

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ

BATHURST CITY COUNCIL

APPELLANT

AND

PWC PROPERTIES PTY LIMITED

RESPONDENT

Bathurst City Council v PWC Properties Pty Ltd (S141-1997)
[1998] HCA 59
30 September 1998

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

W R Davison SC with D R Parry for the appellant (instructed by McIntosh, McPhillamy & Co)

B W Walker SC with B J Preston and A S Bell for the respondent (instructed by Clayton Utz) (Mr Preston did not appear in Court)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Bathurst City Council v PWC Properties Pty Limited

Local government – Council resolution – Validity – Classification of land – Whether land "operational" or "community" – Whether land "subject to a trust for a public purpose".

Trusts – Charitable trust – Trust for purpose beneficial to the community – Vesting of land in local authority for purpose of publicly accessible free car park.

Trusts – Charitable trust – Enforcement – Standing.

Trusts – Charitable trust – Inappropriateness as remedial device – Availability of other adequate remedies.

Words and phrases – "trust", "public purpose", "land subject to a trust for a public purpose".

Local Government Act 1993 (NSW), ss 25, 26, Sched 7 cl 6(2).

Local Government Act 1919 (NSW), ss 518, 526.

1 GAUDRON, McHUGH, GUMMOW, HAYNE AND CALLINAN JJ. The essential issue in this appeal is whether certain land which at the commencement of the *Local Government Act* 1993 (NSW) ("the Act") was vested in the appellant, Bathurst City Council ("the Council"), and which was used for a car park was "land subject to a trust for a public purpose" within the meaning of cl 6(2)(b) of Sched 7 of the Act. If the land answered this description, then the Council dealt with it in a fashion beyond its powers. Clause 6(3) of Sched 7 empowered a council by resolution, within one year after the commencement of the Act on 1 July 1993, to classify as community land or operational land any public land vested in it or under its control which was not classified by cl 6(2). By resolution dated 18 May 1994, the Council classified land which included the car park as operational land. However, if the subject land comprised "land subject to a trust for a public purpose" under cl 6(2), it was not open to the Council to reclassify it in exercise of the power conferred by cl 6(3). Reclassification of community land as operational land could be achieved only by a local environmental plan, pursuant to s 27(1) of the Act.

2 The litigation was commenced by the respondent, PWC Properties Pty Ltd ("PWC"), in the Land and Environment Court which is constituted by the *Land and Environment Court Act* 1979 (NSW) ("the LEC Act"). It is convenient first to indicate the source of the jurisdiction exercised by that Court in the present case.

The legislation

3 Section 16 of the LEC Act divides the jurisdiction of the Court into six classes¹, one of which is Class 4. This is detailed in s 20, which is headed "environmental planning and protection and development contract civil enforcement". Paragraph (d) of s 20(1) provides that the Court has jurisdiction to hear and dispose of proceedings under s 674 of the Act. Section 674(1) of the Act states:

"Any person may bring proceedings in the Land and Environment Court for an order to remedy or restrain a breach of this Act."

The expression "a breach of this Act" means a contravention of or failure to comply with that statute and a threatened or apprehended contravention of or a threatened

1 Section 21B of the LEC Act, which provides for a seventh class, was inserted by the *Native Title (New South Wales) Act* 1994 (NSW) (and amended by the *Statute Law (Miscellaneous Provisions) Act (No 2)* 1994 (NSW)), but has not yet commenced.

or apprehended failure to comply with it (s 672). In order to appreciate the issues which are before this Court, it is necessary to consider other provisions of the Act.

4 "Public land" is defined in the Dictionary to the Act as meaning any land, including a public reserve, which is vested in or under the control of a council². Part 2 (ss 25-54) of Ch 6 of the Act requires all public land to be classified as either "community" or "operational" (ss 25, 26). With presently immaterial exceptions, a council has no power to sell, exchange or otherwise dispose of community land. Community land must not be leased or licensed for more than 21 years. It may only be leased or licensed for more than five years if public notice of the proposal is given and, if objection is made, the Minister's consent is obtained (ss 45-47). These restrictions do not apply to operational land. Hence the distinction, vital to this litigation, between the two classifications.

5 Schedule 7 to the Act makes savings, transitional and other provisions consequent on the enactment of the legislation. Clause 6 of Sched 7 applies to all public land within a council's area at the commencement of Pt 2 of Ch 6 on 1 July 1993. On that date, land vested in or under the control of a council being "land subject to a trust for a public purpose" is taken to have been classified as community land (cl 6(2)(b)). Reclassification of public land may be made by a local environmental plan (s 27(1)). However, in respect of a proposal in such a draft local environmental plan to reclassify community land as operational land, a council must arrange a public hearing under s 68 of the *Environmental Planning and Assessment Act* 1979 (NSW) ("the EPA Act") (s 29). Upon the commencement of such a local environmental plan with respect to the reclassification of community land, that land, with certain presently immaterial exceptions, is "discharged from any trusts, estates, interests, dedications, conditions, restrictions and covenants affecting the land or any part of the land" (s 30(1)).

6 In the Land and Environment Court, PWC obtained declaratory and injunctive relief against the Council³. On appeal, the New South Wales Court of Appeal replaced that relief with a declaration that on the commencement of the Act the land in question was classified as community land, being "land subject to a trust for a public purpose" within the meaning of cl 6(2)(b) of Sched 7 of the Act.

2 The definition excludes public roads, land to which the *Crown Lands Act* 1989 (NSW) applies, a common, and land subject to the *Trustees of Schools of Arts Enabling Act* 1902 (NSW).

3 *PWC Properties Pty Ltd v Bathurst City Council* (1996) 91 LGERA 344 at 351.

3.

The Court of Appeal also restrained the Council from dealing with the land, unless reclassified, otherwise than in accordance with the restrictions imposed by the Act upon the use and management of community land⁴. The Council seeks in this Court orders setting aside the orders of the Court of Appeal and dismissing the application by PWC.

- 7 The land was vested in the Council at a time when the *Local Government Act* 1919 (NSW) ("the 1919 Act") was in force. Accordingly, it will be necessary to have regard to the provisions of that legislation in determining whether on 1 July 1993 the land was "subject to a trust for a public purpose".

The facts

- 8 PWC was formerly named Permewan Wright Consolidated Pty Ltd. The change of name occurred on 18 July 1986. PWC is the owner of a shopping centre at 208-218 Howick Street, Bathurst, which is known as the Payless Plaza Shopping Centre. A 200 space car park ("the car parking site") is provided on an adjacent bitumen surfaced area of land comprising approximately 8,600 square metres. The land is owned or controlled by the Council. The car parking site is in the centre of the block bounded by William, Howick, Bentinck and Russell Streets, Bathurst. It has a vehicular ingress and egress available to the car parking site and a loading dock in the Shopping Centre from Bentinck and Russell Streets.

- 9 The land the subject of the relief which has been granted in these proceedings comprises Lot 21 in Deposited Plan No 258221 and Lot 12 in Deposited Plan No 609772. Lot 12 was transferred by PWC to the Council by a transfer dated 15 June 1987. The only consideration stated in the transfer is \$1. It appears to have been preceded by a contract for sale but this is not in evidence. The land in Lot 21 was transferred by Gurdon Motors Pty Ltd ("Gurdon") to the Council by transfer dated 5 November 1981. This states a consideration of \$800. The transfer was preceded by a contract for sale dated 29 February 1980 between Gurdon and the Council. Special condition 2 thereof stated:

"The purchaser agrees that it will give the benefit of 41 car spaces to the land owned by the vendor adjacent to the subject land comprising premises 210-218 Howick Street Bathurst. The said benefit of car spaces shall accrue to any development application lodged by the vendor or any purchaser from the vendor or any owner for the time being of 210-218 Howick Street

4 *Bathurst City Council v PWC Properties Pty Ltd* (1997) 41 NSWLR 522 at 529.

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

4.

Bathurst who wishes to develop 210-218 Howick Street Bathurst. It is agreed that this condition will not merge on completion of this contract."

10 Whilst special condition 2 was expressed so as not to merge on completion of the contract, it fell short of expressing an intention that the land in Lot 21 was to be held by the Council not as owner but solely as trustee. Formal words were not required, provided there was made clear an intention to constitute the Council trustee of the land. However, the intention manifested in special condition 2 was directed to another objective. This was the attachment of a car park space "benefit" to a development application which might be made by a party which, for the time being, owned 208-218 Howick Street. The text of special condition 2 may be compared with that of a letter which was held by the Privy Council in *Brisbane City Council v Attorney-General for Queensland*⁵ to constitute that Council trustee of a charitable trust.

11 In the present case, the Court of Appeal was not persuaded that any of the material before it "demonstrated any express trust"⁶. This phrase reflects the text of s 23C(1)(b) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act")⁷. This requires that a declaration of trust *inter vivos* respecting any land be "manifested and proved" by some writing which is signed by some person who is able to declare such a trust. In this Court there is no notice of contention or cross-appeal re-agitating any question of the existence of an express trust.

12 On 17 December 1979, Tortuga Securities Pty Limited ("Tortuga") on behalf of PWC (described by Tortuga as "[o]ur Principals") and with the consent of the then owner, Gurdon, lodged a development application with the Council. Tortuga stated that PWC was purchasing the Gurdon site and proposed to operate there a large "½ case" discount food supermarket. The letter of application continued:

5 [1979] AC 411 at 421-422.

6 (1997) 41 NSWLR 522 at 527.

7 Corresponding provisions in the other States are found in *Conveyancing and Law of Property Act* 1884 (Tas), s 60(2); *Law of Property Act* 1936 (SA), s 29; *Property Law Act* 1958 (Vic), s 53; *Property Law Act* 1969 (WA), s 34; *Property Law Act* 1974 (Q), s 11.

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

5.

"We are advised by Council that land is being acquired at the rear of the site for construction of a Council car parking area which when completed will provide approximately 250 car spaces.

As previously discussed, it is essential for the '½ case' operation to have a bitumen paved parking area for at least 100 cars completed to coincide with the opening of the supermarket which we anticipate will be in mid September 1980. *Under the ½ case concept, shoppers are requested to wheel trolleys to their car with their purchases, and unless an area of the car park is paved and available, this concept will not be accepted by the shopping public of Bathurst.*

Therefore we request that Council arrange for the first stage of the car park for approximately 100 cars to be completed by mid September 1980. If required, construction may be coordinated by the developer on a tender basis acceptable to Council at full cost of construction to Council, to coincide with completion of the building works.

We understand that a credit for car parking spaces is attached to the Gurdon Motors site, and by agreement with the vendor we request that this credit be transferred to the present application.

We also confirm that [PWC] will transfer to Council with no compensation the areas of land at the rear of the site occupied by Gurdons 'detailing shed' and portion of one Right-of-way as shown on the plans submitted herewith, and request that the appropriate car parking credits be allowed. Legal costs of transfer are to be the responsibility of Council for these transfers. [PWC] will make a cash contribution for parking spaces not covered by credits as above." (emphasis added)

- 13 By letter to Tortuga dated 21 December 1979, the Town Clerk stated that the Council had granted approval for the development of a shopping centre at 208-218 Howick Street, Bathurst, subject to various conditions. Condition 11 stated:

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

6.

"The developer is to provide 60 off-street car parking spaces -

- (a) A credit of 41 car parking spaces will be granted upon being furnished with evidence that the fee simple of Lot 21 in DP 258221, comprising 1199 square metres, has been conveyed to Council by the owner, [Gurdon] of Bathurst.
- (b) A credit of 12.6 car parking spaces will be granted upon being furnished with evidence that the fee simple of Lot 22 in DP 258221 [which subsequently became Lot 12 in DP 609772] comprising 370 square metres, has been conveyed to Council by the owner [PWC].
- (c) The developer is to pay a cash contribution of \$4,160 being 6.4 car spaces at \$650 per space, in lieu of provision of the 6.4 spaces not credited in (a) and (b) of this condition."

Condition 11(a) was satisfied by the transfer of Lot 21 by Gurdon, dated 5 November 1981. The transfer was not registered until 10 January 1986. Condition 11(b) was met by the transfer by PWC of Lot 12 dated 15 June 1987. This was registered on 31 September in that year. Condition 11(c) was fulfilled by a payment by PWC to the Council on 6 August 1980. Lots 21 and 12 will be referred to as "the nominated lots".

- 14 At the date of the giving of the development consent, 21 December 1979, s 94 of the EPA Act had not come into operation. Accordingly, it does not apply to the grant of consent in the present case. Section 94(3) of the EPA Act made special provision with respect to the satisfaction of conditions imposed in consents to development applications⁸, and cl 6(2)(c) of Sched 7 of the Act classifies as

8 In their original form, sub-ss (1), (3) and (4) of this statute stated:

"(1) Subject to subsection (2), where a council, being the consent authority, is satisfied that a development, the subject of a development application, will or is likely to require the provision of or increase the demand for public amenities and public services within the area, the council may grant consent to that application subject to a condition requiring -

- (a) the dedication of land free of cost; or
- (b) the payment of a monetary contribution,

or both.

(Footnote continues on next page)

7.

"community land" land which, before the commencement of the Act in 1993, was dedicated as a condition of a development consent under s 94 of the EPA Act.

- 15 However, although s 94 did not then apply, the power of the Council to attach conditions to development consents granted under the Bathurst Planning Scheme Ordinance⁹ before the commencement of the EPA Act was not at large. The exercise of the power was attended by the characteristics identified by Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*¹⁰. His Honour said of such a power that it was to be understood¹¹:

"not as giving an unlimited discretion as to the conditions which may be imposed, but as conferring a power to impose conditions which are reasonably capable of being regarded as related to the purpose for which the function of the authority is being exercised, as ascertained from a consideration of the scheme and of the Act under which it is made. This purpose may be conveniently described, in accordance with the expression used by Lord Jenkins in *Fawcett Properties Ltd v Buckingham County Council*¹², as being 'the implementation of planning policy', provided that it is borne in mind that it is from the Act and from any relevant provisions of

...

(3) The council shall hold any monetary contribution in trust for the purpose for which the payment was required and apply the money towards providing public amenities or public services or both within a reasonable time and in such a manner as will meet the increased demand for those amenities or services or both.

(4) Land dedicated in accordance with a condition imposed under subsection (1) shall be made available by the council for the purpose of providing public amenities or public services or both within a reasonable time."

9 Made under Pt XHIA of the 1919 Act and published in New South Wales, *Government Gazette*, No 124, 24 November 1972.

10 (1970) 123 CLR 490.

11 (1970) 123 CLR 490 at 499-500. See also the discussion of the New South Wales authorities by Glass JA in *Rockdale Municipal Council v Tandel Corporation Pty Ltd* (1975) 34 LGRA 196 at 204-206.

12 [1961] AC 636 at 684.

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

8.

the Ordinance, and not from some preconceived general notion of what constitutes planning, that the scope of planning policy is to be ascertained."

- 16 From mid-1980 to 1986, the Council acquired, by private treaty, resumption and dedication, a number of parcels of land near the nominated lots. At the time of acquiring the individual parcels, the Council expressed its intention to acquire the land for a public car park to accommodate the increased demand for parking created by the surrounding commercial development. In the course of negotiations with the Bank of New South Wales, the Council explained as follows its reasons for seeking to obtain a fee simple without restrictive conditions:

"It is Council's policy to strengthen the existing commercial centre and to this end is encouraging re-development. At the same time, it is being subjected to pressures to permit a fringe development whereby shopping facilities may be provided with acres of car parking.

Council is aware of the adverse effect such a development would have upon the existing commercial area and has so far refused to consider such a development.

If the existing commercial area is to remain viable, more parking will need to be provided. *It is envisaged that the existing car parking areas and the one proposed in William Street block would serve the purpose for some time. However, the time will arrive when there will be a need for even more parking space. Such parking may be provided by constructing car parking stations on the existing sites, the cost of which would have to be borne by the property owners deriving the benefit, or by endeavouring to encourage a development within such areas by a leasing arrangement which would ensure the provision of more parking, as well as additional commercial facilities.* Such developments would ensure the success of Council's policy of maintaining the viability of the existing commercial area and of providing more car parking when required.

It is for these reasons that Council desires to obtain the fee simple of lands being acquired for off-street parking developments, believing that if it becomes feasible to expand car parking in association with development within a car parking area, the adjoining lands would appreciate in value and would also benefit from such development. This type of development would also be instrumental in preventing the establishment of fringe area shopping centres before the existing commercial area had been sufficiently strengthened to withstand the competition." (emphasis added)

9.

17 It appears that the Council paid legal and survey fees associated with the acquisitions and provided the vendors of the parcels with a nominal sum, bearing in mind that the construction of the car park was likely to increase the value of any land retained by the vendors. In some cases, the Council undertook to provide the vendors with car parking space credits for future car parking space contributions.

18 In April 1986, PWC provided the Council with the sum of \$8,715, representing the cost of placing a hot mix seal over an agreed part of the car parking site. It would appear that the Council then arranged for the relevant work to be performed.

19 Later, in March 1987, the Council agreed to construct three trolley bays on the car parking site if PWC met the estimated cost. Although the evidence is not clear, presumably the trolley bays were built on the car parking site.

20 The nominated lots acquired as a condition of the development consent, when combined with the parcels of land acquired from mid-1980 to 1986, became the car parking site which is the subject of dispute in these proceedings. However, in the absence from the suit of additional parties, the declaratory and injunctive relief given by the Court of Appeal was limited to the nominated lots.

The plans of the Council to develop the car parking site

21 On 18 May 1994, the Council purported, by resolution, to classify the car parking site as operational land. Although not expressly stated, it appears that the Council acted on the basis that the car parking site was not "land subject to a trust for a public purpose" within the meaning of cl 6(2)(b) of Sched 7. For some reason not borne out in the evidence, the resolution by the Council was stated (incorrectly) to be made under s 34 of the Act¹³.

13 Section 34 of the Act provides:

- "(1) A council must give public notice of a proposed resolution to classify or reclassify public land.
- (2) The public notice must include the terms of the proposed resolution and a description of the public land concerned.
- (3) The public notice must specify a period of not less than 28 days during which submissions may be made to the council.

(Footnote continues on next page)

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

10.

- 22 At an extraordinary meeting on 6 September 1995, the Council considered the possibility of developing the car parking site. During the meeting, the Council passed a resolution that it was not prepared to give an undertaking that car parking spaces, then located at ground level, would remain at that location at all times in the future. In correspondence, the Council also advised PWC that, should the car parking site be developed, car parking spaces may be located on a different level to that which then existed and access could be expected to be via travelators and/or trolley ramps.
- 23 On 14 February 1996, the Council resolved to advertise to seek expressions of interest for the sale and/or development of the car parking site. On 16 March 1996, an advertisement appeared in a local newspaper advising that the Council was calling for expressions of interest for the purchase of the car park site and its development for retail/commercial purposes. The advertisement indicated that a person lodging an expression of interest should be aware that any development must provide for the existing car parking spaces and supply additional car parking spaces to accommodate the proposed development.
- 24 The advertisement seeking expressions of interest, together with the earlier correspondence on the location of car parking spaces, was of concern to PWC. This was because it believed that its shopping centre would adequately be served only if car parking spaces remained on ground level and were thus readily accessible to shopping trolleys.
- 25 On 22 February 1996, PWC commenced proceedings in the Land and Environment Court seeking declarations that the car parking site was "subject to a trust for car parking purposes", that any resolution to classify the land as operational land under cl 6(3) of Sched 7 to the Act was invalid, and that the "relocation of the car parking spaces below the basement level or above the first floor level of the land would be contrary to or result in a breach" of that trust.

(4) This section does not apply to a proposed resolution to classify land to be acquired by the council at a public auction as operational land if the decision to acquire the land has been made at a meeting that was closed to the public and the council has not resolved to make public its proposal to acquire the land."

The Land and Environment Court

26 At the trial before Talbot J, PWC contended that, in light of the purpose for which the car parking site was acquired, the subsequent maintenance of the land by the Council and the permitted use of the public patronising the businesses conducted in the adjacent premises, an express trust for car parking purposes had been established. In the alternative, PWC submitted that it would be unconscionable for the Council to use the land in a way other than for the purpose for which it had been acquired, in particular for provision of car parking at above ground level, bearing in mind the basis upon which Tortuga had made contributions and vendors had transferred parcels of land, and that a constructive trust should be recognised.

27 Talbot J found¹⁴ that the car parking site was held by the Council "subject to a trust for a public purpose" within the meaning of cl 6(2)(b) of Sched 7 of the Act. His Honour stated¹⁵:

"By adopting the line of reasoning in *Toadolla [Co Pty Ltd v Dumaresq Shire Council]*¹⁶ and *Rodmac [Investments Pty Ltd v Great Lakes Shire Council]*¹⁷, it is possible to conclude that a trust was created in the town planning context whereby money and land vested in the Council was impressed with an obligation, in the nature of a trust, to use the monetary contributions and the land for the purpose of providing public car parking. The individual private contributors did not become the beneficiaries of the trust. Monetary contributions, the dedicated land or land acquired by the use of monetary contributions collected for that purpose, are the subject of an obligation on the part of the Council to provide a public amenity in the form of a car park."

14 (1996) 91 LGERA 344 at 351.

15 (1996) 91 LGERA 344 at 350.

16 (1992) 78 LGERA 261.

17 Unreported, Land and Environment Court (Bignold J), 2 August 1991.

The Court of Appeal

28 The principal judgment in the Court of Appeal was delivered by Sheller JA, with whom Cole JA and Studdert AJA agreed.

29 As we have indicated earlier in these reasons, Sheller JA concluded that the nominated lots transferred as a condition of the development consent for the provision of car parking spaces were not held upon an express trust¹⁸. However, his Honour concluded that the nominated lots were held by the Council on a constructive trust for the purpose of providing a car park for members of the public¹⁹. The requirements of s 23C(1) of the Conveyancing Act with respect to writing do not affect the creation or operation of constructive trusts (s 23C(2)). His Honour was also of the view that the trust was one for a public purpose within the meaning of cl 6(2)(b) of Sched 7 of the Act²⁰. Sheller JA stated²¹:

"In *Muschinski v Dodds*²², Deane J said: 'The constructive trust shares, however, some of the institutionalized features of express and implied trust. It demands the staple ingredients of those trusts: subject matter, trustee, beneficiary (or, conceivably, purpose), and personal obligation attaching to the property ...' There are present here subject matter, trustee (the Council), and personal obligation attaching to the property, namely the obligation of the Council to use the [nominated lots] to provide off-street car parking spaces. ...

Deane J did not exclude the concept of a constructive trust fixing upon land where there was no beneficiary, but a purpose for which, in accordance with the personal obligation attaching to the land, it was to be held. Despite [arguments by counsel for the appellant], I can see no reason why the availability of the remedy should be limited to cases where a beneficiary can be identified."

18 (1997) 41 NSWLR 522 at 527.

19 (1997) 41 NSWLR 522 at 528.

20 (1997) 41 NSWLR 522 at 528.

21 (1997) 41 NSWLR 522 at 528.

22 (1985) 160 CLR 583 at 613-614.

13.

Sheller JA found, however, that land other than the nominated lots was not the subject of a trust for a public purpose²³.

- 30 The Court of Appeal gave the relief indicated earlier in these reasons. It made no declaration that the nominated lots were bound by any trust, although the existence of a trust as understood in the general law was essential to its conclusion that cl 6(2)(b) of Sched 7 of the Act applied to the nominated lots. There is no cross-appeal against the form of the relief granted by the Court of Appeal. We would dismiss the appeal against those orders but upon grounds other than those which were adopted by the Court of Appeal.

Charitable trusts and remedial constructive trusts

- 31 It will be apparent that in the Court of Appeal the term "a trust", as employed in the expression "land subject to a trust for a public purpose" in cl 6(2)(b) of Sched 7 of the Act, was given its technical meaning. Attention was then given to the application of the principles concerning constructive trusts and charitable trusts.

- 32 During the course of argument in this Court, the Council conceded that it owed obligations in respect of the nominated lots. When invited to formulate with precision the terms of those obligations, counsel responded in this way:

"(1) To provide for development of Bathurst by the provision of car parking initially at ground level and ultimately in a building which will either be a car park structure or a component of a joint venture for development of the car park land.

(2) To provide for access to [PWC's] loading dock."

- 33 Although, as will become apparent, the appeal to this Court should be disposed of on other grounds, there is force in the submission by PWC that these purposes, or at least the first of them, may be classified as a public purpose within the fourth class of the categories listed by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*²⁴. The fourth class is "trusts for other

23 (1997) 41 NSWLR 522 at 528-529.

24 [1891] AC 531 at 583.

purposes beneficial to the community", being trusts not for the relief of poverty or the advancement of religion or education²⁵.

34 The decision of the Privy Council in *Brisbane City Council v Attorney-General for Queensland*²⁶ is illustrative of two relevant principles: that the spirit and intendment of the Preamble to the statute of Elizabeth²⁷ should be given no narrow or archaic construction, and that the understanding of judges in the community in which they live of what a particular activity (in that case the conduct of shows for agricultural and other purposes) involves may be accepted as a proper understanding of the nature of that activity²⁸.

35 The vesting of land in a town centre in a local authority for the purpose of a publicly accessible free car park has some elements at least of a charitable trust for public purposes. The question, as formulated by Barwick CJ in *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation*²⁹, is whether a purpose beneficial to the community is "within the equity of the preamble to the Statute of Elizabeth". The Preamble refers to "Bridges, Ports, Havens, Causeways ... and Highways". Freely accessible car parks on one view might be regarded as "Havens" from the "Highways" or as so necessarily incidental to the latter in modern times as to be almost indistinguishable in public purpose and utility from them: there is an analogy between a highway and a car park affording a haven from, and a secure place of resort near and accessible to, a highway³⁰.

36 An example of the recognition of a charitable trust of this nature may be provided by the judgment of Hart J in *Mareen Development Pty Ltd v Brisbane*

25 [1891] AC 531 at 583.

26 [1979] AC 411.

27 43 Eliz I c 4.

28 [1979] AC 411 at 422-423.

29 (1971) 125 CLR 659 at 667.

30 See the discussion of the legitimacy in finding an analogy between an object already held to be charitable and a new object by Lord Reid and Lord Wilberforce in *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 147 and 156 respectively, and the discussion by McTiernan, Menzies and Mason JJ in *The Royal National Agricultural and Industrial Association v Chester* (1974) 48 ALJR 304 at 305; 3 ALR 486 at 488-489.

*City Council*³¹. Clause 12 of an Ordinance of the City of Brisbane provided that an applicant for approval of a subdivision was to transfer to the Council three link strips at the end or on the side of existing dedicated roadways. In the Full Court, Hart J referred to the acquisition made by the Council free of cost and, speaking of the strip in question, concluded³²:

"It could not have been the intention of the Ordinance that the Council was to make a profit from them from future subdividers.

In these circumstances I think it holds the strip in trust for Town Plan purposes."

37 It is true that those, such as PWC in the present case, conducting commercial activities may derive a benefit somewhat greater than the general public from a proximate car park. However, the fact that some non-charitable purposes may co-incidentally be served does not of itself destroy the legal character of a charitable trust³³.

38 Far greater difficulty arises in the present case with the decision that a charitable trust should be imposed by a remedial constructive trust.

39 One species of constructive trust is concerned with cases where the intent of a settlor or testator in transferring or devising property otherwise would fail for want of compliance with the formalities for creation of express trusts *inter vivos* or by will. The necessary elements on which the question turns in many of such cases are "intention, communication, and acquiescence"³⁴. This species of constructive trust includes instances where the intention was to create a charitable

31 [1972] Qd R 203; special leave to appeal refused (1972) 46 ALJR 377.

32 [1972] Qd R 203 at 216.

33 See *Monds v Stackhouse* (1948) 77 CLR 232 at 240-241; *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375 at 441-443; *In re Resch's Will Trusts* [1969] 1 AC 514 at 541; *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 at 424.

34 *Voges v Monaghan* (1954) 94 CLR 231 at 233, 235, 237; *Blackwell v Blackwell* [1929] AC 318 at 334.

trust³⁵. In that situation, as is illustrated by *In re Wedgwood*³⁶, the Attorney-General, with or without a relator, is a necessary party to a determination of the validity and enforcement of the charitable trust. At general law, the Attorney-General, with or without a relator, is "the proper and ... the only competent party to protect the charitable trusts and to seek to enforce them and to look after the interests of the public in those trusts"³⁷. In New South Wales, s 6 of the *Charitable Trusts Act* 1993 (NSW) ("the Charitable Trusts Act") now provides that "charitable trust proceedings" are not to be commenced in the Supreme Court unless the Attorney-General has authorised the bringing of the proceedings or leave to do so is obtained from the Supreme Court. The expression "charitable trust proceedings" is broadly defined in s 5(1) as meaning:

"proceedings in the Court brought, whether by any trustee of a charitable trust or by any other person, under the Court's statutory or general jurisdiction with respect to any breach or supposed breach of a charitable trust, or with respect to the administration of a charitable trust".

It is unnecessary to decide whether an action, constituted as was that giving rise to this appeal, would be "with respect to the administration of a charitable trust" and so within the definition in s 5(1).

40 *Muschinski v Dodds*³⁸ and *Baumgartner v Baumgartner*³⁹, to which reference was made in the Court of Appeal, did not involve a constructive trust of the species considered above. The order made by this Court in *Muschinski v Dodds*⁴⁰ allowed the appeal without itself spelling out the terms of any constructive trust which was to be imposed, as a remedy in the circumstances of the case and in accordance with the judgments of Mason J and Deane J. Brennan J and Dawson J dissented and

35 For example *Moss v Cooper* (1861) 1 J & H 352 [70 ER 782]; *Cullen v Attorney-General for Ireland* (1866) LR 1 HL 190 at 195, 197, 198; *O'Brien v Tyssen* (1884) 28 Ch D 372 at 376-377; *In re Wedgwood* [1915] 1 Ch 113 at 119-121.

36 [1915] 1 Ch 113 at 115-116.

37 *Ku-ring-gai Municipal Council v The Attorney-General* (1954) 55 SR (NSW) 65 at 69-70.

38 (1985) 160 CLR 583.

39 (1987) 164 CLR 137.

40 (1985) 160 CLR 583 at 625.

Gibbs CJ had been of the view that the appropriate remedy would have been a charge⁴¹. The constructive trust which Mason J and Deane J favoured was to be imposed only from the date of publication of the reasons for judgment in this Court⁴² and was to be imposed despite the common intention of the parties that each enjoy, from the time of purchase, an immediate and unconditional legal and beneficial one-half interest in the property in question⁴³. The judgments in *Baumgartner*⁴⁴ proceeded on the footing that the constructive trust serves as a remedy which equity imposes regardless of actual or presumed intention.

- 41 However, in our view, the present litigation is not to be resolved by recourse to a remedial constructive trust of that nature. A charitable trust which was imposed by a court as a remedy for unconscientious conduct by a defendant would lack certain distinctive, if not vital, attributes of trusts for a charitable purpose. These express the significance the law attaches, in upholding and effectuating such trusts, to the presence of a charitable intention. In their joint judgment in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)*⁴⁵, Dixon and Evatt JJ explained that the operation of what generally is seen to be the unique equitable jurisdiction with respect to schemes⁴⁶ depends upon whether there is disclosed "a general intention of charity or a particular intention only", understanding by the former "an intention which, while not going beyond the bounds of the legal conception of charity, is more general than a bare intention that [an] impracticable direction be carried into execution as an indispensable part of the trust declared"⁴⁷. Their Honours also pointed out that "continuity and indefiniteness of duration form a common characteristic of charitable trusts"⁴⁸. These considerations, together with the necessary involvement of the Crown, through the Attorney-General, in enforcement or other "charitable trust proceedings" under the Charitable Trusts

41 (1985) 160 CLR 583 at 598.

42 (1985) 160 CLR 583 at 623.

43 (1985) 160 CLR 583 at 598.

44 (1987) 164 CLR 137 at 148, 152, 157.

45 (1940) 63 CLR 209.

46 cf *In re Baden's Deed Trusts* [1971] AC 424 at 451-452, 456-457.

47 (1940) 63 CLR 209 at 225.

48 (1940) 63 CLR 209 at 223-224.

Act, show that the charitable trust has characteristics which make it unsuitable as a remedial device imposed by the court.

42 In any event, before the court imposes a constructive trust as a remedy, it should first decide whether, having regard to the issues in the litigation, there are other means available to quell the controversy. An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over other equally deserving creditors of the defendant⁴⁹. This appears to have been the cause of division between Gibbs CJ on the one hand and Mason J and Deane J on the other hand in *Muschinski v Dodds*⁵⁰. The Chief Justice saw as an adequate equitable remedy an entitlement of the appellant to a contribution from the respondent to the extent to which she had paid more than one-half of the purchase moneys, coupled with an equitable charge for that amount upon the half interest of the respondent in the land⁵¹.

43 In the present appeal, the question is whether the declaratory and injunctive relief with respect to the purported reclassification of land, including the nominated lots, was properly granted by the Court of Appeal. These were adequate remedies to deal with the legal situation of the Council if consideration of the matter is taken from the proper starting point. There then arises no occasion for the imposition of a constructive trust as the foundation for the orders made by the Court of Appeal.

"Trust" in a non-technical sense

44 The determinative consideration is that the term "trust" in the expression "land subject to a trust for a public purpose" in cl 6(2)(b) of Sched 7 of the Act is not to be understood wholly in its technical sense.

49 cf *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 at 826-827; *Fortex Group Ltd v MacIntosh*, unreported, New Zealand Court of Appeal, 30 March 1998; *Dobbs Law of Remedies*, 2nd ed (1993), vol 1, §5.18(3); Goode, "Proprietary Restitutionary Claims" in Cornish et al (eds), *Restitution: Past, Present and Future*, (1998) 63 at 65-67.

50 (1985) 160 CLR 583.

51 (1985) 160 CLR 583 at 598.

45 It is true that, as a general rule, a term such as "trust" is to be taken, unless a contrary intention appears, as having been used by the legislature in its legal and technical sense⁵². However, it is necessary to keep in mind statements by Dixon J and by Lord Diplock. The former, in *Hobart Savings Bank and Launceston Bank for Savings v Federal Commissioner of Taxation*⁵³, was to the effect that, whilst the occasion for determining what purposes are charitable has arisen in the law of property, the attribution to the word "charitable" of a legal meaning facilitates its transfer from the description of the purposes to which property is devoted to a description of the objects for which an institution exists.

46 This translation has been made in legislation conferring favourable revenue treatment upon a range of institutions which are identified in the legislation as "charitable". In construing such legislation, the restriction of the exemption or other taxation benefit to institutions which are "charitable" in the transferred legal meaning of that term, rather than upon any looser meaning, is not to be relaxed on "slight grounds"⁵⁴. But the present litigation concerns quite different subject-matter - the permissible use of land vested in a local government body and the statutory means by which this body may change that use and thereby remove or diminish limitations upon user.

47 The statement by Lord Diplock was made in *Town Investments Ltd v Department of the Environment*⁵⁵. His Lordship emphasised that the term "trust" is not a term of art in public law, even where it is used to describe the capacity in which property is held by a public authority and "where the person to be benefited is a subject"⁵⁶. This must particularly be so where the property in question is land conveyed to such an authority for other than commercial value and consequent upon the exercise of powers to implement planning policy. The observations by

52 *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531 at 580; *Vallance v The Queen* (1961) 108 CLR 56 at 75; *Ashfield Municipal Council v Joyce* [1978] AC 122 at 133-134.

53 (1930) 43 CLR 364 at 375.

54 *Salvation Army (Victoria) Property Trust v Fern Tree Gully Corporation* (1952) 85 CLR 159 at 175.

55 [1978] AC 359.

56 [1978] AC 359 at 382. See also *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* [1984] 3 NSWLR 502 at 517.

Walsh J in *Allen Commercial Constructions Pty Ltd v North Sydney Municipal Council*⁵⁷, set out earlier in these reasons, assist in making the point.

48 Clause 6(2)(b) is concerned with land which, on the commencement of the Act, is to be taken to be classified as community land because it then was vested in or under the control of a council and was "subject to a trust for a public purpose". The phrase "for a public purpose" as it appears in such a statute is "a wide phrase" and should not be "read narrowly"⁵⁸. In relation to the obligations imposed upon local government authorities with respect to land vested in them, the phrase has had a lengthy history. This involves the use of "trust" in a sense broader than a trust of a public nature which qualified as a charitable trust within the spirit and intendment of the Elizabethan statute.

49 Here, the nominated lots, as part of the car parking site, were conveyed to and held by the Council "for" a public purpose, namely the achievement, or at least the advancement⁵⁹, of the town planning purpose which led to the imposition by the Council of the conditions upon the granting of the development consent on 21 December 1979. That town planning purpose was the acquisition of land for a public car park to accommodate the increased demand for parking which would be created by the surrounding commercial development, including what became the Payless Plaza Shopping Centre.

50 It is not to the point that, from time to time thereafter and as foreshadowed in its correspondence with the Bank of New South Wales, the Council's perception as to what was required to provide adequate parking facilities might change. The point for the present litigation is that the public purpose which we have identified still endured when the Act commenced on 1 July 1993.

51 That conclusion plays a large part in the determination of this appeal but it is necessary to apply s 526 of the 1919 Act to the state of affairs which existed when the nominated lots were conveyed to the Council. That provision empowered the Council to hold the nominated lots for the public purpose we have identified. Its operation is to be considered with that of s 518.

57 (1970) 123 CLR 490 at 499.

58 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 209.

59 *Clunies-Ross v The Commonwealth* (1984) 155 CLR 193 at 198.

Sections 518 and 526 of the 1919 Act

52 Section 526 of the 1919 Act was in force when the Council acquired the nominated lots. It is a fair construction of cl 6(2)(b) that it embraced lands held under the authority conferred upon the Council by s 526 of the 1919 Act when the new legislation commenced on 1 July 1993. Section 526 used the disjunctive expression "charitable or public purpose". If the expression had been "public charitable purpose", then there might have been scope for a construction of s 526 which treated "public" as emphasising the public element required for a valid charitable trust⁶⁰. But this is not the scheme of s 526.

53 Section 526 stated:

"The council may -

- (a) accept and hold any real or personal property conveyed, assigned, devised, or bequeathed to it for any charitable or public purpose;
- (b) act in the administration of such property for the purposes and according to the trusts for which the same may have been conveyed, devised, assigned, or bequeathed."

54 Further, whilst s 518(1) empowered a council to sell or exchange any land vested in it, s 518(2) excluded from that power "any public reserve, public place, or cemetery, or any land subject to a trust". In *Attorney-General v The Council of the City of Parramatta*⁶¹, Roper CJ in Eq held that (a) the "land subject to a trust" in s 518(2) included not only a "private trust", but also "a public trust, for instance, created by a Crown grant"; and (b) the Attorney-General had standing to seek orders restraining a council from taking action which was "incompatible with the due exercise of [its] powers". The nominated lots would have been, within the meaning of s 518(2), either part of a "public place" or "land subject to a trust". The

60 *Ashfield Municipal Council v Joyce* [1978] AC 122 at 140.

61 (1949) 49 SR (NSW) 283 at 290-292. In England, "the inherent power flowing from his office ... enables the Attorney-General either to bring proceedings ex-officio himself or to consent to the use of his name ... [in] relator proceedings for the protection of the public interest in the civil courts ... to enforce a duty which a public body, such as a local authority, owes to the public": *Attorney-General v Blake* [1998] 2 WLR 805 at 820; [1998] 1 All ER 833 at 847.

Gaudron J
McHugh J
Gummow J
Hayne J
Callinan J

22.

former term was defined in s 4 so as to apply generally to a "place which the public are entitled to use"⁶².

55 Section 526 had its antecedents in s 206 of the *Sydney Corporation Act* 1902 (NSW). This had provided⁶³:

"(1) The corporation may accept and hold any real or personal estate conveyed, assigned, devised or bequeathed to them or to the council *in trust for* any charitable or public purpose.

(2) The council shall have full power to act for and on behalf of the corporation in the administration of such estates for the purposes and according to the trusts for which the same may have been conveyed, devised, assigned or bequeathed." (emphasis added)

Section 206 in turn was derived from s 231 of the *Sydney Corporation Act of 1879* (NSW). This had stated:

"The Corporation may accept and hold any real or personal estate conveyed assigned devised or bequeathed to them or to the Council *in trust for* any charitable or public purpose And the Council shall have full power to act for and on behalf of the Corporation in the administration of such estates for the purposes and according to the trusts for which the same may have been conveyed devised assigned or bequeathed." (emphasis added)

56 It will be apparent that the provisions of the 1879 and 1902 statutes were limited to the acceptance of property transferred "in trust for any charitable or public purpose", whereas s 526 of the 1919 Act was not so limited. The words "in trust" do not appear in par (a) of s 526 before the expression "for any charitable or public purpose". Paragraph (b) of s 526 empowers the council to act in the administration of such property in two respects. The first is for the purposes for

62 See, as to what amounts to such public "entitlement", *Ward v Marsh* [1959] VR 26 at 29-30, 32-35; *McIvor v Garlick* [1972] VR 129 at 133-135.

63 Section 5 of that Act provided that "the council" was to consist of the mayor and aldermen from time to time in office and s 6 provided for the mayor, aldermen and citizens of the City of Sydney to be a corporation under the style and title of "The Municipal Council of Sydney".

which it may have been conveyed, devised, assigned or bequeathed and the second is in accordance with the trusts upon which the transfer may have been made.

- 57 That there was a distinction between public purposes and charitable purposes had been settled by the House of Lords in 1901. In *Blair v Duncan*⁶⁴, a gift of one-half of the residuary estate of the testatrix to be applied for "such charitable or public purposes as my trustee thinks proper" failed. Lord Davey had said⁶⁵:

"If, therefore, the words in the present case were merely 'charitable purposes,' or were 'charitable and public purposes,' I think effect might be given to them, the words in the latter case being construed to mean charitable purposes of a public character.

But, my Lords, the words we have here are 'charitable or public purposes,' and I think these words must be read disjunctively. It would, therefore, be in the power of the trustee to apply the whole of the fund for purposes which are not charitable though they might be of a public character."

- 58 As is suggested by the reference by Roper CJ in Eq in the *City of Parramatta Case* to "public trusts" created by Crown grant⁶⁶, in the law of New South Wales, the terms "public use" and "public purpose" have a lengthy and significant history. First, Imperial legislation, the *Australian Colonies Waste Lands Act* 1842 (Imp) ("the 1842 Act")⁶⁷, which regulated the management and control of colonial "waste lands of the crown", defined that term (in s 23) so as to exclude lands previously granted from the Crown in fee simple, or for an estate in freehold, or for a term of years, and not "dedicated and set apart for some public use". Further, s 3 of the 1842 Act provided that the restrictions imposed by the legislation did not curtail the exercise of the prerogative with respect to lands required:

"for public roads or other internal communications, whether by land or water, or for the use or benefit of the aboriginal inhabitants of the country, or for purposes of military defence, or as the sites of places of public worship, schools, or other public buildings, or as places for the interment of the dead, or places for the recreation and amusement of the inhabitants of any town or

64 [1902] AC 37.

65 [1902] AC 37 at 44.

66 (1949) 49 SR (NSW) 283 at 290.

67 5 & 6 Vict c 36.

village, or as the sites of public quays or landing places on the sea coast or shores of navigable streams, or for any other purpose of public safety, convenience, health, or enjoyment".

In *Williams v Attorney-General for New South Wales*⁶⁸, Higgins J described s 3 of the 1842 Act⁶⁹ as saving the rights of the Crown "to except from sale and either to reserve or dispose of the lands for roads and certain other public purposes". Of the phrase "which have not been dedicated and set apart for some public use" which appeared in the definition in s 23⁷⁰, Higgins J said⁷¹ that one might conjecture that the draftsman:

"felt a difficulty in applying the word 'dedication' to the appropriation of lands for purposes other than the purpose of highways; that he meant the words 'set apart' to refer to the appropriation of lands for recreation or for hospitals or for public purposes other than the purpose of highways. But, whatever may have been the motive for the change of language, there is no doubt, to my mind, that both expressions, 'dedicate' and 'set apart' - 'for some public use' - connote the giving to the public of some rights in the land which subtract from the Crown's full ownership; the appropriation of the land for some definite public purpose, not for public purposes generally; and for some estate or interest better than at mere will."

- 59 After the grant of representative and responsible government to the colony, New South Wales legislation used the term "public purposes" to identify that for which legislation authorised compulsory acquisition. The Preamble to the *Lands for Public Purposes Acquisition Act* 1880 (NSW)⁷² recited that it was expedient to make provision for the acquisition on behalf of the Crown of lands:

"required for the construction of works for Water Supply and Sewerage throughout the Colony as well as for sites for Public Schools light-houses free libraries courthouses gaols hospitals wharfs ferries bridges fortifications and other purposes of defence and for buildings or works of any kind

68 (1913) 16 CLR 404 at 461; affd (1915) 19 CLR 343 (PC).

69 Misidentified as s 23.

70 And also in s 9 of the amending statute, 9 & 10 Vict c 104.

71 (1913) 16 CLR 404 at 462.

72 44 Vict c 16.

whatsoever to be erected or constructed for public purposes and to provide compensation for lands so acquired".

60 The term "public purpose" and cognate expressions also were used in revenue statutes. For example, s 4 and Sched 2 of the *Stamp Duties Act* 1898 (NSW) provided for an exemption in favour of any policy of insurance "on any public hospital or charitable institution" and s 11(d) of the *Income Tax Assessment Act* 1915 (Cth) conferred an exemption from income tax in respect of "the income of a religious, scientific, charitable, or public educational institution".

61 In some instances legislation was construed by treating a phrase such as "public institutions" as applying only to bodies which pursued charitable objects in the technical sense⁷³. Section 8(5) of the *Estate Duty Assessment Act* 1914 (Cth) provided that estate duty was not to be payable upon so much of an estate as was devised or bequeathed or passed by gift *inter vivos* or settlement "for religious, scientific, charitable or public educational purposes". In *Thompson v Federal Commissioner of Taxation*⁷⁴, this Court decided that a gift to schools restricted to children of members of the masonic association in New South Wales lacked the necessary element of public benefit to qualify under the exemption for charitable purposes. The Court also concluded that for the same reasons the gift did not qualify under the exemption in respect of "public educational purposes".

62 This and other decisions upon legislation of this nature illustrate the point made by Dixon J in the passage from *Hobart Savings Bank*⁷⁵, referred to earlier in these reasons, as to the transferred meaning of the word "charitable" from the description of purposes binding the employment of property to the identification of institutional objectives. They also demonstrate that the meaning of "public purposes" depends in part upon the scope and purposes of the particular legislation and upon the presence or absence of juxtaposition with an expression such as "charity" or "charitable purpose".

73 For example, *Dilworth v Commissioner of Stamps* [1899] AC 99 at 106.

74 (1959) 102 CLR 315.

75 (1930) 43 CLR 364 at 375.

- 63 There developed also, in decisions such as *Kinloch v Secretary of State for India*⁷⁶, the notion that an obligation assumed by the Crown, even if it be described as a trust obligation, may be characterised as a governmental or political obligation rather than a "true trust"⁷⁷. Later, *Tito v Waddell (No 2)*⁷⁸ emphasised that although not a trustee the Crown might "nevertheless [be] administering ... property in the exercise of the Crown's governmental functions".
- 64 This development is to be understood with the acceptance in *Blair v Duncan*⁷⁹ that a trust for public purposes would fail because purposes of a public character would not necessarily qualify as charitable purposes. In *Williams v Attorney-General for New South Wales*⁸⁰, the Court received with scepticism the submission that the setting apart by the Crown of land for a particular public purpose was tantamount to a trust in favour of the aggregation of people resident in New South Wales and was akin to a charitable trust for a public purpose within the fourth class of the categories listed by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel*⁸¹.
- 65 It is against that background that the recasting apparent in s 526 of the 1919 Act of the earlier legislation is to be understood. In particular, a council might accept real or personal property for a public purpose in the sense of that term, by then long understood in New South Wales, even though that purpose was not a charitable purpose and the property was not transferred to and accepted by the council on trust in the strict sense of that term. The council then would be restricted by s 518 in its dealings with that land, and subject to restraint at the suit of the Attorney-General.

76 (1882) 7 App Cas 619. See also *Aboriginal Development Commission v Treka Aboriginal Arts and Crafts Ltd* [1984] 3 NSWLR 502 at 516-517; *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 at 162-163, 180-181.

77 *Tito v Waddell (No 2)* [1977] Ch 106 at 211, 216.

78 [1977] Ch 106 at 211.

79 [1902] AC 37.

80 (1913) 16 CLR 404.

81 [1891] AC 531 at 583. See also *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 at 423, 429, 435, 467.

Conclusion

66 At the commencement of the Act on 1 July 1993, the nominated lots were held by the Council for a public purpose within the meaning of s 526 of the 1919 Act. Land so held was then, with the repeal of the 1919 Act, to be considered as vested in or under the control of the Council and as subject to a trust for a public purpose, within the meaning of cl 6(2)(b) of Sched 7 of the Act.

67 The term "trust" in cl 6(2)(b) of Sched 7 is apt to include those governmental responsibilities which, whilst not imposing a trust obligation as understood in private law, may fairly be described as a "statutory trust" which bound the land and controlled what otherwise would have been the freedom of disposition enjoyed by the registered proprietor of an estate in fee simple. The trust was "not a trust for persons but for statutory purposes"⁸². It would be no answer to the existence of such a constraint that there was lacking a beneficial owner of the nominated lots with standing in a court of equity to enforce observance by the Council of the dedication of the nominated lots to the provision of parking spaces. It had been within the competence of the Attorney-General to seek to restrain action incompatible with "the due exercise of the powers of the [C]ouncil or the due discharge of its duties"⁸³.

68 It follows that it was not open to the Council to resolve to reclassify land including the nominated lots in purported exercise of the power conferred by cl 6(3) of Sched 7 of the Act.

69 The appeal should be dismissed with costs.

82 See *Fouche v The Superannuation Fund Board* (1952) 88 CLR 609 at 640. See also *Harmer v Federal Commissioner of Taxation* (1991) 173 CLR 264 at 274.

83 *Attorney-General v The Council of the City of Parramatta* (1949) 49 SR (NSW) 283 at 291.