

**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**



No A 29 of 2015

**ON APPEAL FROM THE FULL COURT OF
THE SUPREME COURT OF SOUTH AUSTRALIA**

BETWEEN

**ACQUISTA INVESTMENTS PTY
LTD**

First Appellant

**VEOLIA ENVIRONMENTAL
SERVICES (AUST) PTY LTD**

Second Appellant

and

**THE URBAN RENEWAL
AUTHORITY (a statutory
corporation)**

First Respondent

**THE STATE OF SOUTH
AUSTRALIA**

Second Respondent

**ADELAIDE CAPITAL
PARTNERS PTY LTD**

Third Respondent

APPELLANTS' REPLY SUBMISSIONS

Filed on behalf of the Appellants
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Part I: Certification

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

Part II: Reply submissions

Amenability to review (Authority's submissions at [19]-[32]; ACP's submissions at [29]-[35])

2 The Authority accepts at [30] that there is a limit on the Authority's contracting power such that the power could not be exercised for an improper purpose or in bad faith. Presumably the Authority thereby accepts that any exercise of the power in such a manner would be amenable to review.

10 3 However, the Authority argues that the natural person power (sec 8(3)(b) of the Act) and the general power to contract (sec 21 of the Act) operate so that (a) there was no limit on the Authority's power to enter the deed which required the Authority to exercise its power in a legally reasonable manner and (b) the validity of the deed was not affected by an absence of authority or the non-compliance with the Authority's own delegations made under sec 19 of the Act.

20 4 The Authority then argues that as a consequence of those two propositions the decision to enter the deed with ACP is not amenable to review. In this regard, at [31] of the Authority's submissions it is said that the decision is not open to review "by virtue of the breadth of the contracting power, properly constructed, that is conferred on the [Authority]". That submission only serves to point up why the matters raised by the appellants are amenable to review. They involve the proper interpretation of the Authority's incorporating statute in the context of the sale of significant public land.

5 Further, stripped back to its essentials, the logical conclusion of the Authority's submission is that the general powers in sec 8(3)(b) and sec 21 of the Act sanction the Authority making a decision to contract that is unreasonable, capricious or irrational or in the absence of authority and then further those general powers operate in a superadded manner to sterilise that decision from review.

30 6 That would be a surprising result to arise from two general powers in the statutory scheme that do not seek to remove the requirement of reasonableness or the requirement to comply with the delegation power. *Generalia non derogant specialibus*.

7 The submission also overlooks the general principle that in the absence of an express abrogation the requirement of reasonableness would be implied or presumed: see *Minister for Immigration v Li* (2013) 249 CLR 332 at [65]-[72], [92].

8 Moreover, there is no part of the Act which seeks to exclude the court from reviewing the Authority's decision. Indeed, had a privative clause been included in the Act to prevent such scrutiny it would have constituted a breach of the principle underlying *Kirk's case*: see *Kirk v Industrial Court (NSW)* (2009) 239 CLR 531.

40 9 ACP contends at [31] and [33] that the decision by the Authority is not amenable to review because even if the decision was legally unreasonable or was made in the absence of authority in breach of the delegation, the deed is not invalid (see an argument to a similar effect in Authority's submissions at [33]ff). ACP's argument is not properly directed to the

question of amenability. At best it is purporting to address a *Redmore* question: *Australian Broadcasting Corporation v Redmore Pty Ltd* (1989) 166 CLR 454. But such *Redmore* considerations do not immunise the decision from review.

10 In any event the respondents' contention is wrong. A decision by the Authority that is legally unreasonable or is made without authority is invalid and cannot give rise to a legally binding contract: see in the context of reasonableness *Attorney General (NSW) v Quin* (1989-1990) 170 CLR 1 at 36; see also DeBelle AJ at {FC [335], [342]}.

The Property Delegation (Authority's submissions at [61]-[69]; ACP's submissions at [36]-[44])

10 **11** It is common ground that Cabinet was the decision maker and that neither the board of the Authority, the Chief Executive nor any other officer of the Authority made a decision to enter the deed. Those common facts lead to the failure to comply with the Property Delegation.

12 The Authority's construction of the Property Delegation leads to the inconceivable result that (a) there is no requirement for a decision of any kind by any organ of the Authority before the Authority enters into the deed and (b) the Chief Executive's role is reduced to a mere functionary whose sole purpose is to sign the deed.

20 **13** Additionally, according to the Authority, the Minister's approval is said to be inferred from the fact that he signed the Cabinet submission which was apparently provided to Cabinet. The relevant minute recorded that Cabinet approved the deed. Cabinet is obviously a body separate and distinct from the Minister. There was no minute of the Minister's approval and he did not give evidence at trial {FC [298]}. Whether the Minister was at the relevant Cabinet meeting was not the subject of any evidence. It was within the power of the Authority to call evidence to establish the fact of the Minister's approval. It failed to do so.

30 **14** Contrary to the submission advanced by ACP at [44], the appellants did not make any relevant concession at trial: cf {FC at [35]; TR [436]}. Indeed at trial the appellants embraced the argument subsequently accepted by DeBelle AJ that the changes to the deed made after the Cabinet approval were so fundamental to the transaction as to render the approval no longer operative {see trial transcript at p 790.28}. Further it cannot be doubted that the appellants' case was always that the Minister did not make any relevant decision (independently of Cabinet).

The Contracting Delegation and Ad – Hoc Delegation (Authority's submissions at [70]-[79])

15 The Authority by paragraph 2 and 3 of its Notice of Contention seeks to justify Cabinet's decision as legally effective by resorting to the alternative Contracting Delegation or the so-called "ad hoc delegation".

16 The Authority's arguments based on the alternative delegations were not addressed by the majority but were correctly rejected by the trial judge {TR [310]-[351], [357]-[372]} and DeBelle AJ {FC [255]-[268], [269]}. The appellants adopt the reasoning of the trial judge and DeBelle AJ on these issues.

40 **17** In summary, the Contracting Delegation had no application or relevance to the disposal of land. Unsurprisingly that subject matter was dealt with by the specific Property Delegation. The so-called "ad-hoc delegation" was not in fact a delegation but was rather

some form of notation by the board which did not purport to delegate the decision making to Cabinet.

Executive Power (Authority's submissions at [80]-[88]; ACP's submissions at [45]-[48])

18 The fact that the Minister for State Development (who was also the Premier) executed the deed does not validate the deed. By failing to comply with the Property Delegation the Authority acted *ultra vires* and the deed is invalid.

19 To the extent that the Authority at [80] – [81] submits that the Premier had power to bind the State across a whole field of ordinary functions of government, the submission completely overlooks the fact that the land the subject of the deed was an asset held by the Authority and not the State.

20 Section 22 of the Act recognises the distinction between title to and control over the land being vested in the Authority and the beneficial interest in the land being vested in the Crown. It was not for the Premier to seek to bind the Authority in relation to the sale of the Authority's asset.

21 Moreover, the statutory scheme by sec 9 enabled the Minister to give a direction to the Authority or by sec 23 with the concurrence of the Treasurer to transfer an asset of the Authority to inter alia the Crown. Neither power was availed upon by the State in the present case and the existence of such powers are contrary to the Authority's contention that the Premier has some form of residual or implied power to lawfully sell the land held by the Authority. The Premier is not the plenipotentiary over the affairs of the statutory authority which is regulated by legislated procedures.

Authority of the Chief Executive and implied ratification (ACP submissions at [89]-[100])

22 ACP advances by paragraph 2.1 of its Notice of Contention that the signing of the deed by the Chief Executive bound the Authority even where there was a failure to comply with the relevant delegation.

23 ACP's contention is not advanced by the Authority. The argument was not addressed by the majority but was rejected by the trial judge {TR [452]-[456]} and Debelle AJ {FC [303]-[310]}.

24 ACP's argument starts from the proposition that the decision to contract was that of the Authority (as distinct from the board of the Authority) and then proceeds to argue that the Chief Executive had the actual, implied or ostensible authority to bind the Authority in contract.

25 The argument was rightly rejected for the reasons expressed by the trial judge and Debelle AJ. Further, the argument fails at the threshold because pursuant to sec 8(2)(b) of the Act the board is the Authority's governing body. By sec 19 of the Act it is the board that is empowered to delegate a function or power conferred on or vested in the board or in the statutory corporation upon authorised persons.

26 As a result of the statutory scheme it is the board that is validly authorised to sell the land or otherwise to delegate that function pursuant to sec 19 of the Act.

27 The statutory scheme does not enable the Chief Executive to bind the Authority in the absence of compliance with the appropriate delegation. There is no persuasive showing of any holding out by the board of the Chief Executive so as to constitute ostensible authority. Further by operation of section 5(1)(a) of the *Public Corporations Act* and sec 8 of the Authority's regulations the statutory indoor management rule in s 39 of the *Public Corporations Act* did not apply to the Authority which adds to conclusion that a failure to comply with the delegation cannot be saved by the mere signing of the deed by the Chief Executive: {TR [607]-[608]}.

10 28 ACP also advances an argument by paragraph 2.2 of its Notice of Contention that the transaction is expressly or impliedly "adopted" by the Authority's continued defence of the proceedings.

29 The argument was not addressed by the majority but was correctly rejected by the trial judge {TR [447]-[451], [582]-[610]} and Debelle AJ {FC [301]-[302]}.

30 As Debelle AJ pointed out {FC [302]} any ratification by the Authority of the unauthorised act of the Chief Executive must be by the board. That statement is consistent with the role of the board as the governing body of the Authority (see s 8(2)(b) of the Act). There was no resolution or act of the board indicating that it had in any way ratified the transaction or approved the deed.

20 31 Further ratification requires clear and unequivocal words or acts: see *Petersen v Moloney* (1951) 84 CLR 91 at 101. Neither the Authority nor the State pleaded ratification. Their conduct of the case was that there was relevant authority. The result of that forensic position implies acceptance of a conclusion that the dealing lacked authority if they failed. Accordingly, it is impossible to conclude clear or unequivocal words or acts of ratification (that is asserting authority retrospectively not withstanding its original absence).

Legal reasonableness (Authority's submissions at [41]- [60]; ACP's submissions at [49]- [84])

30 32 Each of the Authority and ACP wrongly approach the legal reasonableness question as requiring a detailed consideration of the merits of the underlying decision. The statutory mandatory relevant consideration required the decision maker to have regard to sec 11(1) of the *Public Corporations Act* which required the Authority to perform its commercial operations in accordance with prudent commercial principles and use its best endeavours to achieve a level of profit consistent with its functions.

40 33 Plainly when regard is had to the basal fact that significant public land was divested in the absence of any open or transparent process or consideration of an open or transparent process to enable the market to be tested it is impossible to conclude that the decision maker had any regard to the requirements of sec 11(1). This is so even if sec 11(1) allows the decision maker to take into account the fact that the functions of the Authority extend beyond profit making. As Debelle AJ recorded at {FC [370] – [371]} there was a failure by the decision maker to weigh those policy issues against the fundamental question of whether it would be more prudent to accept the offer or more prudent to sell the land by competitive process, a question that had to be considered at the very outset.

34 There was simply no rational or logical explanation for failing to properly or adequately consider testing the market and there was a complete failure to weigh up the risks

of proceeding with the off-market transaction in the absence of having done so: see DeBelle AJ {FC [357], [368]}.

Standing (Authority's submissions at [9]-[18])

10 35 The Authority advances by paragraph 1 of its Notice of Contention an argument that the appellants lacked standing. ACP (which is 50% owned by the appellants' major competitor, Resource-Co) accepts that the appellants have standing. The trial judge {TR [232]-[243]} and DeBelle AJ {FC [230]-[237]} comprehensively addressed the issue of standing. There is no error of fact or principle asserted by the Authority. The appellants plainly have a special interest in the subject matter of the action: see *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 267.

36 The Authority advances overly abstracted arguments including the extraordinary proposition at [16] that the appellants lack standing because there was no evidence that the appellants had established a relevant commercial relationship with a substantial developer to enable it to exploit the commercial opportunity as presented. Of course, that submission fails to acknowledge that Cabinet's decision to proceed with a private off-market land sale (rather than testing the market) meant that the opportunity was not "presented" to the appellants or any other third party.

20 5 February 2016

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