Federal Court of Australia

 AAL Aviation Limited v Perth Airport Pty Ltd [2022] FCA 437

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| File number(s): | NSD 1351 of 2021 |
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| Judgment of: | **JAGOT J** |
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| Date of judgment: | 27 April 2022 |
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| Catchwords: | **HIGH COURT AND FEDERAL COURT —** jurisdiction  **—** whether dispute over lease terms engaged federal jurisdiction **—** where parties’ rights and obligations under lease arise under Commonwealth Actsand contested interpretation of those rights give rise to justiciable controversy **—** Federal Court has original jurisdiction **—** costs reserved  |
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| Legislation: | *Airports (Business Concessions) Act 1959* (Cth)*Airports (Transitional) Act 1997* (Cth)*Airports Act 1996* (Cth)*Australian National Airlines Act 1945* (Cth)*Constitution* Ch III, s 76(ii) *Federal Airports Corporation Act 1986* (Cth)*Judiciary Act 1903* (Cth) ss 39B(1A)(c), 78B |
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| Cases cited: | *CGU Insurance Ltd v Blakeley* [2016] HCA 2; (2016) 259 CLR 339*Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367*Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5; (2022) 96 ALJR 234*National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543; (2019) 377 ALR 627*Rana v Google Inc* [2017] FCAFC 156; (2017) 254 FCR 1 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Solicitor for the Respondent: | Allens  |
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ORDERS

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|  | NSD 1351 of 2021 |
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| BETWEEN: | AAL AVIATION LIMITED Applicant |
| AND: | PERTH AIRPORT PTY LTD Respondent |

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| order made by: | JAGOT J |
| DATE OF ORDER: | 27 APRIL 2022  |

THE COURT ORDERS THAT:

1. Costs of the first case management hearing and the issue about the jurisdiction of the Court raised by the respondent be reserved.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. In this proceeding the applicant, AAL Aviation Pty Ltd (**AAL**), seeks declarations relating to the proper construction of a “Domestic Terminal Lease” at the Perth Airport dated 31 December 1987 (the **DTL**) between the applicant and the respondent, Perth Airport Pty Ltd (**PAPL**), and the effect of certain other agreements on the operation of the DTL.
2. As framed in AAL’s statement of claim, the dispute between the parties concerns PAPL’s obligation under cl 8.10(a) of the DTL, on the Designated Date, to acquire or procure that some other person acquire the “Lessee’s Facilities then existing…at their then fair market value as determined as at the Designated Date” either by agreement or in accordance with a specified dispute resolution process. The Designated Date was 30 December 2018. PAPL acquired the Lessee’s facilities as required on the Designated Date. However, AAL and PAPL were not able to agree the fair market value of the Lessee’s Facilities then existing as determined at the Designated Date within the prescribed time frame. Clause 8.10(c) of the DTL identifies a process which involves the appointment of a valuer by each party and, failing a determination by them, the appointment of an umpire who is also a valuer, the valuers making submissions to the umpire, and the determination of the fair market valuer by the umpire.
3. In accordance with this process, the parties appointed valuers who could not agree a determination of the fair market value as determined at the Designated Date of the Lessee’s Facilities then existing. Accordingly, an umpire was then appointed and the valuers made submissions to the umpire. The submission from PAPL’s valuer determined a fair market value on the Designated Date on the basis of PAPL’s proposal to cease using the lease area as a domestic terminal by 31 December 2025, said to be a proposal to which AAL’s parent company, **Qantas** Airways Limited, has agreed. The submission from AAL’s valuer determined a fair market value on the Designated Date on the basis of the continuation of the current use of the lease areas as a domestic terminal in perpetuity. Faced with these competing positions, the umpire notified the parties on 24 June 2021 to the effect that he was not able to resolve these differences in legal opinion between them. As a result, negotiations between the parties stalled. PAPL has not paid any money to AAL for the acquisition of the Lessee’s Facilities, but has been charging Qantas and its subsidiaries rent for the use of that area as a domestic terminal.
4. At the first case management hearing on 25 February 2022, PAPL identified that the issue of the jurisdiction of this Court was “not an entirely straightforward question”. PAPL submitted that as the Court had to be satisfied it had jurisdiction, the parties should make submissions dealing with this issue as a preliminary matter. PAPL also indicated that it considered the proposed declarations inappropriate to be made, but accepted that its positon in that regard needed to be properly articulated through a cross-claim or some other form of application.
5. As a result I made orders on 2 March 2022 pursuant to which the parties exchanged written submissions in chief and reply about the preliminary issue of jurisdiction. In the week before the scheduled hearing the parties also indicated that, given the detail in those written submissions, they agreed to me determining the jurisdictional issue on the papers. AAL also served notices on the Attorneys-General as required by s 78B of the *Judiciary Act 1903* (Cth) on 23 March 2022. No Attorney-General has intervened at this stage.
6. There was no disagreement between the parties about the relevant principles. They acknowledged that they reached an impasse about the payment that PAPL had to make to AAL for the acquisition of the Lessee’s Facilities. They accepted that the relevant question was whether the dispute between them involves a “matter” for the purposes of Ch III of the *Constitution* capable of determination by a court exercising the judicial power of the Commonwealth: *Hobart International Airport Pty Ltd v* ***Clarence City Council*** [2022] HCA 5; (2022) 96 ALJR 234 at [25]. They agreed that a “matter” has two elements: “the subject matter itself as defined by reference to the heads of jurisdiction set out in Chapter III [of the *Constitution*], and the concrete or adequate adversarial nature of the dispute sufficient to give rise to a justiciable controversy”: *Clarence City Council* at [26] citing *CGU Insurance Ltd v* ***Blakeley*** [2016] HCA 2; (2016) 259 CLR 339 at 351 [27], quoting Burmester, “Limitations on Federal Adjudication”, in Opeskin and Wheeler (eds), *The Australian Federal Judicial System* (2000) 227 at p 232.
7. AAL’s case is that as:
8. the DTL was originally granted under the *Airports (Business Concessions) Act 1959* (Cth);
9. AAL’s predecessors then entered into the lease by operation of the *Australian National Airlines Act 1945* (Cth); and
10. PAPL is the successor in title to the Commonwealth as lessor under the DTL by operation of the *Federal Airports Corporation Act 1986* (Cth) and then the *Airports (Transitional) Act 1997* (Cth) and a lease between the Commonwealth and PAPL dated 1 July 1997, it follows that AAL’s claims for declaratory relief as to its rights (and PAPL’s obligation) are:
	1. under a lease created under a Commonwealth Act so that, as in *Clarence City Council* as at [27] and [50] respectively “the claims “aris[e] under” a Commonwealth law within s 76(ii) of the *Constitution*” and the lease imposing the obligation “came into existence as an incident of the exercise of a capacity …conferred on the Commonwealth by a law made by the Parliament”; and
	2. dependent on another Commonwealth Act, the *Airports (Transitional) Act 1997* (Cth), by which PAPL succeeded to the legal rights and obligations of the Commonwealth.
11. According to AAL, the requirement for subject matter jurisdiction is therefore satisfied.
12. AAL further maintains that there is a justiciable controversy about the proper meaning of “fair market value” of the Lessee’s Facilities at the Designated Date which determines AAL’s entitlement to a sum of money. Resolution of the dispute in its favour, accordingly, would advance its interests, involves its “real interests”, and would determine as between AAL and PAPL and their successors in title their legal obligations and rights under the DTL, as referred to in *Clarence City Council* at [40], [43], [48]–[49] and [52]–[53], *Blakeley* at [26] and [67]–[70], and *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543; (2019) 377 ALR 627 at [109]–[110] and [120].
13. PAPL challenges these conclusions on a first basis as follows:
14. if AAL is correct that the only issue is the proper construction of the DTL as a lease entered into under the *Airports (Business Concessions) Act 1959* (Cth), then it is also correct that the dispute involves a matter arising under federal law;
15. however, events subsequent to the grant of the DTL may mean that the DTL was surrendered and a new lease automatically vested in the Federal Airports Corporation by virtue of the *Federal Airports Corporation Act 1986* (Cth); and
16. PAPL accordingly “queries whether this is a sufficient link to a law made by the Commonwealth Parliament”.
17. PAPL challenges these conclusions on a second basis as follows:
18. if AAL is correct that PAPL succeeded to the rights and obligations of the Commonwealth under the *Airports (Transitional) Act 1997* (Cth), then it is also correct that the dispute involves a matter arising under federal law;
19. however, events subsequent to the *Airports (Transitional) Act 1997* (Cth) may mean that PAPL granted a sublease to AAL so the question whether the lease, being the subject of the dispute, owes its existence to the *Airports (Transitional) Act 1997* (Cth) or depends on that Act for its enforcement is “not clear cut”;
20. “it is not immediately clear how a sublease… could be said to owe its existence directly to either enactment [the *Federal Airports Corporation Act 1986* (Cth) or the *Airports (Transitional) Act 1997* (Cth)], or to depend on either of them for its enforcement”; and
21. accordingly, “the Court should consider whether it has jurisdiction on the basis that the sublease, and the rights or obligations arising under it that are relevant to the controversy in this proceeding, may be a creation of the general law only”.
22. AAL submitted in response that PAPL’s submissions were wrong in law and fact insofar as they depended on the concept of a new lease or a sublease having been granted, and that in any event:
23. if PAPL’s first basis of challenge is correct, it means only that the relevant Commonwealth Act is the *Federal Airports Corporation Act 1986* (Cth) and not the *Airports (Business Concessions) Act 1959* (Cth), but the consequence is the same; and
24. if PAPL’s second basis of challenge is correct, PAPL became head lessee only by operation of the *Airports (Transitional) Act 1997* (Cth) and thus its power to grant a sublease depends on that Act and the *Airports Act 1996* (Cth).
25. It is unnecessary to resolve the competing issues of law and fact between the parties. It is sufficient for me to be satisfied that this Court has original jurisdiction as there is a matter arising under laws of the Commonwealth within the meaning of s 39B(1A)(c) of the *Judiciary Act 1903* (Cth). This is so both because the dispute between the parties encompasses the dispute as to the effect of the relevant Commonwealth laws on the DTL and the subsequent relevant grants and contracts. That is, the dispute includes the claims as to whether the sources of the relevant rights are the Commonwealth laws on which AAL relies or not (and not merely the interpretation of those laws).
26. Further, even if PAPL is correct, it would appear that the relevant source of power for the existence and enforcement of the relevant grants after the DTL (if properly characterised as such) is or includes Commonwealth laws other than those on which AAL relies. Either way, the circumstances are sufficient for the matter to arise under Commonwealth law within s 39B(1A)(c) of the *Judiciary Act 1903* (Cth): *Felton v Mulligan* [1971] HCA 39; (1971) 124 CLR 367 at 374. This is because, either way, the “the subject matter of the controversy owes its existence to Commonwealth legislation”: *Rana v Google Inc* [2017] FCAFC 156; (2017) 254 FCR 1 at [18]; see also *National Australia Bank Limited v Nautilus Insurance Pte Ltd (No 2)* [2019] FCA 1543; (2019) 377 ALR 627 at [81], [84].
27. AAL submitted further that PAPL’s proposition that it was not challenging this Court’s jurisdiction was untenable. By raising the issue, PAPL required the Court to determine the issue of jurisdiction. I agree. AAL also submitted that PAPL’s jurisdictional argument should not have been raised as PAPL’s argument could not be sustained given the reasoning in *Clarence City Council*. Accordingly, AAL sought costs on an indemnity basis of the first case management hearing and the determination of the issue about jurisdiction. For that purpose AAL also relied on a Calderbank letter.
28. PAPL has not had an opportunity to be heard about costs. Accordingly, while the basis for PAPL’s raising of the jurisdictional issue is not apparent to me, I propose to give PAPL an opportunity to be heard before resolving the costs issue.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot. |

Associate:

Dated: 27 April 2022