

## Fiduciary obligations in commercial dealings

*John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; (2010) 241 CLR 1; 266 ALR 462

The land at White City, best known as being the site of many tennis competitions involving leading international players, has recently been the subject of a complex dispute concerning various parties' rights to the property.

On 26 May 2010 the High Court, constituted by French CJ, Gummow, Hayne, Heydon and Kieffel JJ, granted two appeals from decisions of the New South Wales Court of Appeal. In so doing, the High Court has provided guidance as to the law surrounding fiduciary relationships alleged to arise between contracting parties.

### The facts

The plaintiff in the case (respondent in the two appeals) was White City Tennis Club Ltd (the club). The club had for many years operated a tennis club on a part of the White City land, pursuant to a series of leases and licences granted by the then owner, New South Wales Tennis Associated Limited (Tennis NSW).

After the Sydney 2000 Olympics, Tennis NSW moved its activities to the newly constructed facilities at Homebush and, accordingly, wanted to sell the White City land. It ultimately chose to do this via public tender.

The club desired to continue its activities at White City after the sale of the land. In an attempt to allow this to occur, on 28 February 2005, it entered into a Memorandum of Understanding with John Alexander's Clubs Pty Limited (JACS), an organisation in the business of developing sites for use by sporting clubs. The MOU was premised on the White City land being purchased by the Trustees of Sydney Grammar School (SGS), which ultimately turned out to be the case.

Relevantly, the MOU provided, in effect, that JACS would seek to obtain an option to purchase part of the land, either from Tennis NSW or from SGS. JACS promised, in effect, that if it succeeded in obtaining an option, it would exercise it on behalf of White City Holdings Limited (WCH) upon WCH simultaneously granting John Alexander's White City Club Pty Ltd (JAWCC) a 99-year lease of the relevant land and entering into an operating agreement. Both WCH and JAWCC were companies to be established by JACS, although neither



entity was ever ultimately formed.

Subsequent to the MOU being entered, three agreements (the White City agreements) were entered into between the club, JACS, SGS and Sydney Maccabi Tennis Club Ltd (Maccabi). Maccabi was another organisation that had been conducting a tennis club on part of the White City land and desired to continue doing so.

Pursuant to each of the White City agreements JACS was granted an option to acquire part of the White City land (the option land). There was no reference in any of the White City agreement options to WCH or to the relevant conditions set out in the MOU option. In each White City agreement the club agreed to surrender its rights in relation to the White City land.

There was no reference in either the first or second White City agreements to the continuation of the MOU. However, the third White City agreement provided that the MOU was terminated to the extent of any inconsistency, and a new clause, to prevail over the option clause in the MOU, was introduced.

Dispute arose between the club and JACS and on 12 April 2006, JACS served on the club a notice of termination of the MOU, on the supposed ground that the club had evinced an intention not to be bound by the MOU.

On 27 June 2007 Poplar Holdings Pty Ltd (Poplar) exercised the option granted to JACS by the third White City agreement, as JACS' nominee. The purchase was financed by Walker Corporation Pty Limited (Walker), with security given in the form of an unregistered

mortgage over the option land and a floating charge over Poplar's assets.

### **First instance proceedings**

On the same day that Poplar exercised the option, the club commenced proceedings in the Supreme Court against JACS and Poplar. The club alleged that the MOU gave rise to a fiduciary duty that JACS had breached and that Poplar held its interest in the option land on a constructive trust for the club. The club also made allegations of equitable fraud, unconscionability and breaches of the *Trade Practices Act 1974* (Cth).

Young CJ in Eq dismissed the club's claim.

### **Court of Appeal proceedings**

The club was successful on appeal. The court ordered Poplar to transfer the option land to the club upon the club paying the price at which Poplar exercised the option.

After the Court of Appeal's decision, Walker applied to be joined to the proceedings and sought an order that the Court of Appeal's declaration of a constructive trust be set aside or alternatively, that it be without prejudice to Walker's interests. Walker's applications were refused.



### **The High Court's decision**

Two appeals were brought to the Court of Appeal's decisions, firstly an appeal by JACS and Poplar, and secondly, an appeal by Walker.

### *The JACS/Poplar appeal*

The High Court found that the MOU did not create a fiduciary relationship between JACS and the club.

The court considered Mason J's dissenting judgment in *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 and appeared to accept that this judgment correctly stated the relevant principles regarding the existence of a fiduciary relationship which does not fall within an established category.

The court agreed with the principle stated by Mason J as follows:

It is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

It was held that where a term to like effect as the suggested fiduciary obligation cannot be implied into the contract, it will be very difficult to superimpose the fiduciary obligation upon that limited contract. In this case the club disavowed any attempt to imply a term into the MOU to the effect of the fiduciary obligation for which it contended.

*The High Court found that the MOU did not create a fiduciary relationship between JACS and the club.*

The club's submission that a fiduciary relationship existed, which the Court of Appeal accepted, rested heavily on the twin ideas of vulnerability and reliance. In determining these issues, the High Court took into account, amongst other matters, that the club consented to the unconditional nature of JACS's option

– it could have used its ability to refuse to surrender the lease to bargain for more precision in the option clause, but it did not; that the club was not relying on representations by JACS or depending on JACS to do anything and that the club was not overborne by some greater strength possessed by JACS.

The court held that ‘the only vulnerability of the club was that which any contracting party has to breach by another. The only reliance was that which any contracting party has on performance by another...’

It was held that there was no justification to convert the contractual relationship between JACS and the club into a fiduciary relationship. If the club was able to establish that JACS had breached a contract it had an ample array of contractual remedies available to it, but it chose not to so protect itself.

#### *The Walker appeal*

In relation to the appeal by Walker, the court found that the Court of Appeal erred in failing to take into account the effect of the declaration of a constructive trust on a third party, namely Walker.

The court agreed with Walker’s submission that, as a general proposition, if a court makes an order affecting a person who should have been joined as a necessary party that person is entitled to have the order set aside.

The court allowed the appeals and set aside the orders of the Court of Appeal.

#### **Conclusion**

This decision raises a question as to the extent to which equitable relief, founded upon an asserted fiduciary obligation, will be available to parties to commercial contracts. The case demonstrates the difficulty such parties will face in seeking to establish a fiduciary relationship. It will only be in the rare case that a party to a commercial dealing will be able to demonstrate vulnerability and reliance such that a fiduciary relationship may be found.

The decision also highlights the importance of all parties affected by the court’s orders being joined as a party to avoid the orders later being set aside.

**By Lyndelle Brown**