HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	H2/2021
File Title:	Hobart International Airport Pty Ltd v. Clarence City Council
Registry:	Hobart
Document filed:	Form 27A - Appellant's submissions-H2-2021 - Appellant's su
Filing party:	Appellant
Date filed:	01 Nov 2021

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

BETWEEN: **HOBART INTERNATIONAL AIRPORT PTY LTD**
Appellant

and

CLARENCE CITY COUNCIL
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

APPELLANT'S SUPPLEMENTARY SUBMISSIONS

Part I: Certification

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

Part II: Argument

2. These submissions respond to the Council's supplementary submissions dated 18 October 2021 (**R1 SS**) and those of the Commonwealth dated 28 October 2021 (**R2 SS**). They adopt the defined terms as set out in HIAPL's submissions dated 16 April 2021.

Advancing a new point on appeal

3. The Council now contends that the Commonwealth holds the benefit of the contractual promise made by HIAPL to the Commonwealth, as reflected in cl 26.2(a) of the Lease, on trust for the Council *until* such time as HIAPL and the Council enter into an agreement of the kind contemplated by cl 26.2(a) (hereafter, the **Trust Claim**): R1 SS [2], [14], [16].

4. As the Council acknowledges (R1 SS [3], [6]), no such claim was pleaded or advanced either before the primary judge or the Full Court. That was no oversight, but rather, a deliberate decision taken by the Council. At first instance, the Council expressly submitted that it did not, and *could* not, rely upon such a claim (R1 SS [6] fn 6). In oral argument before the primary judge, Senior Counsel for the Council submitted that "[t]he applicants do not in their own right seek to enforce the promise. We accept, we cannot enforce the promise".[1] He continued: "one wouldn't need to seek a declaration in a trust case".[2]

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[1] Transcript, 26 July 2019, 334.15-18.
[2] Transcript, 26 July 2019, 341.23-43.

5. It is elementary that the parties to an appeal are bound by the conduct of their case at trial.[3] The rationale for that principle is well-established.[4] Except in the most exceptional circumstances, it would be "contrary to all principle" to allow a party to raise a new argument which, whether deliberately (as in this case) or by inadvertence, the party failed to put during the hearing when it had an opportunity to do so.[5] Where all of the facts have been established beyond controversy or where the point is one of construction or of law, then an appellate court may find it expedient in the interests of justice to entertain a new point on appeal, but otherwise the rule is strictly applied.[6] Where a decision has been made not to run a point at trial, the party will be held to their election "save perhaps in 'exceptional circumstances'".[7]

6. Notwithstanding the matters set out above, HIAPL neither consents to nor opposes the grant of leave to the Council to raise the Trust Claim. However, for the reasons set out below, the Council's contentions as to the Trust Claim should not be accepted.

The Trust Claim

Principles

7. The benefit of a contractual promise is a contractual right or chose in action that is capable of being held on trust for another. The courts will recognise the existence of an express trust of that character when it appears from the language of the parties, construed in its context and by reference to the matrix of surrounding circumstances, that the promisor and promisee intended to create such a trust.[8] It is a question of fact whether an intention to create an express trust is sufficiently evinced.[9]

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[3] *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8 (Gibbs CJ, Wilson, Brennan and Dawson JJ) (***Coulton***); *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) (***Metwally***); *WGKS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 10 at [18] (Rares, Moshinsky and Stewart JJ).

[4] *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at [51] (Gleeson CJ, McHugh and Gummow JJ); *Coulton* at 8 (Gibbs CJ, Wilson, Brennan and Dawson JJ).

[5] *Metwally* at 483 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ).

[6] *Water Board v Moustakas* (1988) 180 CLR 491 at [13] (Mason CJ, Wilson, Brennan and Dawson JJ); *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319 (Mason J).

[7] *Kingdom of Spain v Infrastructure Services Luxembourg S.a.r.l.* (2021) 387 ALR 22 at [70] (Perram J; Allsop CJ and Moshinsky J agreeing).

[8] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121 (Mason CJ and Wilson J) (***Trident***); *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at [10]-[11], [50]-[51] (French CJ), [109] (Gageler J) (***Korda***); *Re Australian Elizabethan Theatre Trust* (1991) 30 FCR 491 at 502-3 (Gummow J).

[9] *Korda* at [10] (French CJ).

8. In *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 (***Bahr v Nicolay [No 2]***), Mason CJ and Wilson J stated that if the inference is to be drawn that the contracting parties intended to "create or protect an interest in a third party" and the trust relationship is the appropriate means of creating or protecting that interest or giving effect to that intention, then there is "no reason why in a given case an intention to create a trust should not be inferred" (at 618-19).[10] Their Honours referred with approval to earlier remarks of Fullagar J in *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43 at 67, to the effect that it was difficult to understand the reluctance which courts had sometimes shown to infer a trust in cases involving contracts where a benefit is promised to a third party (at 618). However, there is nothing in the judgment of Mason CJ and Wilson J in *Bahr v Nicolay [No 2]* at pp 618-619 to suggest that their Honours considered that the mere fact of a benefit being promised to a third party, of itself, would be sufficient to impute the necessary intention to create a trust. It is not the case that every contract made between two entities which has the effect or even the intention of conferring a benefit upon a third party gives rise to an express trust in that third party's favour.[11]

9. Illustrating this, the circumstances in *Bahr v Nicolay [No 2]* that led to the recognition by Mason CJ and Wilson J of an express trust of a contractual promise for the benefit of a third party went well beyond the mere fact of there being a promise to confer a benefit on a third party, and differ markedly from the present case (cf. R1 SS [15]). Chief Justice Mason and Wilson J in *Bahr v Nicolay [No 2]* found that the purpose of the contractual promise made by the trustee to the first respondent was to provide that the transfer of title to the trustee was to be subject to the beneficiary's rights under an antecedent contract "in the sense that those rights were to be enforceable against" the trustee (at 616). Otherwise, it would "achieve nothing" (at 616). Critically, the contractual provision in question did not purport to create in favour of the beneficiary any new rights over and above those that already existed (at 612). Their Honours found that the inferences to be drawn from the matrix of circumstances were "so strong" as to provide a "secure foundation" for imputing to the parties an intention to create an express trust (at 616-7).

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[10] See also *Trident* at 147 (Deane J).
[11] E.g. *Purves v Smith* [1944] VLR 186. The Commonwealth makes the same point at R2 SS [13].

10. Further, as French CJ observed in *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 at [11] (***Korda***), "[w]hat was said in *Bahr v Nicolay [No 2]* should not be misconstrued. A trust is not to be inferred simply because a court thinks it is an appropriate means of protecting or creating an interest". In a similar vein, Keane J remarked in separate reasons for judgment in *Korda* that:[12]

> "The language of the relevant documents is not to be strained to discover an intention to create a trust … In *Byrnes v Kendle*, Gummow and Hayne JJ noted the approval by Mason CJ and Dawson J in *Bahr v Nicolay [No 2]* of the proposition stated earlier by du Parcq LJ that 'unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention'".

11. That is, whether a trust has been created must always be determined by reference to intention.[13] An express trust cannot be created unless the person/s creating it objectively intended to do so and that intention is either explicitly declared or otherwise to be imputed by reference to the matters identified at [7] above.[14] The "implication of intention precedes the ascertainment of an express trust".[15] Certainty of intention is, of course, one of the three "certainties" that condition the existence of a trust.[16] The intention (if any) of the putative beneficiary is irrelevant.[17]

No intention to create a trust

12. The Council bears the onus of proving the requisite intention to create a trust.[18] For the reasons developed below, HIAPL submits that cl 26.2(a) does not manifest an intention on the part of HIAPL and the Commonwealth that the latter was to hold the benefit of HIAPL's contractual promise on trust for the Council. The Commonwealth takes the same position: R2 SS [3].

13. The task of construction must begin with the terms of the Lease. The first, and most obvious, point of significance is that the parties have refrained from using the

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[12] *Korda* at [208] (citations omitted).
[13] *Korda* at [3] (French CJ); *Re Australian Elizabeth Theatre Trust* (1991) 30 FCR 491 at 502 (Gummow J).
[14] *Korda* at [3] (French CJ), [109] (Gageler J); *Byrnes v Kendle* (2011) 243 CLR 253 at [114]-[115] (Heydon and Crennan JJ).
[15] *Korda* at [8] (French CJ).
[16] *Kauter v Hilton* (1953) 90 CLR 86 at 97 (Dixon CJ, Williams and Fullagar JJ).
[17] *Wheatley v Kavanagh* [2018] NSWSC 1359; 19 BPR 38691 at [233] (Ward CJ in Eq).
[18] *Pascoe v Boensch* (2008) 250 ALR 24 at [21].

terminology of a trust in cl 26.2(a) (see also R2 SS [11]).[19] That is despite the concept of a trust of a contractual promise plainly being in the contemplation of HIAPL and the Commonwealth at the time of entry into the Lease. Thus, cl 10(b) of the Lease provides that HIAPL must not permit a sub-lease or licence granted thereunder "to be held by a trust without the written approval of the Lessor [the Commonwealth]": AFM 20. The explicit language of a trust in that provision is striking when compared to the absence of such language in cl 26.2(a). Meanwhile, cl 15.6(b) provides that HIAPL is required in the stipulated circumstances to "continue to hold" any relevant agreements (including leases) that it had entered into with other entities in respect of the Airport Site "for the benefit of the Lessor [the Commonwealth]" upon the expiry or earlier determination of the Lease: AFM 29.

14. In short, where the parties to the Lease intended for contractual rights to be held on trust or otherwise for the benefit of another, they said so. It follows that, had the parties intended for HIAPL's contractual promise in cl 26.2(a) to be held on trust by the Commonwealth for the benefit of the Council, they could and would have said so.

15. There are two further compelling bases for rejecting the Trust Claim.

Competitive neutrality

16. It is common ground in these proceedings that the purpose of cl 26.2(a) was to promote competitive neutrality between businesses operated on and off the Airport Site. The Council admitted that fact at first instance. It is also reflected in unchallenged findings made by the primary judge and the Full Court: PJ [2]-[3] (AB 11), FFC [3], [12]-[13], [177] (AB 92, 95, 156). That is, its object was to ensure that the airport lessee and other operators on the Airport Site did not achieve a competitive advantage over comparable businesses offsite by reason of the constitutional prohibition on the levying of Council rates over the Airport Site. Of course, one by-product of that provision is that the Council obtains a financial benefit. However, while that financial benefit is the *effect* of cl 26.2(a), it is not the object of the clause.

17. It follows from that object that cl 26.2(a) is not rendered inutile if, as HIAPL and the Commonwealth submit, it does not on its proper construction reflect any intention on the part of the contracting parties to create an express trust in the Council's favour: cf.

[19] *Korda* at [109] (Gageler J), [136] (Keane J).

Bahr v Nicolay [No 2] at 616. That is because cl 26.2(a) has a purpose that is distinct from the interest of the Council in receiving payments thereunder, and the Commonwealth has a basis, consistent with the object of cl 26.2, to enforce it. There is therefore no basis to infer that the parties to the Lease intended to create an independent legal entitlement in the Council under cl 26.2.

18. The Council's contention that the Commonwealth "acts in the interests of the Council in ensuring performance of the obligation" in cl 26.2(a) (R1 SS [14]) is inconsistent with the uncontested findings as to the objective purpose of cl 26.2 as set out at [16] above. Clause 26.2 was agreed not in the interests of the Council, but in the interests of the Commonwealth. The Commonwealth's interest in that regard is independent of the interests of the Council.

20. Thus, in the present case, any perceived advantages of a trust do not support an inference that the contracting parties intended to create a trust.[20] Clause 26.2 cannot be said to "achieve nothing" if it does not create an express trust in the Council's favour (cf. *Bahr v Nicolay [No 2]* at 616). It achieves precisely what it was intended by the contracting parties to achieve – namely, competitive neutrality. Adopting the language of Giles JA (with whom Mason P and Handley JA agreed) in *O'Halloran v Penrit Pty Ltd* [1999] NSWCA 184 at [63], there is "nothing more to justify the inference of a trust than the fact that the promise, if fulfilled, would benefit [the Council], and nothing from which it appeared that the parties intended that there should be a trust".

21. In those circumstances, the contention that the Commonwealth acts in the *Council's* interest with respect to cl 26.2(a) (R1 SS [14]) must be rejected.

Reasonable endeavours obligation

22. The reasonable endeavours obligation cast upon HIAPL by the final sentence of cl 26.2(a) provides a further powerful basis for rejecting any imputed intention to create a trust.

23. Clause 26.2(a) provides that HIAPL will pay certain amounts to the Council, and it requires HIAPL to use all reasonable endeavours to enter into an agreement with the "relevant Governmental Authority, body or person" to make such payments: AFM 35. Clause 26.2(a) in terms therefore contemplates that the Council might, if those

[20] *Korda* at [53] (French CJ); see also [139] (Keane J).

reasonable endeavours result in agreement, acquire enforceable rights against HIAPL in respect of rate payments by entering into a contractual agreement with HIAPL. If (as the Council contends) the Council already possessed an enforceable right to receive those payments as the intended beneficiary of an express trust, the reasonable endeavours obligation would be superfluous. The Council could *ex hypothesi* already bring proceedings against HIAPL in its own name for alleged breaches of cl 26.2(a).[21] Thus, inclusion of the reasonable endeavours obligation stands strongly against any intention to create a trust.

24. The Council asserts that the "benefit to the Commonwealth in this arrangement is that if the lessees do enter into agreements with the Councils, then it need no longer be concerned to ensure that the lessees comply with the payment obligation": R1 SS [15]. But if the Council was already the beneficiary of a trust in its favour, then the "reasonable endeavours" obligation would add nothing to what was in any event the case. Moreover, this contention ignores the object of cl 26.2, and the obvious interest the Commonwealth therefore has in ensuring compliance with the obligations thereunder. Any "benefits" of a trust do not support the necessary intention.[22]

25. The Council's contention in this regard also exposes a further difficulty with the Trust Claim. As formulated, the Council advocates for a trust of a temporally confined character. It argues that a trust only exists *until* such time as the Council and HIAPL enter into an agreement to make payments in lieu of rates: R1 SS [2], [14], [16]. It must follow that, on the Council's case, a trust in its favour is created, superseded and re-created on each occasion that the Council enters into an agreement with HIAPL or when such an agreement ends. The Council does not explain how a fluctuating trust of that nature would operate, and it would fall well short of the requirement of certainty set out at [11] above.

26. By way of illustration, on 13 May 2004 HIAPL and the Council entered into a bilateral agreement for a term of 5 years which dealt with payments in lieu of rates: AB 99 [23]. It must follow, on the Council's case, that from May 2004 the Commonwealth was no longer a trustee of HIAPL's contractual promise but that its obligations and liabilities as putative trustee revived (without execution of any written document to that effect)

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[21] *Trident* at 147-8 (Deane J).
[22] *Korda* at [53] (French CJ); see also [139] (Keane J).

upon the expiry of the bilateral agreement in May 2009. That is a novel proposition, and one which finds no expression in the terms of cl 26.2(a).

The Commonwealth's submissions

27. The Commonwealth's reliance upon the principles derived from *Kinloch v Secretary of State for India* (1882) 7 App Cas 619, as referred to in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145 (***RACT***), is misplaced. Those principles arose, and have been applied, in the context of obligations and functions cast upon the Crown by statute, not by contract. In so far as those principles have been applied at all in the Australian authorities, they have been applied in that context.

28. The significance of that distinction emerges from the reasons of the majority in *RACT*. As their Honours observed, "clear words" are required before an "obligation on the part of the Crown or a servant or agent of the Crown … will be treated as a trust according to ordinary principles" and "in the absence of clear words, the obligation will be characterised as a governmental or political obligation" (at 162). A dichotomy of that character does not apply in the case of a contract. Thus, the choice is not one between trust obligations and governmental or political obligations; rather the choice is between trust obligations on the one hand, and private law contractual obligations on the other. For the same reason, this is not a case where any question arises as to an intention to "overlay" the principles of representative and responsible government "with additional private law duties" (cf. R2 SS [9]) because the Commonwealth has undisputedly assumed private law (that is, contractual) obligations in the Lease.

29. In any event, as the majority in *RACT* made plain, whether the Crown or an emanation thereof has assumed the obligations of a trustee is to be determined "according to ordinary principles" (at 162-3).[23] The identity of the Commonwealth as the putative trustee is one relevant factor for the Court to consider for the purpose of that analysis for the reasons given at R2 SS [12.1], but on the facts of the present case, the relevant dichotomy is one between private law contractual obligations and those as a trustee.

[23] In that respect, the approach ultimately advocated by the Commonwealth at R2 SS [10] does not differ in any substantive way from the principles identified in *Korda* at [208] (Keane J).

Conclusion

30. For the reasons set out above the Court should reject the Trust Claim.

31. If however this Court accepts the Trust Claim, then the impact of HIAPL's accord and satisfaction contentions on the question of standing, and on the existence of a "matter", will need to be remitted to the primary judge for consideration. Those contentions were advanced by HIAPL, but not determined, before the primary judge and the Full Court (FFC [158], [163] (AB 150-1)) in circumstances where no Trust Claim was raised.

Dated: 1 November 2021

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

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

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