



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 27F - First Respondent's outline of oral argument
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

H2/2021

BETWEEN:

HOBART INTERNATIONAL AIRPORT PTY LTD
Appellant

and

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CLARENCE CITY COUNCIL
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

H3/2021

BETWEEN:

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

and

NORTHERN MIDLANDS COUNCIL
First Respondent

THE COMMONWEALTH OF AUSTRALIA
Second Respondent

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**OUTLINE OF ORAL SUBMISSIONS OF THE FIRST
RESPONDENT IN EACH APPEAL**

Part I: Certification

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

Part II: Propositions to be advanced in oral argument

1. The Councils adopt the oral submissions of the Commonwealth relating to the justiciable controversy and matter requirements and do not repeat their written case.

Ground 1 of the appeal

2. An applicant with a cause of action ordinarily has standing to seek declaratory relief in private law proceedings where questions of standing and cause of action overlap: *Truth About Motorways* (Tab 26) at [92].
- 10 3. It does not follow that lack of a cause of action is fatal: FC [91], [140], [150]; *Ashmere Cove* (Tab 33) at [32]; *CGU* (Tab 13) at [26].
4. Primarily, the privity principle operates within the confines of the law of contract to deny to a non-party a cause of action: *Mason* (Tab 44) p.88; *Trident* (Tab 25) at 134, 136, 143, 144; FC at [77].
5. In cases where the claim does not depend on a cause of action, the principle operates differently: FC at [91-93]. It is relevant to the sufficient interest and intermeddling questions (if the constitutional matter requirement is met): FC [129], [144], [147-148]; *Aussie Airlines* (Tab 30) at 415, B-G. The privity principle does not necessarily deny standing where an applicant is not an outsider: *CGU* (Tab 13) at [96].
- 20 6. The appellants contend that privity operates as an exclusionary principle in these cases to deny declaratory relief to “validate an entitlement” to contractual benefit or which touches upon “rights in relation to a contract”: AS [19]. But as the FC reasoned, it is necessary to inquire more closely to comprehend the true operation of the principle: FC [80]; *Coulls* (Tab 14) at 494.
7. The authorities considered by the FC support its central conclusion at [89-90]: *Coulls* (Tab 14) at 478, 494, 495; *Trident* (Tab 25) at 115, 127, 128, 142, 155 and 163; *Wilson* (Tab 27) at 67. The Councils do not assert a cause of action on or upon the contracts to enforce the benefit that is payable.
- 30 8. The appellants’ arguments are not supported by *EB9&10 Pty Ltd* (Tab 32) or *Royal Insurance* (Tab 24). Each is an example of cases where an applicant could assert an entitlement to coercive relief. Neither stands for the general proposition that a grant of

declaratory relief confers an entitlement to coercive relief and *Smethurst v AFP* (Tab 42) at [76] is firmly against it.

9. There is no doubt that the FC correctly understood the difference between declaratory and executory judgements at [90-92]; *Woolf and Woolf* (Tab 46) at [1.02]. Nowhere do the appellants explain what consequential coercive relief in these cases would look like. If sought, that will be the proper time to apply the privity principle. The PJ did not draw that distinction.
10. Contrary to the reply submission at [14], *CGU* (Tab 13) is a case where the non-party applicant was found entitled to pursue declaratory relief even though the contracting parties were not disputants. As the plurality explained at [67], the anterior claim for declaratory relief was not contrary to the privity principle. Similarly, Nettle J at [96], [99], [102]. *Milebush* (Tab 37) is another example where the parties were not in dispute, albeit relief was refused on discretionary grounds.
11. This is not to say that an absence of privity is irrelevant on the real and sufficient interest question: FC [129], but it is certainly correct to conclude that the seeking of declaratory relief by a non-party (who is a participant in the contractual mechanism) does not necessarily run counter to the doctrine: FC [92].
12. Rather, the correct inquiry requires that attention must focus on the nature and quality of the Councils' interests: FC [144], [148 -153], consistently with the analysis in *Aussie Airlines* (Tab 30) at 415-416 and that of Nettle J in *CGU* (Tab 13) at [92-96].

Ground 2 of the appeal

13. *Meadows Indemnity Co* (Tab 36) is not authority for the proposition that standing to seek declaratory relief is limited to the parties to the contract, save for exceptional circumstances: FC [129]. *Aussie Airlines* (Tab 30) establishes that a non-party, with a real commercial interest, has standing to seek declaratory relief as to the meaning of a contract for the reasons explained by Lockhart J at 415-416. That reasoning was approved of by Nettle J in *CGU* (Tab 13) at [102] and by Heydon J in *Edwards v Santos* (Tab 16) at [38]. *Ashmere Cove* (Tab 33) at [50-52] is to like effect.
14. The Councils are not outsiders within the meaning of the separate reasons of Nettle J in *CGU* at [96] for the reasons explained by the FC at [152-153] and [177-183].
15. In any event, the position in the United Kingdom has 'moved on' since *Meadows: Rolls-Royce PLC v Unite the Union* (Tab 39) at [150], *Milebush* (Tab 37) at [86-88].

*Notices of contention***Exceptional circumstances – Ground 5 of the Councils’ appeals to the FC (CB 54-55; 62-63)**

16. If privity is the correct prism through which to assess the Councils’ standing contrary to the FC at [94], there are exceptions: *CGU Nettle J* at [96]. The PJ erred at [57-59] in confining the relevant circumstances to the absence of a source of right outside of the contract and the agreement as between the parties to the contract that its terms had been complied with.

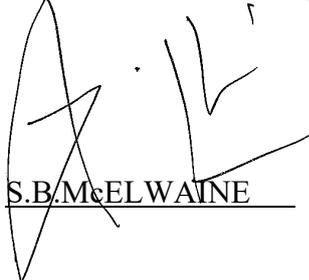
10 17. Neither *Meadows* (Tab 36) nor *CGU* (Tab 13) compel the conclusion that ‘exceptional circumstances’ are to be so confined.

18. All of the circumstances as set out by the FC at [177-183] establish that these cases are ‘exceptional’.

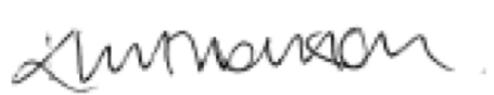
Confining privity

20 19. The appellants’ formulation of the privity principle cuts across the reasoning and the outcome in *CGU, Aussie Airlines* and the autonomy of the contracting parties to invite participation by a non-party in an aspect of their bargain. The principle should be stated no wider than the formulation of Barwick CJ in *Coulls*, which is not in conflict with the justification for the privity rule: *Mason* (Tab 44) at 90, 92; *Furmston and Tolhurst* (Tab 48) at [2.32].

DATED: 11 October 2021



S.B. McELWAIN



KATE CUTHBERTSON