

33 *SOCOG concessions.* SOCOG conceded that TOC remained legally bound to perform the Agency Agreement at least until its purported termination on 5 November 1999. It conceded that it instructed TOC to terminate the Agency Agreement, and that the other ingredients of the tort of interference with contract were present. It conceded that the grounds for termination stated in the letter of 5 November 1999 were not soundly based. But in all other respects SOCOG fought the trial hard.

34 *The plaintiff's credibility.* SOCOG criticised the plaintiff's reliability and credibility on numerous grounds[6]. The trial judge rejected all these attacks.

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5 With effect from 31 October 2001, s 55 of the SOCOG Act transferred the assets, rights and liabilities of SOCOG to the Olympic Co-ordination Authority. Section 6 of the *Olympic Co-ordination Authority Dissolution Act* 2002 (NSW) then transferred those assets, rights and liabilities to the present respondent with effect from 1 July 2002.

6 It even obtained a 10 day adjournment to call named witnesses to give evidence via video link from China with a view to giving the lie to a particular aspect of the plaintiff's evidence, but did not in fact call them.

35 *Invalid termination of Agency Agreement.* The trial judge found that TOC's purported termination of the Agency Agreement on 5 November 1999 was not valid. She rejected SOCOG's arguments that the letter of 4 June 1999 varying the Agency Agreement and consenting to the exercise of the Option was not a contractual document; that the plaintiff procured the exercise of the Option by misrepresentation; and that there were numerous repudiatory breaches of the Agency Agreement by the plaintiff, including acts of dishonesty, justifying termination of it by TOC. She did find some breaches of the Agency Agreement, but held that, whether taken separately or together, they would not have justified termination.

36 *First interference: Deed of Release and Termination.* The trial judge found that SOCOG had sufficient notice of TOC's contractual obligations to the plaintiff under the Agency Agreement, and was aware that entry by SOCOG into the Deed of Release and Termination on 13 September 1999 with TOC, AOC and Synthesis would cause TOC to breach the Agency Agreement. This was because the performance of the Deed of Release and Termination caused TOC to transfer the "business" of the Club to SOCOG, leaving TOC unable to perform its obligations to the plaintiff under the Agency Agreement.

37 *Second interference: persuading TOC to repudiate the Agency Agreement.* The purported termination of the Agency Agreement on 5 November 1999 as a result of Mr Reading's directions to Mr Wyness[7] was a breach of contract because the grounds assigned were baseless and there were no other grounds which were valid.

38 *Third interference: indirect interference by causing the plaintiff's arrest.* The trial judge found that the plaintiff was arrested because the police believed that he had been raising money by representing himself as a person who was entitled to sell Club memberships in China without having authority to do so. That belief was based on information from Ms Ford, which was communicated to them directly at a meeting on 3 December 1999 – in particular, information that the plaintiff was using non-genuine membership certificates. The trial judge found that the plaintiff would not have been arrested on 6 December 1999 had the police been informed by SOCOG of the following facts: that the plaintiff had obtained at least 657 Club memberships; that the plaintiff had paid over $260,000 to TOC; that the purported termination of the Agency Agreement on 5 November 1999 was under challenge by the plaintiff in correspondence; that Mr Wang

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7 See [29] above.

Zhiang had, on 25 August 1999, sought and received assurances from SOCOG officers in the absence of the plaintiff that the Club was genuine; that SOCOG had delivered many blank membership certificates to the plaintiff; and that he was entitled to issue them or have them issued.

39 The trial judge found that since the Agency Agreement remained on foot until the plaintiff terminated it by commencing proceedings on 22 December 1999, SOCOG's inducement of the police to arrest the plaintiff on 6 December 1999 was "unlawful and an intentional infliction of harm to the plaintiff. It amounted to an indirect interference with the contractual relationship." The trial judge called SOCOG's conduct in relation to the arrest "quite extraordinary", "high handed and disgraceful", springing from "a refusal to deal in good faith" and "reprehensible".

40 In this Court, SOCOG denied that the arrest of the plaintiff was an interference with contract on the ground that it did not prevent the plaintiff from carrying out the Agency Agreement, and from taking advantage of the opportunity it afforded to make profits in the period between the arrest on 6 December 1999 and the termination of the Agency Agreement on 22 December 1999.

41 This submission fails. Before the trial judge it was common ground that the arrest of the plaintiff prevented him from carrying out the Agency Agreement. SOCOG did not contend at trial that the arrest had not caused the plaintiff loss. It argued only that it had not caused the arrest. SOCOG's conduct of the trial precludes it from now contending that inducing the arrest of the plaintiff was not a separate and independent tort of interference with contract[8].

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8 SOCOG also contended that there was no independent illegality in its conduct – neither in the form of an unlawful arrest as between the police officers and the plaintiff, nor in the unlawful procurement by SOCOG of an arrest through the innocent medium of the police officers. This submission faces numerous problems. Contrary to SOCOG's argument, the allegation was probably made in the pleadings, and it was common ground at the trial that the arrest was independently unlawful because it was made without reasonable cause, which explains why the trial judge made no explicit finding on the point. It is unlikely that the trial judge would have concluded that SOCOG's inducement of the police to effect the arrest was an indirect interference with the Agency Agreement without deciding either that the arrest was without reasonable cause or that its procurement was independently tortious, particularly in view of the critical language she employed. The Court of Appeal must have shared her Honour's view, since it would not

(Footnote continues on next page)

SOCOG's arguments in the Court of Appeal

42 *SOCOG abandons most challenges.* As will be apparent from what has been written above, the trial was decided on the basis that the requisite mental element of the tort of interference with contract was established. That has not been challenged either in the Court of Appeal or this Court.

43 In its Defence, SOCOG had admitted that at least by about mid-September 1999 it knew that TOC had appointed the plaintiff as its agent to sell to residents in mainland China International Memberships of the Club. In its written submissions at the trial, SOCOG said "[t]here is no issue that SOCOG instructed [TOC] to terminate the Agency Agreement and that the other ingredients of the cause of action were present" and Bergin J proceeded on that basis.

44 In the Court of Appeal, most of SOCOG's grounds of appeal contended that TOC's conduct was not a breach of contract, but was rather the exercise of a lawful right to terminate the Agency Agreement. Two related to the arrest of the plaintiff. All these grounds were abandoned when the appeal was opened.

45 *SOCOG relies only on justification.* The only ground argued was that SOCOG's interference with the contract was justified by its "equal or superior right". SOCOG's contention was that the trial judge had overlooked categories of misconduct by the plaintiff which, though they may not have justified TOC in terminating the Agency Agreement, justified SOCOG in interfering with it.

46 *SOCOG's pleading.* More than a year after the commission of the torts alleged to be justified and the commencement of proceedings, the justification defence was first pleaded in par 17 of a Further Amended Defence, filed on 22 February 2001 ("the Defence"). The following particulars of justification were given:

> "(i) Pursuant to the [Indicia Act] the First Defendant enjoyed statutory rights and bore statutory responsibilities in respect of the Sydney

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otherwise have described the arrest as "an ill-considered infringement of [the plaintiff's] basic rights". SOCOG did not contest the justice of this language. No ground of appeal to the Court of Appeal took the point. However, for reasons given below at [165]-[166] it is not necessary to decide whether SOCOG's third interference involved independent illegality.

2000 Games indicia and images. Those obligations included the obligation to maintain a register of licensed [users] of the indicia and images (s 16) and the responsibility to exercise its statutory rights of standing pursuant to s 43(3) to obtain injunctive relief in respect of contraventions of s 12 in respect of the indicia and images[9].

(ii) By reason of the Plaintiff's breaches alleged at paragraph 14 above, the First Defendant was entitled to obtain an injunction to restrain the Plaintiff from using any of the indicia or images in respect of the promotion, marketing or sale of the travel packages which the Plaintiff was purporting to promote, market and sell in the Government of the People's Republic of China.

(iii) By reason of:

(A) the nature of the First Defendant's status and function as the Organising Committee for the Sydney 2000 Games;

(B) the obligation owed by the First Defendant with respect to The Olympic Club pursuant to the Deed of Termination and Release;

(C) the principle embodied in clause [5(g)] of the Establishment Agreement[10];

the First Defendant had a responsibility to protect the reputation and goodwill of the Olympic movement, The Olympic Club and the Sydney 2000 Games.

(iv) The First Defendant repeats the Plaintiff's breaches alleged in paragraphs 11, 12, 13 and 14 above."

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9 Section 12(1) provided: "A person, other than … a licensed user … must not use Sydney 2000 Games indicia or images for commercial purposes". The Indicia Act was in force at the time of the events in issue, but ceased to have effect from 31 December 2000: s 55.

10 See [57] below.

In order to understand the last allegation, it is necessary to bear in mind that par 11 alleged breaches of express and implied obligations owed to TOC under the Agency Agreement. Paragraph 12 alleged breaches of fiduciary duties. Paragraph 13 alleged breaches of obligations owed to SOCOG in the Deed Poll. Paragraph 14 alleged breaches of obligations under the Indicia Act. However, the allegations were much narrower by the time argument was presented to this Court: SOCOG claimed it had a right to end the Agency Agreement because the plaintiff promoted and sold travel packages using the intellectual property rights without the prior written consent of SOCOG and the Chinese Olympic Committee.

47 *Paragraph 17 of the Defence at trial.* SOCOG informed the Court of Appeal that it had advanced these arguments to the trial judge, but she had overlooked them. The problem arose because the claim in par 17 of the Defence that SOCOG was justified in procuring termination of the Agency Agreement by TOC relied on the many earlier allegations in pars 11-14 about the plaintiff's conduct. SOCOG informed the trial judge that the justification issue involved only "the application of a different legal principle to the same facts". It is therefore not surprising that she did not deal with the rejected factual arguments afresh in relation to justification, and assumed that no outstanding question existed. As the Court of Appeal said, the justification defence was presented "as being linked to conduct said to justify summary dismissal by TOC of the plaintiff." The immensely detailed arguments in support of the justification defence advanced in this Court occupied the better part of a day of oral argument; the corresponding arguments put to the trial judge occupied about 10 lines of the 79 pages of SOCOG's written submissions and six lines in the transcript of oral argument. The Court of Appeal said, rather mildly, that SOCOG had not placed proper emphasis at trial on the point on which it succeeded on appeal. It therefore refused to disturb the trial judge's order that the plaintiff have his costs of the trial, and refused to make any order that the plaintiff pay the costs of the appeal[11].

The Court of Appeal's conclusion

48 The Court of Appeal held that SOCOG had made out the justification defence. It held that the Agency Agreement had "required" the plaintiff to contravene s 12 of the Indicia Act, which forbad him to "use Sydney 2000 Games

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11 SOCOG did not cross-appeal against the Court of Appeal's costs orders and accepted these strictures.

indicia or images for commercial purposes", unless he were a "licensed user"[12]. It held that SOCOG had responsibilities under the Olympic Charter, the Host City Contract and the SOCOG Act to terminate the Agency Agreement. In order to understand the Court of Appeal's reasoning, it is necessary to identify an assumption on which the Court of Appeal operated and to summarise the statutory and other background, while noting some matters which were common ground.

The Court of Appeal's assumption

49 The assumption was that in the course of marketing Club memberships, the plaintiff referred to "The Olympic Club" and used the Club Logo, and hence the Games Logo. That assumption, although its truth was not demonstrated, and although it will have to be examined below, was correct. On that assumption, it was common ground that application of the relevant definitions in ss 7, 8 and 9 of the Indicia Act led to the conclusion that the use of the word "Olympic" in the phrase "The Olympic Club" and the words "Sydney 2000" in the Club Logo meant that these were "Sydney 2000 Games indicia"; and that the Club Logo, which incorporated the Games Logo, was also a "Sydney 2000 Games image", because it was a representation that, to a reasonable person, would suggest a connection with the Sydney 2000 Olympic Games.

50 Hence, on the assumption on which the Court of Appeal operated, the plaintiff fell within the language of s 12(1) of the Indicia Act unless he was a licensed user.

The relevant instruments

51 *Olympic Charter*. The first instrument on which SOCOG relied was the Olympic Charter. The Charter opened by stating in mystical terms some "Fundamental Principles" about what was styled "Olympism". But Ch 1 then quickly moved to questions of power, property and money. Rule 3(1) described the "Olympic Movement" as including the IOC, the National Olympic Committees ("NOCs") and the Organising Committees of the Olympic Games ("OCOGs"). Rule 1 provided that any person or organisation belonging to the Olympic Movement was bound by the Olympic Charter and was to abide by the decisions of the IOC, the "supreme authority of the Olympic Movement". Rule

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12 Further, s 13A rendered secondary participants in the conduct of persons caught by s 12 liable.

11 provided that the IOC owned all rights relating to the Olympic Games including rights relating to their "exploitation" and "reproduction". Rule 15 defined an Olympic emblem ("Olympic Emblem") as an integrated design associating the Olympic Symbol with another distinctive element. (An example would be the Games Logo.) Rule 17 provided that all rights to the Olympic Symbol belonged exclusively to the IOC.

52 After r 17 there appeared the Olympic Charter Bye-law. From it three points emerged.

53 The first was the paramount control of the IOC. The IOC was empowered to take all appropriate steps to obtain the legal protection of the Olympic Symbol (par 1.1 of the Olympic Charter Bye-law). Even if national law or trademark registration granted to a NOC the protection of the Olympic Symbol, that NOC was only to use the ensuing rights in accordance with instructions from the IOC Executive Board (par 1.2).

54 Secondly, each NOC was responsible to the IOC for the observance, in its country, of rr 12-17 of the Olympic Charter and their Bye-law (par 2). NOCs and OCOGs were allowed to design their own Olympic Emblems, subject to approval by the IOC Executive Board (pars 7.1-7.6). The Olympic Emblems of a NOC were to be speedily registered within the relevant country, and NOCs were to take all possible steps to protect them (par 7.7). Paragraph 7.7 continued:

> "Similarly, the OCOGs must protect their Olympic emblems, in the manner described above, in their countries as well as in other countries as decided in consultation with the IOC Executive Board."

That is, in Australia the obligation to protect the Games Logo lay with SOCOG.

55 Thirdly, a territorial system of protection was established. Paragraph 10 provided that any OCOG (eg SOCOG) wishing to use its Olympic Emblem for profit-making purposes, "either directly or through third parties" (such as TOC and the plaintiff), was obliged to comply with the Bye-law and secure its observance by third parties. Paragraph 11 provided that all contracts and arrangements, including those concluded by an OCOG, were to be signed or approved by the relevant NOC and were to be governed by various principles. SOCOG placed great stress on par 11.2:

> "[T]he Olympic emblem of an OCOG as well as any other Olympic-related symbols, emblems, marks or designations of an OCOG, may not be used for any advertising, commercial or profit-making purposes

whatsoever in the country of an NOC without the prior written approval of such NOC".

That is, the Club Logo was not to be used in China without the prior written approval of the Chinese Olympic Committee – not subsequent approval nor oral approval. Paragraph 12 made provision for the Chinese Olympic Committee to take half the net profits of the exploitation of the emblems in China. And par 10 imposed a "duty" on SOCOG to ensure that par 11.2 was complied with by TOC and by the plaintiff in relation to his Chinese activities. That "duty" was said to be backed up by s 11(a) of the SOCOG Act, which provided that in exercising its functions SOCOG was to take into account, to the fullest extent practicable, the Olympic Charter. In this Court it was argued that that duty was enforceable by mandamus at the instance of a State Minister.

56 *Host City Contract*. By cl 33(a) of the Host City Contract, the City of Sydney and the AOC acknowledged that the IOC owned all rights concerning the marketing of the Sydney Games. By cl 33(b), the IOC Executive Board was given power to assign, license or convey the IOC's rights to SOCOG, provided the Board was satisfied as to the protection of the IOC's proprietary rights. Clause 34 imposed a duty on the City, the AOC and SOCOG to ensure adequate protection of various forms of intellectual property. Clause 35 provided that various intellectual works and creations developed by or on behalf of or for the use of the City, the AOC or SOCOG should be vested in and remain in the ownership of the IOC. Clause 48(iii) provided that the IOC Executive Board was entitled to terminate the Host City Contract and withdraw the Games from Sydney if there was a violation by SOCOG "of any material obligation set forth in this Contract, the Olympic Charter or the applicable law." Before rights of termination and withdrawal could be exercised, the IOC Executive Board was required to serve SOCOG with a notice calling on SOCOG to remedy the breach of contract.

57 *Establishment Agreement.* Clause 5(g) of the Establishment Agreement provided that if all the AOC and SOCOG representatives on the Club Committee were reasonably of the opinion that an activity of TOC was likely to affect the goodwill or reputation of the Olympic movement adversely, they could compel TOC by direction to cease that activity. Clause 7 granted TOC the right to use the intellectual property rights, subject to the terms of the Agreement. Clause 25(c) provided that, except as permitted by the Establishment Agreement or a "Transaction Document" (such as the Licence Agreement), TOC would not, without SOCOG's consent, use the intellectual property rights. Clause 27(a) provided that TOC was to procure that each person with whom it dealt "in the

course of carrying out its functions in relation to the Club" executed a document in the form of the Deed Poll.

58 *Licence Agreement.* Clause 3.1(a) confirmed the grant by cl 7 of the Establishment Agreement to TOC of approval to use the intellectual property rights. By cl 3.1(b), SOCOG granted TOC, inter alia, the rights and opportunities set out in Appendix A1 solely with respect to the Club. Among those rights was "[t]he right in Australia … to use [the intellectual property rights] on Consumer Communication Vehicles in connection with the promotion and advertising of the Olympic Club to indicate a relationship or association with the Games or SOCOG". That expression was defined as meaning:

> "letterheads, stationery, display materials and other advertising, promotional and public relations materials approved by SOCOG to promote the Olympic Club pursuant to [Appendix A1]."

59 The materials on which the plaintiff exercised the intellectual property rights fell within this definition. In particular, it may be inferred that they were approved by SOCOG. By its execution of the Licence Agreement, SOCOG was aware that rights had been granted to TOC in relation to those materials and that TOC might authorise agents to use them. It was therefore aware that its approval might be sought. Two of the Club Committee were SOCOG representatives. The fact that officers of TOC handed documents over to the plaintiff supports an inference that they were approved by SOCOG, since it is inherently unlikely that TOC would have done so without SOCOG approval. The inference that arises from the circumstances is strengthened by SOCOG's failure to call evidence from Mr Reading or any other SOCOG officer denying its validity. But, alternatively, even if the evidence is insufficient positively to establish that SOCOG approved the documents used by the plaintiff, it was for SOCOG, in seeking to make out its justification defence, to prove that it did not grant approval. This it did not do.

60 By cl 3.3(g), a provision much emphasised by SOCOG, TOC was prohibited from allowing any other person to use the Club Logo without first obtaining SOCOG's written consent. Clause 3.10 prohibited TOC from entering any agreements with third parties (eg the plaintiff) inconsistent with its obligations under the Licence Agreement. By cl 3.7(a), TOC agreed to exercise the rights and opportunities granted under the Licence Agreement in compliance with the Olympic Charter (including par 11.2 of the Bye-law).

61 *Deed Poll.* Finally, the Deed Poll executed by the plaintiff provided:

"In order to protect the rights of SOCOG, [AOC], [IOC], the Olympic movement and the official sponsors, suppliers and others who are from time to time authorised to use those rights (Olympic Bodies), the Covenantor is required to execute this deed in favour of SOCOG.

1. The Covenantor will not, without the prior written permission of SOCOG, which SOCOG may withhold in its absolute discretion, represent, hold out, market, promote or advertise in any way that it has any connection or [association] with the Olympic [Bodies], the Sydney 2000 Olympic Games (the Olympic Games) or the 1998 or 2000 Australian Olympic teams (the Teams).

2. The Covenantor acknowledges that it has no right to use any intellectual property belonging to any Olympic Body, including but not limited to, any Olympic logo, mark or design.

3. The Covenantor agrees that, without the prior written consent of SOCOG, which SOCOG may withhold in its absolute discretion, it has no right to use and it will not use for any purpose, including, but [not] limited to, for any marketing, promotional or advertising purpose, any words, phrases, symbols or images which [included the Club Logo]. … The Covenantor further agrees that, without the prior written consent of SOCOG (which SOCOG may withhold in its absolute discretion), in any marketing, promotion or advertisement it will not:

   …

   (d) use any 'Sydney 2000 Games images' or 'Sydney 2000 Games indicia' (as those terms are defined in the [Indicia Act]).

…

5. The obligations of the Covenantor imposed by this deed are subject to any rights granted to the Covenantor by any Olympic Body."

Since TOC was authorised to use the relevant rights, it was an Olympic Body.

The Court of Appeal's reasoning

62 The Court of Appeal said that officers of TOC had misled the plaintiff and encouraged him to "engage in conduct which flouted the Olympic Charter and

the [Indicia Act]"; that some officers of SOCOG were aware of this and did nothing to prevent it until TOC ran into financial trouble; and that although SOCOG now conceded that the plaintiff was entitled to damages against TOC, at the trial it had "fought a lengthy contrary case and suffered total defeat". The Court of Appeal strongly criticised the plaintiff's arrest. However, despite being troubled by these matters, the Court of Appeal decided that SOCOG's defence of justification succeeded[13]:

> "The language of s12 of the [Indicia Act] is unequivocal. Subsection (1) prohibits a person, not a licensed user, using Sydney 2000 Games indicia and images for commercial purposes. Not only was Zhu acting contrary to this dictate so too were his sub-agents. Clause 48 of the Host City Contract entitled the IOC Executive Board to terminate that contract and to withdraw the Games from Sydney if there was a violation by SOCOG of any material obligation set forth in the Olympic Charter or the applicable law. The legislation under which SOCOG was constituted required SOCOG to take into account 'to the fullest extent practicable' the Olympic Charter, (s11). …
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> … SOCOG was justified in procuring the termination of the Agency Agreement. That agreement if allowed to remain in place *required* continued illegal conduct not only by Zhu but by others. The agreement permitted Zhu commercially to exploit intellectual property owned by the IOC on behalf of the Olympic Movement in a country outside Australia, the [People's] Republic of China, *without* the consents of any of the Olympic bodies who were required to consent and in particular by the relevant Chinese bodies. … [SOCOG had a] right to bring this otherwise illegal conduct to a stop. As SOCOG claimed, it was its duty and responsibility as the organising committee of the Sydney Games to do so. Zhu's contractual rights to exploit Olympic intellectual property in Mainland China under the terms of the Agency Agreement derived from TOC. The [Licence] Agreement made it plain that TOC had no authority to grant such rights. The superior right SOCOG calls in aid is an absolute one based on its constitution and statute. Moreover those who aided and abetted or were directly or indirectly knowingly concerned in or a party to the contravention by a person of s12 of the [Indicia Act] were taken

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13 *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380 at [184]-[186]. The words to which emphasis has been added are important parts of the plaintiff's argument in this appeal.

themselves to have contravened s12: s13A. SOCOG's responsibility also required it to ensure compliance with the Olympic Charter and the Host City Contract. These were not responsibilities and duties which SOCOG could barter away. Nor was there any way so long as the Agency Agreement continued that the illegality of Zhu's activities and those of the sub-Agents could be escaped.

Even if it be accepted that Zhu's arrest interfered with the Agency Agreement by inhibiting his ability to perform it, that had no relevance to SOCOG's entitlement to rely upon its *statutory responsibilities and duties to procure termination of the Agency Agreement*."

The correctness of the Court of Appeal's reasoning

63 The plaintiff argued that the first central proposition in the Court of Appeal's reasoning was that the Agency Agreement "required continued illegal conduct … by" the plaintiff. The plaintiff argued that that proposition was false. The Agency Agreement did not require the plaintiff to contravene s 12(1) of the Indicia Act by using the intellectual property rights without licence from SOCOG. Rather, it forbad him to use them without appropriate consents. By cl 9.1(b), the plaintiff covenanted to execute the Deed Poll. By cll 1 and 3(d) of the Deed Poll, the plaintiff covenanted that he would not, without SOCOG's consent, use the intellectual property rights.

64 The plaintiff argued that a second central proposition in the Court of Appeal's reasoning was that the Agency Agreement permitted the plaintiff to exploit the intellectual property rights in China "without the consents of any of the Olympic bodies who were required to consent and in particular by the relevant Chinese bodies." The plaintiff said that that proposition was also false. So far as the proposition referred to SOCOG's consent, it was falsified by the Deed Poll. So far as the proposition referred to the consent of the Chinese authorities, it was falsified by cl 9.1(a) of the Agency Agreement, in which the plaintiff covenanted to do:

"all things and sign all documents reasonably necessary to obtain the appropriate and required approvals and authorisations from the Government of the [People's] Republic of China and the Chinese Olympic Committee".

65 In short, the plaintiff contended that the Agency Agreement granted permission to do things with the consent of various persons; that permission could not be tortured into a contractual requirement to act without consent. The

truth was that the Agency Agreement did not require illegal conduct, but prohibited it. Had it required illegal conduct, a question would have arisen as to whether it was enforceable.

66 In this Court, SOCOG rightly accepted that, if the passage quoted above[14] was given its natural meaning, the plaintiff's criticisms of it were unanswerable. In particular, SOCOG accepted, consistently with its Defence, and with its concession to the Court of Appeal that the plaintiff was entitled to damages from TOC for repudiation of the Agency Agreement, that the Agency Agreement "was not illegal in its inception or inevitably illegal in its performance."

An alternative construction of the Court of Appeal's reasoning

67 However, SOCOG submitted that the Court of Appeal's language should be given a special construction, and that, on that construction, the reasoning was sound. SOCOG submitted that the Court of Appeal meant to indicate acceptance of the following argument: that exploitation of the intellectual property rights by the plaintiff required SOCOG's consent under cl 3.3(g) of the Licence Agreement and cll 1 and 3 of the Deed Poll; that SOCOG had a complete discretion whether or not to give that consent; that it had not been and never would have been given; that the only way in which the plaintiff wished to perform the Agency Agreement was using the intellectual property rights in the belief that the Agency Agreement permitted and perhaps required this; and hence that his conduct could never have been lawful. In these circumstances, it was lawful for SOCOG to engage in acts of interference with the contract rather than taking "wasteful inefficient steps such as letters before action, such as direct negotiation, such as talking, such as litigation", including the "more time consuming and expensive" course of applying to a court for an injunction to restrain the plaintiff's unlawful conduct. Alternatively, SOCOG submitted that if the Court of Appeal did not mean that, it had misunderstood SOCOG's argument, but that that argument ought to be accepted by this Court.

68 It is impossible to give the Court of Appeal's language the construction suggested. It follows that the orders of the Court of Appeal can only be upheld if the argument which SOCOG put to this Court, and said it put to the Court of Appeal, is correct[15].

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14 See [62].

15 It may be remarked in passing that if SOCOG is not a legally unmeritorious litigant, it is a singularly unfortunate one: for its sole argument in this Court is one

(Footnote continues on next page)

69 It is proposed now to deal with the following questions. According to SOCOG, what activities of the plaintiff in Australia and in China triggered SOCOG's supposed duty and right to interfere? In what way did SOCOG say those activities were unlawful? Which of those activities were in truth unlawful? Did SOCOG establish a defence of justification?

SOCOG's complaints about the plaintiff's conduct in Australia

70 SOCOG complained of two incidents in Australia.

71 *The request for SOCOG approval.* On 30 August 1999, Mr Zhang Zhao Ming wrote a letter to Mr Wyness on behalf of the plaintiff, seeking the approval of TOC and SOCOG for the use in China of what the trial judge described as "the Olympic Club folder, an application form for International Membership, a document relating to Membership Privileges and Benefits, a Membership Card and a Fact Sheet in Chinese". These materials were enclosed and the Club Logo appeared on some of them. There was no reply.

72 *The September 1999 transaction in Australia.* In September 1999, negotiations took place in Sydney between Mr Zhang Zhao Ming and another sub-agent of the plaintiff with Mr Ya Fa Wang, who was representing a group of companies in China. Mr Ya Fa Wang prepared a contract under which, in return for a promise by the group to pay $217,500, 25 of their employees were to attend the Games. Olympic Club Membership Certificates were to be issued to the 25 employees at a press conference in Shanghai. On 22 September 1999, Mr Ya Fa Wang made an initial payment of $72,500 to Mr Zhang Zhao Ming and the other

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which it says the trial judge overlooked and the Court of Appeal misunderstood. It may also be observed that SOCOG's argument that it would never have consented is inconsistent with its attempts to establish a defence of justification. On that argument either the Agency Agreement would not have come into force for want of compliance with a condition precedent, or it would have been discharged for impossibility of performance. Either way, there would have been no actionable interference with it, because it would not have been in force at the times of the interferences relied on. In that event, TOC would have been obliged to return the money it had received from the plaintiff. SOCOG's insistence that TOC need not return that money is inconsistent with the argument that it was impossible for the Agency Agreement ever to be performed on the ground that SOCOG would never have consented to performance.

sub-agent. On 4 November 1999, Mr Zhang Zhao Ming handed the Membership Certificates to Mr Ya Fa Wang in Australia.

SOCOG's complaints about the plaintiff's conduct in China

73 While SOCOG did not point to any specific incident, it was common ground that in publicising the International Memberships in China, the plaintiff used the intellectual property rights.

SOCOG's contentions on the plaintiff's chain of title

74 SOCOG's complaints about the plaintiff's conduct in both Australia and China turned on the plaintiff's title to use the intellectual property rights. It was common ground that, by reason of the Host City Contract and related transactions, SOCOG had the capacity to license the use of the intellectual property rights in Australia and, with the consent of the Chinese Olympic Committee, in China. The controversy turned on how far it had done so.

75 *Australia.* SOCOG contended that while TOC was entitled to use the intellectual property rights in Australia pursuant to the Licence Agreement, cl 3.3(g) of that Agreement prohibited TOC from allowing "any other person to use the Club Logo or otherwise deal with it without first obtaining SOCOG's written consent". Hence, it was said, TOC had no power to license the plaintiff to use the intellectual property rights unless SOCOG's written consent was first obtained; SOCOG's consent to their use by the plaintiff was also necessary under s 12(1) of the Indicia Act and cll 1 and 3 of the Deed Poll, and it was never granted.

76 *China.* SOCOG contended that not even TOC had a right to use the intellectual property rights in China because the Licence Agreement only authorised their use in Australia. First, SOCOG said that the plaintiff's use of the rights in China ignored the requirement of par 11.2 of the Olympic Charter Bye-law requiring the prior written consent of the Chinese Olympic Committee. Secondly, SOCOG said (even though it was not a party to the Agency Agreement) that cl 9.1(a) of the Agency Agreement[16] had not been complied with. Thirdly, SOCOG said that, again, its written consent had not been obtained under cll 1 and 3 of the Deed Poll. Finally, it said that the plaintiff was not a licensed user within the meaning of s 12(1) of the Indicia Act.

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16 See [64] above.

The plaintiff behaved lawfully in Australia

77 In SOCOG's view of the world, the whole human scheme was acrawl with requirements for its prior written consent, without which not a sparrow could fall. Since SOCOG said it had never given prior written approval to, and had never licensed, the plaintiff's use of the intellectual property rights, it accused the plaintiff of having been allowed by TOC to use the intellectual property rights without complying with cl 3.3(g), of contravening cll 1 and 3 of the Deed Poll, and of contravening s 12(1) of the Indicia Act. These accusations fail. In summary, first, cl 3.3(h) of the Licence Agreement obviated the need for the plaintiff to obtain SOCOG's prior written consent as required by cl 3.3(g). Secondly, cll 1 and 3 on their true construction did not require SOCOG's prior written consent, and even if they did, cl 5 of the Deed Poll rendered cll 1 and 3 subject to the plaintiff's right to use the intellectual property rights granted by TOC pursuant to its powers under cl 3.3(h). Thirdly, SOCOG's grant of power in cl 3.3(h) to TOC to authorise an agent such as the plaintiff to use the intellectual property rights was a licensing of the plaintiff's use of them within the meaning of s 12(1) once SOCOG exercised that power. The basis for those three conclusions is as follows.

78 *Effect of cl 3.3(h) of the Licence Agreement on cl 3.3(g).* Clause 3.3(h) of the Licence Agreement, to which, unlike cl 3.3(g), SOCOG did not draw attention, provided:

> "[TOC] may, notwithstanding [cl 3.3(g)], authorise its employees, agents and contractors to use the Club Logo in relation to the Olympic Club and in a manner consistent with this Agreement".

Clause 3.1(b) read with Appendix A1 gave TOC the right to use the Club Logo on "Consumer Communication Vehicles"[17]. The effect of cll 3.1(b) and 3.3(h) was that TOC was permitted to authorise the plaintiff, its agent, to use the Club Logo on the materials employed in the two Australian incidents of which SOCOG complained. TOC did authorise him to use the Club Logo when it provided the plaintiff with the first letter of authority dated 8 March 1999 and the second letter of authority dated 4 June 1999, each of which was typed on the letterhead of the Club, which included the Club Logo. TOC also granted to the plaintiff the right to use the intellectual property rights when it provided the

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17 See [58] above.

plaintiff with the Club letterhead and approximately 100 "Welcome Kits" for members containing satchels and other merchandising materials for use by the plaintiff in the execution of his duties under the Agency Agreement.

79 Thus although cl 3.3(g) prohibited TOC from allowing any other person to use the intellectual property rights without the prior written approval of SOCOG, cl 3.3(h) obviated the need for that approval as far as the plaintiff was concerned.

80 *Clauses 1 and 3 of the Deed Poll: true construction.* Sheller JA rightly pointed to a radical tension between cll 1 and 3 of the Deed Poll, on the one hand, and the Agency Agreement, on the other[18]:

> "By the Deed Poll Zhu covenanted not, without the prior written permission of SOCOG, to represent, hold out, market, promote, or advertise in any way that he had any connection or association with the Olympic bodies, the Sydney 2000 Olympic Games or the 1998 or 2000 Australian Olympic teams and acknowledged that he had no right to use any intellectual property belonging to the Olympic body, including but not limited to, any Olympic logo, mark or design. By the Deed Poll Zhu agreed that, without the prior written consent of SOCOG, he had no right to use and would not use for any purpose including any marketing, promotion or advertising purpose any words, phrases, symbols or images which, in SOCOG's opinion, suggested any connection or association between the plaintiff and any Olympic body, the Olympic Games or any of the teams. Standing alone these covenants would be extraordinary ones when combined with an agreement enabling the covenantor to sell to people in Mainland China International Memberships of a club with a logo which incorporated Sydney 2000 Games indicia, and thereby, to provide Olympic benefits including tickets to the Olympic Games, Olympic Arts Festival events, access to the Official Dress Rehearsal of the Opening Ceremony, Club member recognition on a special memorial, privilege rights to become a volunteer and involvement rights in the torch relay."

81 Sheller JA pointed out that the plaintiff's obligation to execute the Deed Poll stemmed from cl 9.1(b) of the Agency Agreement, in which he agreed to refrain:

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18 *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380 at [170].

> "from, in any way, utilising the … Club Logo or this Agency generally for the purpose of promoting, marketing or selling any services other than the International Memberships and the Agent agrees to execute the … Deed Poll presented to him at the time of executing this Agreement."

And his Honour pointed out that cl 7.1(b) of the Agency Agreement obliged TOC to provide the first letter of authority dated 8 March 1999. He then said[19]:

> "It is plain enough that the Deed Poll must be read as an integral part of the contract between Zhu and TOC. It would be absurd to read it as intended to contradict and defeat the Agency Agreement. While courts should give the words of a written agreement the natural meaning that they bear, in giving meaning to the words of an agreement between commercial parties, courts will endeavour to avoid a construction which makes commercial nonsense."

Sheller JA concluded that if the plaintiff operated within the limits of the Agency Agreement and the first letter of authority issued pursuant to cl 7.1(b), he would not be in breach of the Deed Poll.

82 That reasoning is correct. The Deed Poll had to be executed because under cl 27(a) of the Establishment Agreement, TOC agreed to:

> "procure that each person with whom it deals in the course of carrying out its functions in relation to the Club … executes a deed in the form of the [Deed Poll] … in favour of SOCOG under which the person agrees, amongst other things, not to represent, hold out, promote or advertise its connection with SOCOG, the AOC or the Games without SOCOG's prior written permission."

The Deed Poll was a standard form instrument designed to apply to TOC's dealings with a wide range of persons. The execution of the Deed Poll pursuant to an obligation in, and at the same time as, the Agency Agreement meant that it had to be given a construction conformable with the Agency Agreement. It was necessary to construe the Deed Poll so as to avoid it making commercial

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19 *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380 at [173].

nonsense or working commercial inconvenience[20]. Its commercial purpose – the purpose of reasonable persons in the position of TOC and the plaintiff – was relevant[21]. That, in turn, required attention to "the genesis of the transaction, the background, the context, the market" in which the parties were operating, as known to both parties[22].

83 The plaintiff knew nothing of the Licence Agreement[23]. The genesis, background and context of the Agency Agreement and the Deed Poll as known to the plaintiff and TOC suggested the same purpose as that suggested by the express terms of the Agency Agreement – to attract International Members of the Club in China. A construction of the Deed Poll conformable with the Agency Agreement meant that cll 1 and 3 bound the plaintiff if he was acting outside the Agency Agreement but not if he acted within its terms. The function of the Deed Poll was to buttress the prohibition in cl 9.1(b) on the plaintiff using the intellectual property rights for purposes other than selling the International Memberships.

84 The contrary construction advanced by SOCOG is nonsensical in view of the express obligations on TOC under the Agency Agreement. One was to supply the first letter of authority under cl 7.1(b): it was on Club letterhead, which included the Club Logo, and was intended to be widely used, since it was addressed "To whom it may concern". Another express obligation on TOC was to "do all things reasonable to assist in introducing the [plaintiff] to the Chinese Olympic Committee" under cl 7.1(h), pursuant to which it supplied the letter to the Chinese Olympic Committee of 10 March 1999: that too was on Club letterhead including the Club Logo. Another express obligation was to supply the second letter of authority pursuant to cl 7.1(e): like the first letter of authority, it was on Club letterhead, and was intended for wide use. Another

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20 *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313-314 per Kirby P.

21 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 351 per Mason J.

22 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 350 per Mason J, quoting *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989 at 995-996 per Lord Wilberforce; [1976] 3 All ER 570 at 574.

23 It was confidential: Licence Agreement cl 12.1 and Establishment Agreement cl 24.

express obligation was to supply an "International Membership Welcome Kit" for each new International Member pursuant to cl 7.1(c). That expression meant:

> "[A]n Olympic Club satchel, Welcome magazine, Video, CD, Membership Certificate, Member pin, Australian Souvenir such as the $5 … Sydney Olympic Coin as produced by [TOC] or its suppliers in Australia, and subject to Sydney Olympic Committee approval, one complimentary invitation to attend the Opening Ceremony Dress Rehearsal at Olympic Stadium".

The parties to the Agency Agreement must have contemplated that the Club Logo might be extensively employed in this array of items. Over 100 Welcome Kits were in fact provided. SOCOG's construction is also inconsistent with the implied duty of cooperation between TOC as principal and the plaintiff as agent, pursuant to which TOC supplied all the material bearing the Club Logo.

85 SOCOG's construction is also inconsistent with the fundamental obligation on the plaintiff created by cl 9.1(d) "to do all things reasonably necessary and expeditious to sell up to 10,000 International Memberships" in China, and with the condition precedent to the exercise of the Option created by cl 5.1(a) to sell 2,000 International Memberships in China by 30 June 1999. It would have been very hard for the plaintiff to do these things unless he could have held himself out as being associated with an Olympic Body (eg TOC) or the Olympic Games, yet this would place him in contravention of cll 1 and 3 of the Deed Poll construed as SOCOG would have it. Whether or not TOC had the right to appoint the plaintiff as the exclusive agent to market Club Memberships in China, and whatever SOCOG's purpose was in procuring the execution of the Deed Poll, it cannot have been the objective intention of the plaintiff and TOC that the Deed Poll should operate to prohibit the plaintiff from holding himself out as being associated with Olympic Bodies or the Olympic Games when marketing International Memberships in China.

86 *Clauses 1 and 3 of the Deed Poll: effect of cl 5.* The trial judge decided that even if without cl 5 there was a breach of cll 1 and 3, cl 5 prevented that result. Her reasoning may be put thus. TOC was an "Olympic Body" because it was authorised (by the Establishment Agreement and the Licence Agreement) to use the rights of SOCOG, AOC and IOC. It was also authorised in turn to authorise the plaintiff to use those rights (cl 3.3(h) of the Licence Agreement).

By reason of cl 5, cll 1 and 3 were subject to those rights, and the prior written consent of SOCOG was not necessary[24]. That reasoning is correct.

87 *Section 12(1) of the Indicia Act.* The words "licensed user" as employed in s 12(1)[25] meant a user who had been licensed – that is, a person who had been authorised to do something which would otherwise be unlawful[26]. SOCOG's grant to TOC of the right to authorise its agents to use the Club Logo meant that, once TOC authorised the plaintiff to do so as an agent, he became a person authorised by SOCOG to use the intellectual property rights.

88 The Indicia Act did not specify any formal requirements in relation to licences. Where SOCOG licensed a person, s 15(1) obliged it to make an entry in the register of licensed users containing the particulars set out in s 17. Licensing was to take effect when the entry was made in the register (s 15(2)), but SOCOG did not dispute the Court of Appeal's view that registration did no more than provide evidence of the grant of a licence; it was not itself a source of rights. Since the burden of proof that the plaintiff was not licensed rested on SOCOG, and since SOCOG could not rely on its failure to fulfil its duty to make an appropriate entry in the register, SOCOG failed to discharge its burden of proving that the plaintiff was not a licensed user[27].

89 *The letter of 30 August 1999.* There is an additional reason why the 30 August 1999 letter was not a breach of any statutory or contractual obligation on the part of the plaintiff. The sending of that letter with its enclosures could not have been a breach of s 12(1) of the Indicia Act because it was not a "use" of Sydney 2000 Games indicia or images for "commercial purposes".

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24 *Zhu v Sydney Organising Committee for the Olympic Games* [2001] NSWSC 989 at [353]-[355]. In the Court of Appeal, Hodgson JA (Giles JA concurring) said this reasoning was "arguably" correct: *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380 at [206].

25 See footnote 9 above.

26 *Federal Commissioner of Taxation v United Aircraft Corporation* (1943) 68 CLR 525 at 533 per Latham CJ.

27 It is not necessary to consider whether cl 3.3(h) of the Licence Agreement only gave TOC power to authorise the plaintiff, as an agent, to use the Club Logo, but did not give the plaintiff power to authorise his own agents to do so, since SOCOG did not take the point.

90 SOCOG argued that the 30 August 1999 letter was an application to TOC for its written approval to use the Club Logo pursuant to cl 9.1(c) of the Agency Agreement, not an application to SOCOG for consent or a licence. However, the letter said: "We are looking forward to having the approval of [TOC] and SOCOG." The letter was not only an application to TOC under cl 9.1(c), but also an (unnecessary) application for a licence from SOCOG, and an (unnecessary) application for the written consent of SOCOG before the plaintiff undertook conduct which might have required it (eg under cll 1 and 3 of the Deed Poll). It would be absurd to treat a request for consent as contravening any provision requiring consent.

91 *Conclusion.* For all these reasons, the plaintiff's conduct in Australia complained of by SOCOG was not in fact unlawful. It is now necessary to consider the plaintiff's activities in China.

The legality of the plaintiff's conduct in China

92 SOCOG's argument was that the plaintiff's conduct in China had not received the prior written consent of the Chinese Olympic Committee as required by the Olympic Charter Bye-law, par 11.2; he had not complied with cl 9.1(a) of the Agency Agreement; he had contravened s 12(1) of the Indicia Act; he had been allowed by TOC to use the intellectual property rights without complying with the requirement in cl 3.3(g) of the Licence Agreement for SOCOG's prior written consent; and he had contravened cll 1 and 3 of the Deed Poll.

93 *Olympic Charter Bye-law, par 11.2.* Although the Chinese Olympic Committee gave its prior consent to the plaintiff's conduct, it was not in writing. Paragraph 11.2, the text of which has been set out at [55] of these reasons, required written approval of an NOC for the use of Olympic-related symbols in its country for commercial purposes. The significance of this is discussed below[28].

94 *Clause 9.1(a) of the Agency Agreement.* Clause 9.1(a) of the Agency Agreement required the plaintiff to do all things and sign all documents necessary to obtain the required approvals and authorisations from the Chinese Government and the Chinese Olympic Committee. This the plaintiff did. On 10 March 1999, in Sydney the plaintiff met the Chinese Consul General who said

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28 See [109], [167]-[168].

that he would arrange meetings between the plaintiff and Mr Tu Mingde, the Director of the Liaison Department of the State Sport General Administration and Chief Secretary of the Chinese Olympic Committee, and Mr Shaozu Wu, the Minister for Sport in China. In China, on 23 March 1999, the plaintiff met Mr Tu Mingde. According to the evidence, Mr Tu Mingde did not oppose the plaintiff's activities and said that when they commenced, the plaintiff should contact him, at which time the Chinese Olympic Committee would consider them. Indeed, Mr Tu Mingde advised the plaintiff to "hurry up", and said that if the plaintiff had problems, he (Mr Tu Mingde) could assist in solving them.

95 On 5 July 1999, the plaintiff met senior Chinese officials in Beijing, one being the Vice Minister of the State Sport General Administration Ministry and the Vice President of the Chinese Olympic Committee, and the other being a representative of the office of the Minister for Sport. He described his plan to sell International Memberships in China as part of a tour package for Chinese citizens to travel to Sydney. According to the evidence, those officials approved the project and said letters of support and authority were not needed. One of the officials said that they would give the plaintiff whatever support he needed. Thus the senior officials to whom the plaintiff spoke approved his conduct both before he started it and after that time, and said it was not necessary for him to do anything more than receive their oral approval. There was no evidence that the Chinese Olympic Committee ever complained to the AOC or SOCOG about his activities. The plaintiff did not breach cl 9.1(a) of the Agency Agreement.

96 *Section 12(1) of the Indicia Act.* Nor was the plaintiff's conduct in China in breach of s 12(1) of the Indicia Act, because that Act did not apply to China. Prima facie the prohibition created by s 12(1) against "use" of property[29], contained as it was in a statute relating to intellectual property, would be construed as applying only to use in Australia[30]. That is reinforced by s 15B of the *Acts Interpretation Act* 1901 (Cth), which provides that federal Acts are to be taken to have effect in and in relation to the coastal sea of Australia as if it were part of Australia: that suggests that, in the absence of express provisions, those Acts have no wider effect. One express provision supporting a slightly wider

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29 See footnote 9 above.

30 *Norbert Steinhardt and Son Ltd v Meth* (1961) 105 CLR 440 at 443-444 per Fullagar J (revd on other grounds (1962) 107 CLR 187); *Estex Clothing Manufacturers Pty Ltd v Ellis and Goldstein Ltd* (1967) 116 CLR 254 at 267 per Windeyer J.

application than that achieved by s 15B was s 5 of the Indicia Act, which extended it to Christmas Island, Cocos (Keeling) Islands, Norfolk Island, the waters above the continental shelf of Australia, and the air space above Australia and the continental shelf of Australia. But that provision in itself suggested no wider extraterritorial application. The Indicia Act had no equivalent to s 5(1) of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") which provides that particular provisions extend to conduct outside Australia by Australian citizens or persons ordinarily resident in Australia. Section 6(b)(i) of the Indicia Act provided: "In addition to its effect apart from [s 6], [the Indicia Act] also has the effect that it would have if each reference to use for commercial purposes were a reference to … use for commercial purposes by any person in the course of … trade or commerce with other countries". But that provision did not relate to the geographical reach of the Indicia Act. It, and the other provisions of s 6 of the Indicia Act, were designed, like those in s 6 of the Trade Practices Act, only to give the Indicia Act wider constitutional support.

97 Even if the textual pointers against extraterritorial operation were inconclusive, the same conclusion would flow from the fact that s 12(1) was enacted in the context of, and no doubt with knowledge of, the instruments pursuant to which the Olympic movement operated and the Sydney Games were to be conducted[31]. Under one of those instruments, the Olympic Charter Bye-law, par 11.2[32], the Chinese Olympic Committee had a veto over and a power to permit use of SOCOG-related intellectual property in China. The better construction of s 12(1) is that it did not give Australian courts jurisdiction to interfere with the Chinese Olympic Committee's rights in China.

98 It was common ground that the Indicia Act permitted the seizure and forfeiture of imported goods, and the grant of remedies against the importation of goods, where the goods had already had applied to them Sydney 2000 Games indicia or images: s 10(2). But beyond that, as SOCOG eventually conceded, s 12(1) did not apply to any conduct of the plaintiff in China, only to conduct within Australia and the areas indicated in s 5.

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31 The Ministerial Second Reading Speech in the Senate reveals awareness of the obligations created by the Host City Contract and suggests a close involvement of SOCOG with the Bill: Australia, Senate, *Parliamentary Debates* (Hansard), 8 May 1996 at 469-472.

32 See [55] above.

99 *Clauses 3.3(g) and (h) of the Licence Agreement.* The plaintiff contended, but invalidly, that cl 3.1 of the Licence Agreement granted TOC the right to use the Club Logo outside Australia, and that cl 3.3(h) granted TOC the right to authorise the plaintiff to do so. Clause 3.1(a) was not itself a grant of rights; it merely confirmed that TOC had been granted certain rights and approvals under the Establishment Agreement. Those rights and approvals included the right and licence to use the intellectual property granted by cl 7(c), but cl 7(d) provided that they were to be subject to the terms of the Licence Agreement when executed. Clause 3.1(b) of the Licence Agreement granted the rights in Appendix A1[33], but that grant was limited to Australia. It is necessary to read cl 3.1(a) with cl 3.4, which approved the use by TOC of the intellectual property rights, but only "in Australia". While cl 3.3(h) of the Licence Agreement permitted TOC to authorise its agents to use the Club Logo in relation to the Club, the use had to be "in a manner consistent with this Agreement". The rights of an agent purportedly authorised by TOC under cl 3.3(h) could not be greater than the rights of TOC itself.

100 Hence neither cl 3.3(g) nor cl 3.3(h) apply, since the Licence Agreement did not give either TOC or the plaintiff any rights in relation to China.

101 *Inapplicability of cl 5 of the Deed Poll.* It follows that the reasoning set out above[34], which led to the conclusion that cl 5 of the Deed Poll prevented cll 1 and 3 from applying, is not available. TOC had no rights to grant to the plaintiff in China.

102 *Were cll 1 and 3 of the Deed Poll contravened?* However, the construction of cll 1 and 3 in a manner consistent with the Agency Agreement, discussed above[35], is as sound for conduct in China as it was for conduct in Australia. Clauses 1 and 3 did not require SOCOG's prior written consent to conduct of the plaintiff which was within the Agency Agreement itself, as his conduct was.

103 That conclusion is not affected by the fact that the Licence Agreement did not authorise the purported grant by TOC of permission to use the Club Logo in

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33 See [58] above.

34 See [86].

35 See [77]-[86].

China by its conduct at the time of and after the execution of the Agency Agreement. Some entity claiming to own, or otherwise to have the right to protect, the intellectual property rights may have had curial standing to prevent the plaintiff from acting as he did in China, whether that entity was the Chinese Olympic Committee or the IOC or some other body. But, s 12(1) apart, SOCOG never contended that it had standing. Further, it did not prove Chinese law and did not allege any breach of Chinese law. It pointed to no trademark or design registration. It did not accuse the plaintiff of any breach of copyright. No claim was made that the Trade Practices Act, or any equivalent Australian legislation, was contravened. The plaintiff was not said to be guilty of passing off. In each instance it is understandable why no such contention was advanced. But even if some breach of duty by the plaintiff could have been advanced, it was a breach of duty distinct from a breach of cll 1 and 3.

104 Thus the only one of SOCOG's complaints that it made out was non-compliance with par 11.2 of the Olympic Charter Bye-law, requiring *written* approval of the Chinese NOC for the use of Olympic-related symbols.

SOCOG's argument on justification

105 SOCOG submitted that Romer LJ was correct in saying, in *Glamorgan Coal Co Ltd v South Wales Miners' Federation*[36]:

> "I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is 'sufficient justification', and most attempts to do so would probably be mischievous. … I respectfully agree with what Bowen LJ said in the *Mogul Case*[37], when considering the difficulty that might arise whether there was sufficient justification or not: 'The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell.' I will only add that, in analyzing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach."

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36 [1903] 2 KB 545 at 573-574.

37 *Mogul Steamship Co Ltd v McGregor Gow & Co* (1889) 23 QBD 598 at 618-619.

Mogul had concerned an action for the tort of conspiracy but Bowen LJ had advanced the following general propositions[38]:

> "[I]ntentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."

He also said[39]:

> "If it was bona fide done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable".

The "line" which Bowen LJ drew and which Romer LJ inadvertently introduced to the tort of contractual interference was between such selfish or unreasonable conduct and those acts purely "done with the intention of causing temporal harm"[40] and which thus lacked legal justification. Later in these reasons it will be necessary to refer further to the confused genesis of the doctrine of justification in the tort of contractual interference.

106 Secondly, SOCOG submitted that no remedy should be given where the justice of the case required that it not be given, or did not require that it be given; that the tort of interference with contract was wide, and perhaps widening, and defendants needed some insulation from its rigours; that the function of the justification defence was to achieve these goals; and that they were best achieved by treating the relevant conduct as tortious only if it were done "without just cause or excuse".

107 Thirdly, SOCOG submitted that there were two inconsistent sets of legal rights: the plaintiff's contractual rights against TOC, and SOCOG's rights. SOCOG accepted that it had no superior statutory right positively authorising the

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38 (1889) 23 QBD 598 at 613.

39 (1889) 23 QBD 598 at 618.

40 (1889) 23 QBD 598 at 618.

commission of the tort and no superior proprietary right of a conventional kind[41]. SOCOG's rights arose from the right to protect the intellectual property which had been purportedly, but wrongly, granted by TOC to the plaintiff and of which it was the custodian. SOCOG said it was necessary to engage in a flexible discretionary "balancing exercise", weighing social and individual interests, to determine which set of rights should prevail. SOCOG submitted that its rights entitled it to interfere, using "brusque efficiency", with the plaintiff's contractual rights even though it might have been possible, in some less brusque way like negotiation or litigation, to ensure that the plaintiff did not interfere with those rights. SOCOG argued that it was more efficient for it to "wreck the contract" by preventing TOC and the plaintiff from performing it than to take measures to prevent its allegedly unlawful performance. It submitted that the defence of justification did not depend on a defendant selecting the most attractive course of conduct, but on recognition of an entitlement to protect its own interests. It argued that the Court of Appeal's finding of justification should not be disturbed merely because this Court might have reached a different conclusion if approaching the matter for the first time.

Justification: the correct approach

108 *Preliminary difficulties in SOCOG's argument.* SOCOG had no "rights" against the plaintiff in relation to his Australian conduct, since it was all lawful. Any duty SOCOG had to take action against the plaintiff in relation to his conduct in China could only have flowed from an absence of prior written consent from the Chinese Olympic Committee as stipulated in par 11.2 of the Olympic Charter Bye-law. SOCOG submitted that par 10 imposed a duty on it to ensure compliance with par 11.2, and that, under cl 48(iii) of the Host City Contract, the IOC Executive Board could have withdrawn the Games from Sydney unless it fulfilled that duty. SOCOG also argued that s 11(a) and (b) of the SOCOG Act required it, in exercising its functions, to take into account, to the fullest extent practicable, the Olympic Charter and the Host City Contract.

109 SOCOG's justification submission assumed that it had a legal duty to prevent TOC from entering a contract that purported to grant rights to use the intellectual property rights in China without the prior written consent of the

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41 Thus SOCOG did not contend that it owned the intellectual property rights. It did not contend that it could have sued under any statute save the Indicia Act, and it accepted that that Act itself gave no right to interfere with the Agency Agreement as distinct from seeking the remedies provided in it.

Chinese Olympic Committee. Even if that assumption were correct, SOCOG would have to go further and show that it had legal rights against the plaintiff once TOC entered the Agency Agreement, or legal obligations to curtail the plaintiff's conduct thereafter. This it did not do.

(a) Neither s 11 nor any other provision of the SOCOG Act granted any statutory right of action to SOCOG against the plaintiff.

(b) While cl 5(g) of the Establishment Agreement empowered the AOC and SOCOG representatives on the Club Committee to direct TOC to cease a particular activity, it did not empower them to direct, or to obtain a court order directing, the plaintiff to cease any activity.

(c) Even if, contrary to the conclusions reached above[42], there were breaches of cll 1 and 3 of the Deed Poll, SOCOG could have claimed damages against the plaintiff, but they would be nominal only unless SOCOG could prove a loss. SOCOG would have grave difficulties in obtaining injunctive relief: it was a volunteer under the Deed Poll, it was not a party to the Agency Agreement and SOCOG failed to communicate a refusal of the plaintiff's request of 30 August 1999 to SOCOG for consent to use the intellectual property rights.

(d) The Host City Contract, cl 48(iii), only gave an entitlement to the IOC Executive Board to terminate the Host City Contract and withdraw the Games from Sydney if there had been a breach of the Olympic Charter *by SOCOG*, but SOCOG never attempted in argument to establish any such breach. Any contention that there was a breach stemming from pars 10 and 11.2 of the Olympic Charter Bye-law would face the following obstacles. First, it would be remarkable if the Chinese Olympic Committee could not waive the requirement that its prior written approval be granted, in view of the fact that the requirement apparently existed for the benefit of that Committee, and in view of the territorial structure which the IOC devised in the Olympic Charter to protect the intellectual property. According to the uncontested evidence, the requirement probably was waived by the Chinese Olympic Committee's express oral consent to the plaintiff's conduct, and its statement that it was unnecessary to give the plaintiff a document indicating its consent in writing[43].

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42 See [77]-[86].

43 See [94]-[95] above.

> Secondly, although SOCOG attempted to place a considerable distance between itself and TOC, if SOCOG bears some responsibility for any misconduct on the part of TOC in entering the Agency Agreement, on the basis of the considerable control over TOC which SOCOG was in a position to exercise, it is hard to see how that circumstance is compatible with a justification defence. Thirdly, any breach of the Olympic Charter capable of remedy could only have been remedied after service of a notice of breach under cl 48(iii) of the Host City Contract. No such notice was ever given or, so far as the evidence indicated, suggested. Fourthly, it is wholly unrealistic to imagine that, even if SOCOG was in breach of its duty to ensure compliance with par 11.2 of the Olympic Charter Bye-law (which it did not demonstrate), the IOC Executive Board would have acted under cl 48(iii) on the ground of the plaintiff's rather modest activities. Against the overall background of the Games of the XXVII Olympiad in Sydney and the international "Olympism" to which they were to contribute, the plaintiff's activities in China scarcely loomed large.

110 In truth, SOCOG had no legal rights and corresponding duties of the kind alleged, but nevertheless attempted to vindicate the interests of itself and the related entities that it wanted to protect by the most direct means, independently of any concern for legality.

111 But there were more general problems in SOCOG's approach.

112 SOCOG argued that the statement by Romer LJ in *Glamorgan Coal Co Ltd v South Wales Miners' Federation*[44] was approved in *R v Archdall and Roskruge; Ex parte Carrigan and Brown*[45] when Knox CJ, Isaacs, Gavan Duffy and Powers JJ applied it to the words "without reasonable cause or excuse" in s 30K of the *Crimes Act* 1914 (Cth). Section 30K provided: "Whoever … without reasonable cause or excuse, by boycott or threat of boycott of person or property … hinders the provision of any public service by the Commonwealth … shall be guilty of an offence." Whatever force those statements have with respect to s 30K, *R v Archdall* cannot be regarded as a decision approving the words of Romer LJ in relation to interference with contract. It did not purport to approve those words in that context; no argument was directed in support of or against those words as a correct statement of the law in relation to interference with contract; and the tort of interference with contract was not in issue in that case.

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44 [1903] 2 QB 545 at 573-574.

45 (1928) 41 CLR 128 at 136-137.

113 However, *R v Archdall* does serve to illustrate the varied uses in the law of the notion of justification. At the time Romer LJ in *Glamorgan* adopted what had been said by Bowen LJ in *Mogul* in another context, the phrase "without just cause or excuse" on occasion was used in apposition to "maliciously". This was done by Lord Davey in *The Royal Baking Powder Co v Wright Crossley & Co*[46] when stating as an element of the tort of slander of title that the statements "were made maliciously – ie, without just cause or excuse". In many of the earlier cases, justification had been found in the bona fide assertion of the defendant of a claim of right, being a rival title to the property in question[47].

114 "Malice" in the sense of spite or ill-will has not been required for the tort of contractual interference, but there remains a requisite mental element, the presence of which has not been disputed in this litigation. A review of the cases such as *Glamorgan Coal Co Ltd v South Wales Miners' Federation* decided a century ago has led to the suggestion that[48]:

> "[i]n these cases the question was whether there was 'just cause or excuse' for the inducement of the breach of contract and this is only another aspect of the idea of 'wrongful intention'."

115 That was how Dixon J saw the matter. In *James v The Commonwealth*[49], after stating that the principle in *Lumley v Gye*[50] was wide enough "to include within its protection civil rights which exist independently of contract", so as to encompass the procuring of breaches of the duty of a common carrier to carry the dried fruit of Mr James, his Honour continued[51]:

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46 (1900) 18 RPC 95 at 99.

47 Newark, "Malice in Actions on the Case for Words", (1944) 60 *Law Quarterly Review* 366 at 372-374; Prosser, "Injurious Falsehood: the Basis of Liability", (1959) 59 *Columbia Law Review* 425 at 428-429.

48 Fridman, "Malice in the Law of Torts", (1958) 21 *Modern Law Review* 484 at 499.

49 (1939) 62 CLR 339.

50 (1853) 2 El & Bl 216 [118 ER 749].

51 (1939) 62 CLR 339 at 370-371.

> "In more than one respect, however, the elements of the cause of action are ill defined. Sometimes malice is said to be an ingredient; but this seems to mean no more than that the defendant must have knowledge of the existence of the civil right or of the facts from which it arises and must act without lawful justification. What constitutes a lawful justification is a matter of some difficulty[52]. The question which appears to me to arise in the present case under the head of justification or excuse is whether the bona-fide execution of a law for the time being upheld as valid by the competent judicial power amounts to just cause or excuse notwithstanding that the law is afterwards found to be invalid."

116 Dixon J answered this question in the affirmative. But the present significance of Dixon J's remarks and of the tangled legal history of which he was aware is the caution those remarks suggest in adoption of any loose notion of "lawful justification" as a defence to the tort of contractual interference.

117 Accordingly, the primary difficulty with the approach SOCOG would have this Court take is that in Australian law the defence of justification does not depend upon a discretionary "balancing" of social and individual interests[53]. The statement of Romer LJ in *Glamorgan Coal Co Ltd v South Wales Miners' Federation* may be relevant, at a high level of generality, to the elucidation of the law, but appears never to have been decisive of the outcome in any particular case.

118 Another difficulty was that, so far as SOCOG's case relied on a desire to protect its own interests as organiser of the Sydney Games, it collided with authorities establishing that justification cannot be found in mere self-interest. So far as it rested on a duty or desire to protect the interests of others, those others were entities linked with SOCOG, for example the AOC, the IOC, the Olympic movement, and all persons enthusiastic for the Games to proceed.

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52 See *Glamorgan Coal Co Ltd v South Wales Miners' Federation* [1903] 2 KB 545, particularly at 573, 575; [1905] AC 239; *Brimelow v Casson* [1924] 1 Ch 302; Winfield, *Textbook of the Law of Tort*, (1937) at 624; Salmond, *Law of Torts*, 7th ed (1928) at 634, §159(4); Sayre, "Inducing Breach of Contract", (1923) 36 *Harvard Law Review* 663 at 677-686, 702; Note, "Inducing Breach of Contract – Problems of Intent and Justification", (1926) 39 *Harvard Law Review* 749; Jenks, *A Digest of English Civil Law*, 3rd ed (1938), §983, note b.

53 cf *Restatement of Torts*, 2d, vol 4, Ch 37, §§767-773 (1977).

119 Further, SOCOG's invocation of justification did not deal with the detail of the reasoning in the relevant authorities, to which it is now necessary to turn.

120 *Interference in legal relations between other parties.* Analysis of justification in terms of a search for a right in the defendant which is superior or equal to that of the plaintiff compels attention to the function of the tort. It is instructive to compare the tort with other instances where the law grants remedies against a third party who interferes in the legal relations between two other persons – where a third party procures or takes advantage of a breach of duty owed by a trustee to a beneficiary; where a third party procures or takes advantage of a breach of duty by some other fiduciary to the principal; where a third party not bound by a court order thwarts its operation; or where a third party aids, abets, counsels or procures a breach of duty created by statute.

121 Intervention against a third party who obtains trust property from a trustee in breach of trust is based on the need to protect the proprietary interests of the beneficiaries. Intervention against a third party who obtains some other advantage as a result of a trustee's breach of trust is based on the need to ensure that the trust receives property which, if it were to be acquired at all, should have been acquired for the trust. Intervention against persons who knowingly assist other fiduciaries to breach their duty is based on the need to deter conduct that directly undermines the "high standard" required of fiduciaries, and on the inequitable character of permitting those persons to retain benefits resulting from their conduct[54]. Intervention against persons who, though not personally bound by a court order, procure those who are bound by it to contravene it, or otherwise thwart it, rests on a different basis: those persons are not liable as accessories who aided and abetted the persons bound by the order, but are directly liable for independent contempts committed by themselves in obstructing the course of

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54 *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397 per Gibbs J.

justice[55]. Statutory extensions of primary statutory prohibitions to catch conduct of accessories rest on goals peculiar to the particular statute[56].

122 On what basis are defendants who interfere with contracts to which they are not party liable?

123 *Kitto J's analysis of contractual rights as "quasi-proprietary".* In *Attorney-General for New South Wales v Perpetual Trustee Co (Ltd)*[57], Kitto J drew attention to the ancient common law rule that "where A is prevented from fulfilling his obligations to B by reason of an injury wrongfully inflicted upon him by C, B has no right of action against C in respect of his loss". He also drew attention to the exception that existed "where A's obligations arise out of a relationship of master and servant existing between B and himself". He then said that the principle on which the exception rested[58]:

> "provides a remedy for the wrongful invasion of a quasi-proprietary right which a master is considered to possess in respect of the services which his servant is under an obligation to render him. If that right is invaded by a wrongful injury to the servant which disables him from performing his due service, the *injuria* to the master is collateral to, and not consequent upon, the *injuria* to the servant".

He explained the existence of "this quasi-proprietary right or interest" as arising from[59]:

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55 *Seaward v Paterson* [1897] 1 Ch 545 at 555 per Lindley LJ; *Z Ltd v A-Z and AA-LL* [1982] QB 558 at 578-579 per Eveleigh LJ; *ICI Australia Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248 at 255 per Lockhart J and 266 per Gummow J; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 395 [30] per Gaudron, McHugh, Gummow and Callinan JJ.

56 For example, the Trade Practices Act, ss 75B(1) and 80; *Corporations Act* 2001 (Cth), s 1324.

57 (1952) 85 CLR 237 at 294.

58 (1952) 85 CLR 237 at 294-295.

59 (1952) 85 CLR 237 at 295.

> "a notion which originally was a corollary of the ancient conception of the relationship of master and servant as one of status … That conception has gone, but the notion of a right in the master, as a species of property, that others shall not, by their wrongful acts, deprive him of the benefit of the relation between himself and his servant has not been abandoned. An infringement of that right entitles the master to recover damages."

124 Kitto J pointed out that though the right of an employer to claim damages for loss of services by physical injury to employees was never extended to contracts for the provision of services as distinct from contracts of service, the right of a plaintiff receiving the services of another person to sue a defendant who enticed that other person away, or continued to employ that other person in breach of his or her contract with the plaintiff, was recognised, certainly by the time of *Lumley v Gye*[60]. In that case the contract of an opera singer with the plaintiff, a theatre manager, to perform only in his theatre, which was interfered with by the defendant, was clearly a contract for services. Kitto J said that "by parity of reasoning a right of action has been conceded for every interference with contractual relations committed knowingly and without justification"[61]. He continued[62]:

> "The conception which has led to this development of the law may be said to be that a person has a right, a right *in rem*, in respect of the contractual rights, the rights *in personam*, which he possesses as against the other party to his contract."

125 *The status of Kitto J's reasoning.* Kitto J's thesis that though as between the plaintiff and the other party to the contract the rights are rights in personam, as between the plaintiff and a defendant who interferes with a contract the rights are "rights in rem" or "quasi-proprietary" did not explain the distinction between "quasi-proprietary" and "proprietary" rights. The distinction seems to rest on the view that proprietary rights are stronger than quasi-proprietary rights in that while the former are marked by a combination of characteristics like alienability of benefit and burden and a right to exclusive possession or use enforceable against the world (for example, the rights of the owner of land in fee simple

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60 (1853) 2 El & Bl 216 at 227 [118 ER 749 at 753] per Crompton J; *De Francesco v Barnum* (1890) 63 LT 514 at 515 per Fry LJ.

61 (1952) 85 CLR 237 at 296.

62 (1952) 85 CLR 237 at 296-297.

absolute in possession, or of the absolute owner of a chattel or a share or a patent), quasi-proprietary rights do not have the totality of those characteristics. Their principal, but not always sole, characteristic is that they are protected from third party interference. The thesis may also have an element of circuity. It seeks to answer the question: "Why is a plaintiff's right to performance of a contract protected against third party interference?" It gives the answer: "Because it is quasi-proprietary." But that raises the question: "Why is it quasi-proprietary?" The answer is: "Because it is protected against third party interference."[63] However, whether or not that is so, Kitto J's thesis has significant support.

126 First, in *Lumley v Gye* itself, Erle J, in answering an objection that the Court ought not to extend the cases permitting masters to recover against defendants who procured a breach of contract between master and servant, said that the existing authorities rested[64]:

> "upon the principle that the procurement of the violation of the right is a cause of action, and that, when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security".

While this did not equate all contractual rights to quasi-proprietary rights, it did treat contractual rights as having an analogy with proprietary rights.

127 Secondly, Kitto J's characterisation also commonly appears in American cases. "That the interest of an employer or an employé in a contract for services is property is conceded. Where defendants in combination or individually

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63 This tendency to circuity is a common problem in discussing property rights. See *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* (1968) 122 CLR 25 at 34 per Windeyer J for a related difficulty in the protection of non-statutory trademarks by injunction.

64 (1853) 2 El & Bl 216 at 232 [118 ER 749 at 755].

undertake to interfere with and disrupt existing contract relations between the employer and the employé, it is plain that a property right is directly invaded."[65]

128 Thirdly, subject to the established limits on the grant of specific performance and injunctions, in Australian law each contracting party may be said to have a right to the performance of the contract by the other. It is not true here to say: "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, – and nothing else."[66] As Sir Frederick Pollock pointed out in a letter to Holmes J dated 17 September 1897, if that statement was true, "how can it be wrong to procure a man to break his contract, which would then be only procuring him to fix his lawful election in one way rather than another?"[67] The relevant volume contains no reply to that letter or to the question. But Holmes J returned to the subject on reading the following words in the 8th edition of Pollock's *Principles of Contract*, published in 1911[68]:

> "Mr. Justice O.W. Holmes … suggests that every legal promise is really in the alternative to perform or to pay damages: which can only be regarded as a brilliant paradox. It is inconsistent not only with the existence of equitable remedies, but with the modern common law doctrine that premature refusal to perform may be treated at once as a breach."

Holmes J in a letter of 12 March 1911 said[69]:

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65 *Jersey City Printing Co v Cassidy* 53 A 230 at 232 (NJ Ct of Ch 1902). See also, for example, *Tubular Rivet & Stud Co v Exeter Boot & Shoe Co* 159 F 824 at 829 (1st Cir 1908); *R an W Hat Shop Inc v Sculley* 118 A 55 at 58-59 (Conn SC Error 1922); *Sorenson v Chevrolet Motor Co* 214 NW 754 at 756 (Minn SC in Banc 1927); *DeLong Corp v Morrison-Knudsen Co Inc* 244 NYS 2d 859 at 863 (NY App Div 1963).

66 Oliver Wendell Holmes, "The Path of the Law", (1897) 10 *Harvard Law Review* 457 at 462. See also Holmes, *The Common Law*, (1882) at 301: "The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass."

67 Howe (ed), *The Pollock-Holmes Letters*, (1942), vol 1 at 80.

68 Pollock, *Principles of Contract*, 8th ed (1911) at 192 n (k).

69 Howe (ed), *The Pollock-Holmes Letters*, (1942), vol 1 at 177 (emphasis in original, footnote omitted).

> "I stick to my paradox as to what a contract was at common law: not a *promise* to pay damages or, etc, but an act imposing a liability to damages *nisi*. You commit a tort & are liable. You commit a contract and are liable *unless* the event agreed upon, over which you may have no, and never have absolute, control, comes to pass."

This riposte did not deal with the tort of interference with contract, nor with the existence of equitable remedies. The breadth of the latter was noted by Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd*[70]. He said that damages are inadequate if they cannot satisfy the demands of justice, and that justice to a promisee might well require that a promisor perform the promise, save for exceptional cases like promises to render a personal service.

> "There is no reason today for limiting by particular categories, rather than by general principle, the cases in which orders for specific performance will be made."

Windeyer J also said[71]:

> "It is … a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages. Rather … the promisee has 'a legal right to the performance of the contract'."[72]

129 A fourth factor suggesting that the plaintiff's right to contractual performance from another contracting party is protectable against third parties in a quasi-proprietary manner is the nature of injunctive relief. In days when lawyers insisted more commonly than they do now that, negative covenants apart, injunctions could not be granted in the auxiliary jurisdiction of equity unless in aid of a proprietary right, it was common for injunctions, interlocutory and final, to be granted against interferences with contract. Thus in *Woolley v Dunford*[73] Wells J said that an injunction was available not only to protect

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70 (1967) 119 CLR 460 at 503.

71 (1967) 119 CLR 460 at 504.

72 Quoting *Alley v Deschamps* (1806) 13 Ves Jun 225 at 228 [33 ER 278 at 279] per Lord Erskine.

73 (1972) 3 SASR 243 at 297.

"proprietary rights or rights in possession, [*stricto*] *sensu*", but also to protect "rights created by a concluded contract" which were being tortiously interfered with.

130 There are numerous instances where the right to contractual performance is called a "chose in action". The expression suggests that, like a chose in possession, the right is proprietary. Many choses in action are alienable, and alienability is a common feature of rights called "proprietary".

131 Another respect in which a proprietary character can be seen in the rights protected by the tort is illustrated by the role of notice. A defendant who is unaware of a plaintiff's contract is not liable; a defendant who is aware is liable provided all the other conditions of liability are satisfied. While liability for interference with some items of property is strict, that is not universally true: the knowledge requirement in the tort of interference with contract resembles a rule of priority between competing proprietary claims[74].

132 The conventional explanations for recognising private property rights have been said to apply equally to contracts protected by the tort under consideration[75]:

> "[F]irst the argument that the private property institution extends the range of choices open to human beings and thus increases their freedom; secondly the argument that the institution makes possible the existence of a market for scarce commodities which will ensure that they are allocated so as to maximize social wealth; thirdly, the argument that the private property institution provides a suitable reward (and hence an incentive) for productive endeavour."

133 There is also support for Kitto J's analysis in texts[76]:

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74 Epstein, "Inducement of Breach of Contract as a Problem of Ostensible Ownership", (1987) 16 *Journal of Legal Studies* 1 at 2-3.

75 Bagshaw, "Inducing Breach of Contract", in Horder (ed), *Oxford Essays in Jurisprudence* (Fourth Series), (2000) 131 at 133, see also 134-137.

76 Rogers, *Winfield and Jolowicz on Tort*, 16th ed (2002) at 628.

> "[C]ommercial contractual relations had become valuable rights which could be regarded as entitled to at least some of the protection given by the law to property".

134 On the other hand, there have been critics of the quasi-proprietary theory, principally in the United States[77]. In particular, Kitto J's view has been attacked as "crude" and as part of a process by which "[i]nstinctively, certainly nonchalantly, common-law judges made recourse to property conceptions"[78]. This language does little justice either to the reasoning of Kitto J or to the difficulty of finding any alternative to it. Many of the criticisms of Kitto J's reasoning are directed to the goal of reformulating the tort in a manner quite inconsistent with its well-settled elements in Australian law. The arguments in the present case did not suggest that Kitto J's reasoning does not represent the law in Australia and did not suggest any alternative to it.

135 *Jordan CJ's approach.* "Property" is a comprehensive term which is used in the law to describe many different kinds of relationship between a person and a subject-matter; the term is employed to describe a range of legal and equitable estates and interests, corporeal and incorporeal[79]. Accordingly, to characterise something as a proprietary right (and, a fortiori, a quasi-proprietary right) is not to say that it has all the indicia of other things called proprietary rights. Nor is it to say "how far or against what sort of invasions the [right] shall be protected, because the protection given to property rights varies with the nature of the right"[80]. But, statute apart, where reliance is placed on the defence of

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77 For example, Dobbs, "Tortious Interference with Contractual Relationships", (1980) 34 *Arkansas Law Review* 335; Perlman, "Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine", (1982) 49 *University of Chicago Law Review* 61; Carty, *An Analysis of the Economic Torts*, (2001) at 70-72. The arguments are summarised by McChesney, "Tortious Interference with Contract Versus 'Efficient' Breach: Theory and Empirical Evidence", (1999) 28 *Journal of Legal Studies* 131.

78 Palmer, "A Comparative Study (From a Common Law Perspective) of a French Action for Wrongful Interference with Contract", (1992) 40 *American Journal of Comparative Law* 297 at 332 and 333 n 144.

79 *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[20] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 388-389 [85] per Gummow J.

80 Carpenter, "Interference with Contract Relations", (1928) 41 *Harvard Law Review* 728 at 733.

justification to protect a right which is equal or superior to the contractual right of the plaintiff, logic suggests that the protected equal right of the defendant will normally have a similar character to the right of the plaintiff – ie a quasi-proprietary character – while a superior right will be proprietary. Logic is a dangerous guide in relation to terms as subtle, fluid and lacking in fixed and uniform criteria as "proprietary" and "quasi-proprietary", but Jordan CJ's analysis of superior rights in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*[81] certainly suggests that a right which is "superior" to the plaintiff's contractual right must be proprietary.

136 That was a case in which the plaintiff was a petrol wholesaler selling to retail dealers on the condition that the dealers would sell the plaintiff's petrol at a retail selling price fixed by the plaintiff from time to time. The defendants were also petrol wholesalers. They sold petrol to the same retail dealers on condition that if the dealers observed a margin prescribed between the price at which the petrol was purchased from the defendants and the price at which it was sold to the public, and also sold all corresponding grades of petrol at the same price, the dealers would be supplied with petrol by the defendants at a price less than the retail price. The defendants, but not the plaintiff, increased their prices with the result that the retail selling price of the plaintiff's petrol, which corresponded in grade to that of the defendants, was less than that of the defendants'. The defendants then, pursuant to their conditions of sale, refused to supply petrol, except at the full retail price, to dealers who sold the plaintiff's petrol at the lower rate. This course resulted in the dealers receiving no profit on the resale of the defendants' petrol. Certain dealers thereupon broke their agreements with the plaintiff and increased the price of the plaintiff's petrol beyond the selling price fixed by the plaintiff. Nicholas J granted an interlocutory injunction restraining the defendants from inducing dealers to commit breaches of their contracts with the plaintiff, but the Full Court of the Supreme Court of New South Wales discharged it. The Full Court held that the tort of interference with contract had not been committed. The contracts between the retailers and the plaintiff were terminable at will by the dealers. If the contracts were terminated, the only breach by the dealers of their contracts with the plaintiff not to sell the petrol sourced from the plaintiff above the price fixed by the plaintiff would arise in relation to petrol still in the dealers' tanks. The Full Court held that the evidence revealed no attempt by the defendants to induce the dealers to sell the petrol still in their tanks at a higher price. In effect, it held that the defendants were seeking

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81 (1937) 37 SR (NSW) 394 at 415.

the lawful termination of the dealers' contracts with the plaintiff, not their breach[82].

137 Hence the outcome of the case did not turn on justification for a proved tort, but on failure to prove the tort.

138 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* does, however, contain a valuable analysis of the defence of justification which has been much neglected by both judge and jurist. Jordan CJ (Long Innes CJ in Eq and Davidson J concurring) cited Lord Lindley's reference to "cases in which a person, whose rights will be violated if a contract is performed, is justified in endeavouring to procure a breach of such contract."[83] Jordan CJ said justification in that sense rested on the principle that "an act which would in itself be wrongful as infringing some legal right of another person may be justified if shown to be no more than reasonably necessary for the protection of some actually existing superior legal right in the doer of the act". He illustrated the operation of the principle thus[84]:

> "[A]n occupier of land may after notice lawfully eject a trespasser, and anyone may lawfully defend himself, by acts which would in other circumstances constitute the tort of assault."

The legal strength of the trespasser's position could not be improved, and the legal strength of the occupier's position could not be reduced, by the fact that the trespasser had entered the occupier's land pursuant to a contract with a third party. Nor could the third party complain. Thus he extended the example[85]:

> "If A without authority from B employs C to cut down trees upon B's land, B may lawfully procure C not to commit the trespass, just as he may lawfully prevent him from committing it."

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82 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 419-420.

83 *South Wales Miners' Federation v Glamorgan Coal Co Ltd* [1905] AC 239 at 254.

84 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 415.

85 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 416.

He gave another example of justification in the relevant sense as follows[86]:

> "If one person without authority employs another to sell the land or goods of a third party, neither of them can complain if the third party procures the other not to perform a contract which cannot be performed without violating his superior legal right".

Jordan CJ continued[87]:

> "[I]t does not appear to have yet been authoritatively decided that anything short of the protection of an actually existing superior legal right will justify the wilful procuring of a breach of contract".

For that he cited *South Wales Miners' Federation v Glamorgan Coal Co Ltd*[88], where the Earl of Halsbury LC said that justification could not be founded upon a belief that the plaintiff would be benefited by the defendant procuring a breach of the contract to which the plaintiff was party, and strongly suggested that justification could not be founded upon moral or religious grounds, or upon any duty or moral right to tender advice. Jordan CJ concluded by saying that if *Brimelow v Casson*[89] decided to the contrary it was inconsistent with authority, namely *South Wales Miners' Federation v Glamorgan Coal Co Ltd*[90]. That case was, of course, decided shortly before the enactment of the *Trade Disputes Act* 1906 (UK), and later legislation both in the United Kingdom and here, conferring defences on trade unions in relation to economic torts. Further, Jordan CJ was writing at a time when decisions of the House of Lords were normally followed without question by Australian courts and when social conditions affecting

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86 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 415.

87 *Independent Oil Industries Ltd v The Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394 at 416.

88 [1905] AC 239 at 244-245.

89 [1924] 1 Ch 302 (where union officials were held to be justified in interfering with contracts between theatre owners and an impresario who paid the actresses he employed so little as to force them into prostitution).

90 [1905] AC 239 at 244-245 per the Earl of Halsbury LC, 246 per Lord Macnaghten, 255 per Lord Lindley.

allegations of interference with employment contracts were somewhat different from those existing today. It is unnecessary to consider the correctness of Jordan CJ's observations in relation to the particular context of an employment relationship, which was not the context of the case before him and which is not the context of the present case. Subject to that reservation, the general principle remains. Ordinarily, to justify the wilful attempt of a stranger to procure a breach of contract, a superior legal right must be established.

139 It appears to follow that by "actually existing superior legal right" Jordan CJ meant a right in real or personal property, not merely a right to contractual performance. The former type of right may be seen as superior to the latter because the former is proprietary, while the latter is at most quasi-proprietary, in the sense which Kitto J appeared to be employing. Two competing rights to contractual performance involving no proprietary interest would be equal rights, neither being superior to the other; but Jordan CJ did not mention the protection of an equal right as a form of justification. The conclusion that by "superior legal right" Jordan CJ meant a right to real or personal property is also indicated by the fact that he limited his examples of persons justified in interfering with contracts to the owners of rights in real or personal property that were inconsistent with rights created by contracts between other persons. It is also suggested by the fact that after giving the example of one person employing another to sell the land or goods of a third, he referred, with the preface "cf", enigmatically suggesting partial acceptance and partial doubt, to *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales*[91] and *Smithies v National Association of Operative Plasterers*[92]. In the latter case, Buckley LJ said:

> "No doubt there are circumstances in which A is entitled to induce B to break a contract entered into by B with C. Thus, for instance, if the contract between B and C is one which B could not make consistently with his preceding contractual obligations towards A, A may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it. If B having agreed to sell a property to A subsequently agrees to sell it to C, A of course may restrain B by injunction from carrying out B's contract with C, and the consequence may ensue that B will be liable to C in damages for breaking it."

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91 [1902] 2 KB 88 at 95.

92 [1909] 1 KB 310 at 337.

The reference to entitlement in the first sentence, leading to the illustration given in the second sentence, is open to several interpretations.

140 First, where A holds a covenant from B which imposes upon B a valid restraint upon B entering into or performing a contract with C, it may be that the tort of inducement has no application at the instance of C where A seeks to enforce the restraint which binds B. In such a case, the correct legal characterisation may be that there is no inducement because A is not relying upon "some power or influence independent of lawful authority". The words are those of Dixon J in *James v The Commonwealth*[93] to which further reference will be made.

141 Secondly, while the language in the second sentence of that passage is wide enough to cover a competition between mere contractual rights, in the third sentence Buckley LJ appears, by the words "a property", to have meant real property. An agreement for valuable consideration to sell property confers, if the agreement be specifically enforceable, the special equitable interest of the nature recently considered in *Tanwar Enterprises Pty Ltd v Cauchi*[94]. Buckley LJ then referred to *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales*. Darling J's judgment in that case contains what appears to be the first judicial reference to a defendant being able to find justification in a right which is "equal or superior" to the plaintiff's[95]. Darling J earlier said[96]:

> "It may well be that a person, or many persons acting in concert, would have a right to demand the fulfilment of a contract entered into with him or them, even though such fulfilment involved him who performed it in breaking a contract made by him with another person. Many examples may be put – for instance, a man who had affected to sell the same article to two separate purchasers could not possibly perform one contract without breaking the other, if both insisted on their rights, yet it could not render the purchaser, who insisted on his contractual rights, liable at the suit of the other purchaser."

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93 (1939) 62 CLR 339 at 373.

94 (2003) 77 ALJR 1853 at 1860-1861 [43]-[47] and 1870-1871 [96]; 201 ALR 359 at 369-370 and 383.

95 [1902] 2 KB 88 at 96.

96 [1902] 2 KB 88 at 95.

142 Darling J's example appears to postulate a contract for the sale of an "article" which is specifically enforceable on the ground that damages would not be an adequate remedy – because, for example, the article is of special value to the purchaser.

143 So read, Darling J's proposition is correct as far as the first purchaser is concerned. However, it cannot be correct so far as the second purchaser is concerned. Before completion, each purchaser is claiming an equitable interest of a special and limited nature[97]. The second purchaser's claim must fail, being an equitable claim in competition with that of a prior equitable claimant who is first in time and who has done nothing to lose priority[98]. That reveals that the example is not one of competition between rights, but one in which while the first purchaser has a right, the second has no right at all.

144 In short, Jordan CJ's reference to the statements of Buckley LJ and Darling J supports the view that an "actually existing superior legal right" is required, and that such superiority is not established by priority between merely contractual rights. Superiority is conferred by the proprietary nature of the right[99] or, as in *James v The Commonwealth*[100], must be found in statute. No such statutory right or duty exists in the present case, as explained earlier in these reasons. This approach to the defence of justification should be accepted for Australia[101].

145 An English example of a superior right was discussed in *Edwin Hill & Partners v First National Finance Corp plc*[102]. The defendants lent money to a

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97 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 77 ALJR 1853 at 1860-1861 [43]-[47]; 201 ALR 359 at 369-370.

98 *Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq)* (1965) 113 CLR 265 at 276 per Kitto J.

99 For an example of a United States case in which the transferee of a proprietary right was held justified in asserting that right against a later transferee, see *Tidal Western Oil Corporation v Shackelford* 297 SW 279 (Tex Civ App 1927).

100 (1939) 62 CLR 339 at 373.

101 Subject to what is said at [138] above.

102 [1989] 1 WLR 225; [1988] 3 All ER 801.

property developer to enable him to develop a particular property and secured the loan by charges on the property. The property developer engaged the plaintiffs as architects but was unable to get the development started. He fell into financial difficulties. The defendants agreed to make further advances in order to finance the development, provided the plaintiff architects were dismissed. The plaintiffs were dismissed, in breach of contract. It was held that the defendants had unlawfully interfered with the plaintiffs' contract, but that they had made out a defence of justification. It was common ground that if the defendants had relied on their legal rights, called in the loan, and exercised their power under the charge to sell the land or appoint a receiver, this would inevitably have led to the termination of the plaintiffs' contract, but without any tortious liability on the part of the defendants to the plaintiffs[103]. Stuart-Smith LJ (Nourse LJ and Sir Nicolas Browne-Wilkinson V-C concurring) said[104]:

> "[T]he law may grant legal remedies to the owner of property to act in defence or protection of his property; if in the exercise of these remedies he interferes with a contract between A and B of which he knows, he will be justified. If, instead of exercising those remedies, he reaches an accommodation with A, which has a similar effect of interfering with A's contract with B, he is still justified notwithstanding that the accommodation may be to the commercial advantage of himself or A or both."

146 Similarly, there are United States authorities holding that a mortgagee[105] or lessor[106] is entitled to exercise its proprietary rights adversely to the interests of persons contracting with the mortgagor or lessee, even if those contracts are interfered with.

147 *Authorities for a wider approach.* SOCOG's argument depended on the proposition that, though it did not have any property right of the type discussed in these cases or in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*,

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103 The correctness of this assumption is discussed by O'Dair, "Justifying an Interference with Contractual Rights", (1991) 11 *Oxford Journal of Legal Studies* 227 at 231-234.

104 [1989] 1 WLR 225 at 233; [1988] 3 All ER 801 at 808.

105 *Meason v Ralston Purina Co* 107 P 2d 224 (Ariz SC in Banc 1940).

106 *O'Brien v Western Union Telegraph Co* 114 P 441 (Wash SC in Banc 1911).

it had contractual rights equal to or superior to the plaintiff's rights. In *Edwin Hill & Partners v First National Finance Corp plc*[107] there is a dictum that justification for interference with the plaintiff's contractual rights could be based upon an equal or superior right in the defendant derived from contractual rights. And *Clerk & Lindsell on Torts*[108] states:

> "The fact of an earlier contract with a defendant inconsistent with the claimant's contract may well afford a justification to the defendant for procuring a breach of the latter".

148 This proposition primarily rests on the more general dicta of Buckley LJ in *Smithies v National Association of Operative Plasterers*[109] and Darling J in *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales*[110], together with statements of other judges referring to them[111]. As discussed[112], their generality is sharply qualified by the proprietary character of the rights of the defendants in the examples given.

149 The proposition that a defendant can invoke as justification for interfering with the plaintiff's right to contractual performance a contractual right equal to it finds no support in the statements of Jordan CJ on behalf of the Full Court of the Supreme Court of New South Wales in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*. The Full Court only supports the existence of justification in superior, ie, proprietary rights: SOCOG's concession that it had no proprietary rights is fatal if Jordan CJ is correct[113]. And the examples employed by Buckley LJ and Darling J, as distinct from their more general statements, do not support the proposition that a defendant who makes a contract

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107 [1989] 1 WLR 225 at 233; [1988] 3 All ER 801 at 808.

108 18th ed (2000) at [24-64]. See also Fleming, *The Law of Torts*, 9th ed (1998) at 764; Balkin and Davis, *Law of Torts*, 3rd ed (2004) at [21.15].

109 [1909] 1 KB 310 at 337.

110 [1902] 2 KB 88 at 96.

111 *Pratt v British Medical Association* [1919] 1 KB 244 at 265 per McCardie J.

112 See [139]-[144] above.

113 Subject to the reservation at [138] above.

with a person who enters an inconsistent contract with the plaintiff can rely on the justification defence, unless the defendant's contract was a specifically enforceable contract to sell property which passed an equitable interest. Darling J's statements, untied to examples, are too general to give guidance as to the law.

150 Judge Learned Hand stated the following principle after referring to the English cases[114]:

> "If *A* has promised one performance to *B* and has later promised the same performance to *C*, *A* cannot satisfy both promises. If he chooses to perform his contract with *C* he remains liable to *B* and that liability is measured by the value of what *B* has lost, though, as we have said, the remedy is not the same thing as performance. There is no justification for allowing *A* the liberty to choose which of the two obligees he will grant the advantage: he is the wrongdoer. While it is true that *B* and *C* are equally innocent, there must be a choice between them, and if *A* is eliminated as chooser the basis for choice can only be he who has the earlier claim. He may justly insist on preference; it cannot be a wrong against *A* that he seeks to induce *C* not to enforce that performance to which as between them *B* himself has the preferred claim."

However, this reasoning is unpersuasive. Judge Learned Hand appears to approach the matter as if there were competing claims to subject-matter, identified as "the same performance", which are to be resolved in favour of the claim which is earlier in time. One result would be that the party who contracted twice would have an answer to an action for breach of the second contract, that it was obliged by law to perform the first contract. It is not apparent why there should be that defence. The reason for this outcome appears to be the denial to a dual contract-maker of the choice of party to whom performance is tendered.

151 Even if that be accepted, it does not follow that, in the above example, B should have an action in tort against C, and C an action in tort against B, as a consequence of C or B (as the case may be) urging A to perform its contract with

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114 *Hendler v Cuneo Eastern Press Inc* 279 F 2d 181 at 185 (2nd Circ CA 1960). He quoted Darling J's statement about the sale of the same article to two purchasers in *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 88 at 95 and cited Buckley LJ's reference to it in *Smithies v National Association of Operative Plasterers* [1909] 1 KB 310 at 337.

that party where that performance will prejudice the other contract. In *James v The Commonwealth*[115], Dixon J said that what amounts to procurement or inducement for the purpose of the tort was a "matter of some obscurity". He went on to refer to the distinction drawn by Salmond between creating a reason for breaking a contract and pointing to reasons which already exist[116], and to the necessity of "an element of impropriety, or of reliance upon some power or influence independent of lawful authority"[117]. Where each of B and C has a right to performance, in the sense described above, of its contract with A, it may be that for either to insist upon that performance involves no necessary element of impropriety independent of lawful authority. Another example may be that already discussed, where A enforces a covenant imposing a valid restraint upon B entering into or performing a contract with C.

152 Reference has been made to the concessions respecting the constituent elements of the tort upon which the trial was conducted[118]. The application of the law concerning inducement and procurement in tripartite circumstances cannot be satisfactorily explored without a detailed factual context to serve as background. That makes this an inappropriate occasion further to pursue this aspect of the law.

153 Further, in any event, Judge Learned Hand's proposition cannot assist SOCOG. It cannot be said that TOC promised one performance to SOCOG and later promised the same performance to the plaintiff. The most that can be said is that TOC was only granted a right to use or license its agents to use the intellectual property rights in Australia, not China, but purported to license an agent to use the intellectual property rights both in Australia and China. Nor is it a case in which SOCOG sought to induce the plaintiff not to enforce performance of the Agency Agreement; rather it induced TOC not to perform it.

154 SOCOG did not place reliance, either in its Defence or its arguments, on the general statement of Buckley LJ in *Smithies v National Association of Operative Plasterers* quoted above[119]. On analysis, that case does not assist

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115 (1939) 62 CLR 339 at 371.

116 (1939) 62 CLR 339 at 371.

117 (1939) 62 CLR 339 at 373.

118 At [42] above.

119 At [139].

SOCOG. In Buckley LJ's example, "A" is SOCOG, "B" is TOC, and "C" is the plaintiff. The contract interfered with was the Agency Agreement, between TOC ("B") and the plaintiff ("C"). The initial question is: were there "preceding contractual obligations" arising between TOC ("B") and SOCOG ("A"), having the result that the Agency Agreement was a contract which TOC could not make consistently with those preceding contractual obligations? The answer to that question is "Yes". In the Licence Agreement, TOC promised SOCOG not to "authorise the use of [the intellectual property rights] on or in relation to any goods or services of [TOC] or any third person, except as expressly permitted in this Agreement": cl 3.5(a). Contrary to that promise, in the Agency Agreement TOC did authorise the plaintiff to use the intellectual property rights in China, which was not expressly permitted by the Licence Agreement.

155 But does the rest of Buckley LJ's statement apply? If it did, SOCOG would have been entitled to induce TOC to breach the Agency Agreement and entitled to invoke the assistance of a court to make TOC cease to perform it. The validity of the former proposition appears to be linked to the latter: it would be bizarre if defendants could gain by self-help advantages greater than those which they could obtain from the court. Thus the question becomes: could SOCOG have obtained an injunction against TOC performing the Agency Agreement, or against the plaintiff performing, or obtaining any advantage from, the Agency Agreement?

156 The position of the parties must be assessed at the moment when SOCOG interfered with the Agency Agreement. Here there were three key dates. The first was 30 July 1999, when it was agreed that SOCOG should take over responsibility for running the Club (an agreement converted into formal terms by the Deed of Release and Termination on 13 September 1999). The second was 5 November 1999, when TOC repudiated the Agency Agreement after being persuaded by SOCOG to do so. The third was 6 December 1999, when the plaintiff was arrested. At none of these dates had the plaintiff committed the tort of interfering with the Licence Agreement.

157 For the plaintiff to enter the Agency Agreement with TOC, being an agreement inconsistent with TOC's obligations under the earlier Licence Agreement, was not tortious unless the plaintiff had notice of the Licence Agreement, which he did not. To continue to deal with TOC would have been tortious after the plaintiff obtained notice of the Licence Agreement[120], provided

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120 *D C Thomson & Co Ltd v Deakin* [1952] Ch 646 at 694 per Jenkins LJ.

that that dealing caused SOCOG loss – for the tort is only actionable on proof of damage[121]. There is no evidence that the plaintiff knew of the Licence Agreement until after he terminated the Agency Agreement on 22 December 1999 by commencing proceedings, and after that date there is no doubt that he did not interfere with the Licence Agreement. Nor is there any evidence or allegation that the making and performance of the Agency Agreement caused SOCOG any loss. The trial judge found that the plaintiff had performed the Agency Agreement without actionable breach, and SOCOG has abandoned all challenges to that finding. Proper performance by the plaintiff of the Agency Agreement could do nothing but assist the interests of SOCOG by bringing to the Games from China 10,000 visitors who might not otherwise have come. For that reason it is highly unlikely that SOCOG could have obtained an injunction against the plaintiff at any time. It is equally unlikely that SOCOG could have obtained an injunction against TOC which would have had the effect of depriving the plaintiff, as an innocent third party, of his rights under the Agency Agreement[122]. Since the court would not have assisted SOCOG in any attempt to stop the performance of the Agency Agreement, it seems that Buckley LJ's approach does not require that the extra-curial attempts by SOCOG to stop its performance be treated as justification.

158 In *Griffiths v Commonwealth Bank of Australia*[123], Lee J said:

> "[I]t may be said that … justification … will depend upon whether the interferor has sought, bona fide, to protect an equal or superior right to that of the interferee.
>
> A test of the standing of the right sought to be promoted would be whether it was capable of supporting injunctive relief to restrain the other party from exercising the contractual rights subjected to interference."

This goes beyond the instance of competing specifically enforceable contracts to sell the same property: it is possible to protect one's contractual rights by injunction even though they create no proprietary right[124]. Lee J's statement was

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121 *Jones Brothers (Hunstanton) Ltd v Stevens* [1955] 1 QB 275 at 281-283 per Lord Goddard CJ, Hodson and Romer LJJ.

122 *Maythorn v Palmer* (1864) 11 LT 261.

123 (1994) 123 ALR 111 at 119.

124 *Brown v Heffer* (1967) 116 CLR 344 at 351-352 per Windeyer J.

not only tentative, but also obiter, since he found that the test propounded was not met by the defendant on the facts. Nor is it satisfied on the present facts because of the difficulties SOCOG would have faced in obtaining an injunction.

159 This appeal may be decided on the footing that SOCOG's conduct does not meet the criteria for a defence of justification, whether they be as indicated by Jordan CJ in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*, by Buckley LJ in *Smithies v National Association of Operative Plasterers* or as canvassed in any of the other authorities. *James v The Commonwealth*[125] apart, what is striking is the absence in Anglo-Australian law of occasions where such a defence, however understood, has succeeded. *James v The Commonwealth*, it should be added, was a case where the superiority of right flowed from statute, not reasons found purely in the general law. The rarity of instances of success probably reflects the high store placed on compliance with contractual obligation by English law and by the common law systems derived from it. The assertion of justification by a stranger to interfere with such compliance necessarily impinges on the general approach of the law. It is for that reason that justification requires either the authority of statute or some other superior right if the interference is to be lawful.

160 However, in stating the law for Australia, it should now be accepted that, where the superiority of right rests in some characteristic of the general law, then, as indicated above, and as perceived by Jordan CJ, temporal priority of other purely contractual rights will not suffice.

161 *Was SOCOG's conduct "reasonably necessary"?* Even if SOCOG's conduct had fallen within some existing judicial test, it would not constitute justification for an additional reason. According to Jordan CJ in *Independent Oil Industries Ltd v The Shell Co of Australia Ltd*[126] an act of interference may be justified "if shown to be no more than reasonably necessary for the protection of some actually existing superior legal right in the doer of the act."

162 This "reasonably necessary" requirement is consistent with two statements in *Building Workers' Industrial Union of Australia v Odco Pty Ltd*[127]. There the

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125 (1939) 62 CLR 339.

126 (1937) 37 SR (NSW) 394 at 415.

127 (1991) 29 FCR 104 at 144, 146 per Wilcox, Burchett and Ryan JJ.

Full Court of the Federal Court of Australia said: "There is good reason for the rarity of cases where justification has been shown. In a society which values the rule of law, occasions when a legal right may be violated with impunity ought not to be frequent." The Court concluded that: "The matter was quite susceptible of determination by … means [other than interference with contract]". Jordan CJ's requirement is supported by Dixon J's opinion that "the law always countenances resort to the courts … as the proper means of determining any assertion of right"[128]: equally, the law discountenances refusal to resort to the courts and the employment of self-help without notice instead. It is also supported by Simonds J's denial of justification in *Camden Nominees Ltd v Forcey*[129] on the ground that the defendants had curial remedies to which they did not resort. That may not defeat the defence of justification in every case, but it supports the relevance of an inquiry into whether the defendant's interference was reasonably necessary.

163 The "reasonably necessary" test directs attention to how a reasonable and prudent person or body in SOCOG's position would have behaved[130].

164 If SOCOG had been able to prove the cause of action it claimed to have against the plaintiff under s 12 of the Indicia Act, it could have sought an injunction under s 43, an interlocutory injunction under s 44, an order for corrective advertisements under s 45 or damages under s 46. None of these forms of relief were sought. Instead, a course of action was embarked upon which was precipitous, high-handed and oppressive in its consequences. SOCOG was a statutory body created by the Parliament of New South Wales. Its conduct in the present case fell far short of the conduct conventionally expected of bodies exercising powers granted by an Australian Parliament. Its conduct was so unsatisfactory that it may have been acting beyond its statutory power.

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128 *James v The Commonwealth* (1939) 62 CLR 339 at 373.

129 [1940] Ch 352 at 365; cf *Pete's Towing Services Ltd v Northern Industrial Union of Workers* [1970] NZLR 32 at 54. Jordan CJ's requirement may also explain Romer LJ's reference to "the means employed to procure the breach" in *Glamorgan Coal Co Ltd v South Wales Miners' Federation* [1903] 2 KB 545 at 574: see [105] above.

130 *Stanford v Roberts* [1901] 1 Ch 440 at 444 per Buckley J; *In re Chemists' Federation Agreement (No 2)* [1958] 1 WLR 1192 at 1206 per Devlin J.

However, the plaintiff did not challenge the conduct of SOCOG on this ground, and it is unnecessary to take this matter further.

165 SOCOG's submission that its conduct demonstrated "brusque efficiency", or efficiency of any sort, is negated by the events of this litigation. SOCOG never contended in 1999, and did not demonstrate in this appeal, that the plaintiff had any suspicion that TOC lacked power to authorise him to use the intellectual property rights or that TOC was in breach of the Licence Agreement in entering the Agency Agreement. SOCOG never sought to tell the plaintiff about its concerns, to share with him any information it had about TOC's shortcomings, to gain from him any information he had, to negotiate concessions from him, to reason with him, to check with the Chinese authorities whether they were happy with him, or to remind him and them of par 11.2 of the Olympic Charter Bye-law. Its officers refused to deal with the plaintiff in good faith, and evaded attempts by the plaintiff's representatives to speak with them. Because SOCOG never sought to obtain an injunction against the plaintiff, it never went through the salutary experience of pondering the consequences of the undertaking as to damages it would have had to offer as the price for an injunction – an experience which is strongly conducive to calm and clear thinking.

166 Any of the above steps would have been far more efficient than doing what SOCOG actually did. Instead of undertaking them, it formed an opinion that the plaintiff was a "loose cannon", even though there was no reasonable basis for applying that hoary metaphor from the age of fighting sail to the plaintiff. What SOCOG did went outside its statutory duty under s 9(2)(a) and (c) of the SOCOG Act in carrying out its primary objective of organising the Sydney Games, namely "to act in a financially sound and responsible manner" and "to use its best endeavours to avoid the creation of debts and liabilities (including debts and liabilities that are or are likely to become the responsibility of the State) that will extend or are likely to extend beyond the time by which SOCOG must be wound up". Instead it created a huge judgment debt owed by the Treasurer years after the time when SOCOG was to be wound up, which was at the latest 31 March 2002[131].

167 Further, one function of the Agency Agreement was to permit the exploitation of Olympic-related intellectual property in China. The Chinese authorities to whom the plaintiff spoke supported the conduct he wished to carry out in performance of the Agency Agreement. The Olympic Charter Bye-law,

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131 SOCOG Act, ss 52 and 54.

par 11.2, exclusively confided the key decisions about who was to exploit those intellectual property rights to the Chinese Olympic Committee, which had a financial interest in the exploitation of them by reason of par 12. SOCOG's interference with the Agency Agreement caused it to contravene s 11(a) of the SOCOG Act in that it did not appear to take into account to the fullest extent practicable par 11.2 of the Olympic Charter Bye-law. Very senior officials of both the Chinese Government and the Chinese Olympic Committee knew of and positively encouraged the plaintiff's activities. There is no evidence that the Chinese Olympic Committee would not have authorised the plaintiff's conduct in writing if SOCOG had made it plain that it insisted on this.

168 The interference with the Agency Agreement not only deprived the Chinese Olympic Committee of an opportunity to obtain part of the proceeds of the plaintiff's activities, but also pre-empted any further attempt on the plaintiff's part to obtain that Committee's written approval before he undertook any further activities. If the plaintiff's conduct in China was anyone's business, it was the business of the Chinese Olympic Committee, not SOCOG. Had the plaintiff been informed in 1999 of the difficulties which SOCOG relied on by way of justification from 2001 onwards, he might have been able to overcome them. In short, SOCOG could not rely on s 11(a) of the SOCOG Act to justify its interference with the Agency Agreement so far as par 11.2 and any breach by the plaintiff of the Deed Poll in relation to China (if, contrary to what was held above, there was one) were concerned, because its interference might have been injurious to the interests of the Chinese Olympic Committee[132].

169 Finally, once it became clear that the plaintiff was not prepared to be cowed by the high-handed treatment he received, the lack of reasonableness in SOCOG's conduct is indicated by the grave risks it ran, which have now fallen in – it caused a lengthy trial which wasted much judicial time, it attracted hard but correct judicial criticisms, and it became subject to a very high damages award.

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132 The plaintiff also argued that the Olympic Charter contained a contractual promise by SOCOG to the Chinese Olympic Committee not to deprive the Committee of the right to decide what use should be made of the intellectual property rights in China. He submitted that the defence of justification was not open if it depended on a breach of SOCOG's promise. In view of the lack of attention given in argument to the contractual status of the Olympic Charter, it is undesirable to rule on that contention.

170 What SOCOG did was not reasonably necessary to protect it in relation to the very narrow breaches by the plaintiff found above.

171 Even if the whole of SOCOG's allegations of unlawful conduct against the plaintiff had been made good, it would still be unable to rely on the justification defence, because, for the reasons just set out, it was not reasonably necessary to protect even that very wide conception of its rights.

172 *Conclusion.* For the above reasons the defence of justification failed.

173 *Justification questions which need not be considered.* SOCOG argued nevertheless that a contractual right could be equal to or superior to the contractual rights of the plaintiff under the Agency Agreement, even though it came into existence after the Agency Agreement. There is some authority for[133] and some against that argument[134]. Since the present appeal does not raise this question – for whatever rights SOCOG had pre-existed the Agency Agreement – it is not necessary to decide it.

174 The plaintiff advanced further reasons for rejecting the justification defence. First, the rights on which SOCOG said from 2001 it could rely were not the matters on which it in fact relied in 1999, and hence they could not constitute justification[135]. Secondly, the plaintiff contended that the third form of interference engaged in by SOCOG, the procurement of the plaintiff's arrest, was independently unlawful, and that the defence of justification did not apply to independently unlawful conduct[136]. Each of these two questions is difficult.

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133 *Swiss Bank Corporation v Lloyds Bank Ltd* [1979] Ch 548 at 575 per Browne-Wilkinson J. Taken at its highest, Darling J's statement in *Read v Friendly Society of Operative Stonemasons of England, Ireland and Wales* [1902] 2 KB 88 at 95 is to the same effect, but it is subject to the qualifications discussed above. See also *British Homophone Ltd v Kunz* (1935) 152 LT 589 at 592-593 and *The "Kaliningrad" and "Nadezhda Krupskaya"* [1997] 2 Lloyd's Rep 35 at 40.

134 *Pritchard v Briggs* [1980] Ch 338 at 415 per Goff LJ.

135 *SOS Kinderdorf International v Bittaye* [1996] 1 WLR 987 at 993 (not cited below); cf *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359.

136 The plaintiff relied on *Ansett Transport Industries (Operations) Pty Ltd v Australian Federation of Air Pilots* [1991] 1 VR 637 at 677-678 and argued that *Latham v Singleton* [1981] 2 NSWLR 843 at 867-869 was wrong.

Little argument was devoted to the second. As it is not necessary to decide them, it is not desirable to say anything about them.

Orders

175 The appeal should be allowed with costs. The orders of the Court of Appeal should be set aside and in lieu thereof it should be ordered that the appeal to that Court should be dismissed with costs.