HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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 REPLY TO THE SUBMISSIONS OF THE SECOND RESPONDENT

Part I: Certification

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

Part II: Reply

Standing and the doctrine of privity

2. The Second Respondent (**Commonwealth**) contends that privity has "nothing to say" about the standing of the First Respondent (**Council**) to seek declaratory relief in respect of the meaning of the Lease: Commonwealth's submissions (**RS**) at [6]-[7], [42]-[43]. Rather, the Commonwealth argues that the Council's standing is to be determined simply by reference to the "real or sufficient interest" test because this Court has approved that test "without any qualification as to the character of the proceeding to which it applies" (RS [25]).

3. That submission faces two immediate hurdles. *First*, the content of the standing requirement is shaped not only by the relief sought but by the nature and subject-matter of the litigation.[1] Subject to one qualification, none of the authorities identified by the Commonwealth entailed consideration by this Court of the standing of a third party to seek declaratory relief in respect of the construction of a contract to which it is not a party. *Second*, the sole qualification in that respect – being the decision in *CGU Insurance Ltd v Blakeley* (2016) 259 CLR 339 (***CGU***) – confirmed the relevance of privity for the purpose of determining whether there was a justiciable controversy, which was in turn analysed by reference to the interlinked question of standing to claim the declaration sought.

4. The question for determination in *CGU* was whether the liquidators' claim for declaratory relief involved a "matter" (at [33], [59]). While the question was not directly framed as one of standing (cf. RS [36]), Nettle J nevertheless had regard to the liquidators' standing in

[1] Appellant's submissions in chief (**AS**) at [31] fn 16 and fn 18; cf. RS [21].

analysing whether there was a justiciable controversy (at [92]-[96]). His Honour remarked that "[g]enerally speaking it may be correct to say that an outsider has no standing to seek a declaration about the meaning and effect of a contract to which the outsider is not party" (at [96]). The two authorities cited in support of that proposition each articulate the privity doctrine. In short, Nettle J relied on the privity doctrine in support of a general proposition about the standing of a third party to seek declaratory relief about the meaning of a contract to which it is not a party, which was in turn relevant to whether there was a justiciable controversy: cf RS [29]. The analysis of the plurality in *CGU* likewise attached significance to any potential incursions into privity: AS [33]. The reason that this Court did not consider privity "to be a bar to the liquidators' claim" (RS [36]) is explained at AS [27] and [34].

5. As to RS [25], the statement of Lord Dunedin in *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448 went to the availability of declaratory relief in a claim *between contracting parties* in a context far removed from the Constitutional requirements of a "matter" at issue in the present case.

6. As to RS [27], HIAPL's submissions as to *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406 (***Aussie Airlines***) are set out at AS [38]-[39]. If this Court were to conclude that *Aussie Airlines* should be understood as holding that the doctrine of privity is irrelevant to questions of standing in a private law claim, as contended by the Commonwealth, or that standing in such a case depends solely upon a "real interest" test, then HIAPL's submission would be that the case was wrongly decided. Were a "real interest" test alone to determine questions of standing in private law contractual claims by a third party without any regard to the privity doctrine, that would effectively deny any continuing significance to the doctrine of privity of contract. It is hard to conceive of any case in which a third party would devote the time and expense to litigation unless it anticipated some tangible benefit accruing to it from the litigation.

7. The Commonwealth's designation of the Council as an "active participant in the process" set out in cl 26.2(a) (RS [32]) obscures the effect of that clause which, as is common ground, creates no contractual right or obligation in the Council. Contrary to the assertion that the Council is "drawn directly into the contractual mechanisms established by the leases" (RS [32]), the only mechanism by which the Lease contemplates that the Council may be given enforceable rights vis-à-vis HIAPL is by way of direct agreement as between those two entities, the possibility of which is expressly contemplated in cl 26.2(a).

8. The Council's position does not bear the analogy with the position of the plaintiffs in *Edwards v Santos Ltd* (2011) 242 CLR 421 (***Edwards***) that is claimed by the

Commonwealth at RS [32]. The declarations sought in *Edwards* went to the preconditions for a grant of a petroleum lease and the invalidity of any such grant under s 40 of the *Petroleum Act 1923* (Qld): at [23]. The case did not concern a declaration as to the application of contractual, or indeed any private law, rights but was one of standing to seek a declaration going to matters of public law. Justice Heydon identified that one way for the plaintiffs to establish standing in that context was to "attack the claim by the petroleum defendants of a right which interfered with the plaintiffs' interests" (at [34]). HIAPL does not contend that *Edwards* was wrong (cf RS [28]). Rather, it contends that the present case concerns an entirely different question: see AS [40].

9. In support of the limitation imposed by the Full Court upon the privity doctrine, the Commonwealth emphasises that "varying formulations have been used" to express the ambit of that doctrine (RS [37]) – a circumstance explored in some detail at AS [17]-[19]. Critically, however, the broader statements of the rule are apt to capture those formulations that are comparatively narrow in their ambit; but the converse is not true. That is the vice in the Full Court's novel finding that privity "only" precludes a third party from suing "on" or "upon" a contract, to the exclusion of the broader expressions of the operation of that rule, and that it does not apply where the third party seeks declaratory relief (cf. RS [35]). Contrary to the Commonwealth's assertion at RS [37] that HIAPL "never clearly identifies the alleged error" in the Full Court's reasoning with respect to privity, the relevant errors are exposed in clear terms at AS [16] and [20] (read with AS [21], [23]-[26], [29]-[30]).

Declaratory relief

10. The Commonwealth accepts that if the Council succeeds in obtaining the declaratory relief sought and subsequently takes steps to enforce the declarations granted, that "*would* fall foul of the privity doctrine" (RS [40]; emphasis in original). However, it asserts that the Council would not be entitled to enforce any declaratory relief granted in its favour in this proceeding because the Council has no relevant existing right that is capable of enforcement: RS [39]-[41]. That submission is misconceived. Contrary to its premise, an applicant's entitlement to seek coercive relief in order to secure compliance with a declaration of right is not conditioned by the existence of any enforceable right independent of the declaration itself. Such a proposition effects, without justification, a significant qualification to the key authorities on the consequences of declaratory relief.

11. The finding of Isaacs J (Knox CJ and Starke J agreeing) in *Royal Insurance Co Ltd v Mylius* (1926) 38 CLR 477 was that on a proper application a court may enforce *every* order for declaration of right if the defendant acts contrary to it (at 497). To similar effect, Barrett

AJA (with whom Meagher and Gleeson JJA agreed) found in unqualified terms in *EB 9 & 10 Pty Ltd v The Owners Strata Plan 934* (2018) 98 NSWLR 889 (***EB***) that where a binding declaration of right alone is made, the successful applicant is entitled to further invoke the court's assistance in compelling the defendant to fulfil its terms (at [39]). His Honour's careful exposition of the inherently coercive capacity of declaratory relief was not conditioned by any requirement of the kind posited by the Commonwealth; nor was it expressed by reference to the particular circumstances of the appellant but rather, at the level of principle. The qualification propounded by the Commonwealth should be rejected.

12. The example offered at RS [40] is of little assistance in determining whether the Full Court wrongly assumed that the relief sought by the Council could be enforced. Plainly, if the subject of a declaration is confined to the unlawfulness of past conduct which is *not* ongoing and inflicted *no* loss, then no occasion for seeking coercive relief to enforce that declaration will arise. That is because, *ex hypothesi*, the defendant will not have failed to comply with its terms. Recognition that such a scenario might arise says nothing about whether a defendant who does not abide by the terms of a declaration can be compelled to do so through subsequent executory relief. To that question, the authorities unanimously provide an affirmative answer (AS [23]). For the reasons at AS [21]-[24] the Full Court erred in failing to acknowledge those consequences of the Council's success in this proceeding.

Matter and justiciability

13. The Commonwealth relies upon *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 in support of twin submissions that the Council need not assert or claim some right, duty or liability in order for a "matter" to arise in the present proceeding, and that the contracting parties need not be in dispute: RS [12], [19]. In *Truth About Motorways*, each of Gummow J (at [105] and [122]) and Hayne J (at [183]) confirmed that there is no "universal" requirement for reciprocity or mutuality of right and liability between opposing parties before a "matter" can arise, in language that does not foreclose the existence of such a requirement in a particular setting; the joint judgment of Gaudron and Gummow JJ in *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at [67] is cast in similar terms. However, in *Truth About Motorways* Gummow J stated that there is no "fixed and constitutionally mandated content" of standing as an element in the term "matter" across the spectrum of Ch III (at [122]). His Honour's ultimate conclusion was expressed by reference to the particular character of the proceeding, namely one in which Parliament had provided "a remedy for the enforcement of its laws" (at [122]). That illustrates the

importance of considering questions of standing and "matter" by reference to the character of the particular proceeding before the Court. So too does the judgment of Gaudron J in *Truth About Motorways*. Having found that the constitutional meaning of matter does not *dictate* that the person who initiates proceedings have a direct or special interest, her Honour also identified a claim for a binding adjudication of private rights other than at the suit of a person who claimed their right was infringed as an example of a case where, absent standing, there was no justiciable controversy (at [45]-[46]).

14. Save for that express consideration by Gaudron J, neither decision involved any finding as to standing in a claim for declaratory relief as to the construction of a contract: see AS [59]-[60]. Indeed, the rejection by Gummow J in *Truth About Motorways* of the notion that standing has any fixed content stands against the Commonwealth's submission. The contention that an applicant's interest in the relevant controversy "need not involve the same right, duty or liability as is the subject of the controversy" (RS [12]) is contrary to established authority[2] and should be rejected. Similarly, the Commonwealth's reliance upon *Employers Reinsurance Corporation v Ashmere Cove Pty Ltd* (2008) 166 FCR 398 at RS [13] is misplaced. The conclusion relied on was dependent upon the Court's finding that there had been a controversy between the insured and the insurers which formed part of a single controversy arising out of the investors' claims against the insured (at [51]).

15. The Commonwealth denies that any distinction ought to be drawn between public rights and private contractual rights for the purpose of determining whether there is a "matter" (RS [16], [19]). That denial cannot be reconciled with the observations set out at [13] above. The suggestion that the subject of the Council's claim in this proceeding involves anything other than private law rights (RS [18]) is in any event unconvincing. The only rights put in issue in the Council's claim are private law rights under an existing contract (FC [142] AB 144). The application for declaratory relief raises no questions as to the ambit or existence of public duties and obligations.[3]

Dated: 4 June 2021

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[2] *Abebe v The Commonwealth* (1999) 197 CLR 510 at [31]-[32] (Gleeson and McHugh JJ).
[3] See *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th ed, 2015) at [19-210].