Supreme Court
New South Wales

Medium Neutral Citation:	**Application of Willoughby City Council (as manager of the Talus Reserve Trust) & anor [2016] NSWSC 1717**
Hearing dates:	23 November 2015 and 3 February 2016
Date of orders:	05 December 2016
Decision date:	05 December 2016
Jurisdiction:	Equity
Before:	Brereton J
Decision:	The Talus Trust would not be justified in giving its consent to, or seeking and obtaining the Minister's consent to, the proposed sublease of the Talus Reserve to Love 'n Deuce Pty Ltd.
Catchwords:	EQUITY – trusts and trustees – applications to the court for advice and authority – application for judicial advice – by trustee of public trust – where issue subject of public controversy – where no contradictor – where issue in suit in other adversarial litigation – whether appropriate for judicial advice – held, inappropriate REAL PROPERTY – crown lands – New South Wales – crown reserves – reserve for public recreation – whether demise of reserve to private club consistent with public recreation – held, it is not – secondary interests – whether opinion that such demise not materially harmful to use for reserved purpose reasonably open – held, it was not – whether grant which dominates or excludes reserved purpose is a secondary interest – held, it is not – subleases – whether lessee of crown reserve can grant sublease – held, it can so long as use under sublease is for reserved purpose or not materially harmful to use for reserved purpose.
Legislation Cited:	(CTH) Corporations Act 2001, s 601FC(2) (NSW) Crown Lands Consolidation Act 1913, s 28, s 37M, s 37P

(NSW) Crown Lands and Other Acts (Reserves) Amendment Act 1974
(NSW) Crown Lands (Continued Tenures) Act 1989
(NSW) Crown Lands Act 1989, s 6, s 10, s 11, s 34AA, s 44, s 44AA, s 92, s 95, s 97A, s 98, s 98A, s 100, s 102, s 102B, s 103, s 186, Schedule 8, cl 1, cl 2, cl 4, cl 5, cl 59
(NSW) Crown Lands Amendment (Multiple Land Use) Act 2013
(NSW) Trustee Act 1925, s 63

Cases Cited:

Astarra Asset Management Pty Ltd (in liq), In the matter of Purchas as Liquidator of [2011] NSWSC 91
Attorney-General v Cooma Municipal Council (1963) 63 SR(NSW) 287; (1962) 8 LGRA 111
Auspac Corporate Managers Pty Ltd v J Noble Pty Ltd [2003] NSWSC 548
Australian Pipeline Limited (2006) 60 ACSR 625
Bathurst CC v PWC Property Pty Limited (1998) 195 CLR 566
Brush Park Bowling Club Limited v Ryde Municipal Council (1970) 19 LGRA 380
Chow Cho-Poon, Re Estate late [2013] NSWSC 844
Council of the Municipality of Randwick v Rutledge (1959) 102 CLR 54
Cudgen Rutile (No 2) Pty Ltd v Chalk [1975] AC 520
Friends of Pryor Park Incorporated v Ryde City Council (1996) 91 LGERA 302
Harrison v Mills [1976] 1 NSWLR 42
International Art Holdings Pty Ltd (admin apptd), In the matter of; International Art Holdings Pty Ltd (admin apptd) & ors v Adams & ors [2011] NSWSC 164
Lenyco Pty Ltd, Application of [2010] NSWSC 1094
Lenyco Pty Ltd; In the matter of the Daquino Family Trust [2009] NSWSC 846
Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand [2008] HCA 42; (2008) 237 CLR 66
MF Global Australia Ltd (in liq), In the matter of [2012] NSWSC 994
Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council [2009] NSWCA 138
Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim) (2012) 84 NSWLR 219; [2012] NSWCA 358
North Sydney Council, Re (1997) 96 LGERA 227

	Seaton v Mosman Municipal Council (1998) 98 LGERA 81 St Alder v Waverley Local Council [2010] NSWCA 22; (2010) 172 LGERA 147 State of New South Wales v Bardolph (1934) 52 CLR 455 Storey v Council of the Municipality of North Sydney (1970) 123 CLR 574 Swan Yacht Club Inc v Town of East Fremantle (2005) 30 WAR 193; [2005] WASCA 99 Uncle's Joint Pty Ltd, Application of [2014] NSWSC 321 Waverley Municipal Council v Attorney General (1979) 40 LGRA 419
Category:	Principal judgment
Parties:	Willoughby City Council (as manager of the Talus Reserve Trust) (first plaintiff) Talus Street Reserve Trust (second plaintiff) Minister for Crown Lands (first intervener) Jaques Morschel Owens, Michael Scott Berneschi, Harriet Ingrid Owens, Madeleine Rose Owens & Desley Jane Creedy (second interveners)
Representation:	Counsel: B A Coles QC w A C Harding (plaintiffs) T Wong (first intervener) J B Owens (solicitor) (second interveners) Solicitors: Pikes & Verekers (plaintiffs) Crown Solicitor’s Office (first intervener) J B Owens (second interveners)
File Number(s):	2015/046210

JUDGMENT

1 The Talus Reserve (being Lot 7304 in DP1142941) – a “reserve” within the meaning of (NSW) *Crown Lands Act 1989* (CLA89)*,* Part 5, of which the registered proprietor is the State of New South Wales – comprises about three and a half acres of land at Naremburn in the local government area of Willoughby. [1] It was reserved for public recreation by notice published in the Government Gazette of 16 September 1949. The second plaintiff Talus Street (R73306) Reserve Trust (“the Talus Trust”) is a corporation taken to be constituted under CLA89 Part 5 as the trustee of the Talus Reserve. [2] The first plaintiff Willoughby City Council is responsible for managing the affairs of the Talus Trust. [3]

2

Since 1978, the Talus Reserve – on which are situated eight tennis courts, a clubhouse and a car park – has been leased to private interests which organise and conduct sporting (tennis) activities. The most recent lease, dated 6 December 2000, was between the Talus Trust as lessor and Northern Suburbs Tennis Club Limited ("NSTC") as lessee ("the 2000 Lease"). That lease, to which the Minister administering the Crown Lands Act consented, will expire in April 2018. On 18 July 2001, NSTC – with the consent of the Minister – assigned its interest as lessee to Northern Suburbs Tennis Association Inc ("NSTA"), an incorporated association, the objects of which include organising and promoting tennis within its boundaries on the North Shore of Sydney.

3 By a series of "management agreements" made in 1992, 2005 and most recently in October 2008, NSTC and subsequently NSTA have authorised and permitted Love 'n Deuce Pty Limited ("LnD") to occupy the Talus Reserve – excluding some parts of the clubhouse – whence LnD operates for profit a commercial business which includes conducting tennis programmes, coaching clinics, competitions, school holiday tennis camps, and "Humpty Squad" multisport activities for children. LnD also uses the premises on the Talus Reserve as its headquarters, from which it operates tennis centres and schools elsewhere. None of these management agreements had the prior written consent of the Council, the Talus Trust, or the Minister.

4 Since at least 1998, Humpty Dumpty Foundation Limited has occupied a portion of the clubhouse on the Talus Reserve. Humpty Dumpty is a not-for-profit company that raises funds for the purchase of children's medical equipment used in hospitals and health services.

5 However, the 2000 Lease, and the occupation and use by LnD and Humpty Dumpty, are the subject of controversy. From about July 2011, certain members of the public have contended that the use and occupation of the Talus Reserve by LnD and by Humpty Dumpty, and in particular the generation of profits by LnD, is incompatible with the reservation of the land for public recreation, and thus unlawful. The plaintiffs characterise these as "broadly sourced expressions of concern and criticism of the trustee and its manager in connection with the administration of the trust property or its management". On or about 4 October 2013, Mr J M Owens, Mr Berneschi, Ms H I Owens, Ms M R Owens and Ms Creedy ("the 2013 Plaintiffs") commenced proceedings in this Court against the Council and the Talus Trust – and also against the Minister, the Attorney-General, NSTA, LnD and Humpty Dumpty (as well as, initially, various individuals including the then general manager of the Council, a councillor serving on the Council, and the person who then occupied the position of mayor, although the proceedings against them have since been discontinued) – claiming a declaration that the present use and occupation of the Talus Reserve by NSTA, LnD and Humpty Dumpty is unlawful, and that the 2000 Lease is void, for the reasons that (1) a lease of the whole reserve to a private club practically excludes the public from the reserve and

is incompatible with the reserved purpose; and (2) the use of the reserve by LnD to generate private profit which is not applied to a public purpose is not permissible in light of the reserved purpose ("the 2013 Proceedings"). According to the present plaintiffs, the 2013 Plaintiffs and their supporters have repeatedly expressed to the Council in strident terms their strongly held views about the continued use of the reserve by LnD.

6 The statement of claim in the 2013 Proceedings was the subject of extensive amendment, in order to refine the issues. The 2013 Plaintiffs obtained, and provided to the Council, an opinion of Mr Finkelstein QC, to the effect that LnD's use of the Reserve was unlawful, in the sense that it was not permitted by the reservation. [4] The Council wished to consider that opinion, and an order was made in the 2013 Proceedings that the defendants were not required to file any defences until further order.

7 Meanwhile, the Council undertook steps with a view to regularising the use and occupation of the Talus Reserve by LnD and Humpty Dumpty, which resulted in the negotiation of a proposed sublease between NSTA and LnD of substantially the whole of the Talus Reserve, and a proposed licence between LnD and Humpty Dumpty in respect of a portion of the clubhouse. The terms of the proposed sublease and the proposed licence were said to be not objectionable to the Minister at this stage, [5] acceptable to LnD and to Humpty Dumpty, and have been negotiated and closely considered by the Council, which expects that subject to the advice of the Court, the Talus Trust would give its consent to them .

8 By summons filed on 13 February 2015, the Council and the Talus Trust seek the Court's opinion and advice, pursuant to (NSW) *Trustee Act* 1925*,* s 63, as to whether the Talus Trust would be justified in giving its consent to, and seeking and obtaining the Minister's consent to (1) the proposed sublease of substantially the whole of the Talus Reserve to LnD, and (2) the proposed licence of a part of the clubhouse to Humpty Dumpty. A third question in the summons is expressed in terms "whether the answer to the questions (1) and/or (2) is influenced or affected by the principles laid down by the High Court of Australia in *Council of the Municipality of Randwick v Rutledge* (1959) 102 CLR 54"; however it is subsumed in the earlier questions and it is unnecessary to address it separately. Further, Hoever, after the hearing was concluded and judgment was reserved, the Court was informed by the solicitors for the plaintiffs that Humpty Dumpty had vacated the premises it previously occupied at the Talus Reserve and no longer wished to enter into a licence in relation to the Talus Reserve or any part of it, and that the proposed licence to Humpty Dumpty was therefore no longer required. Nonetheless, some aspects of the history concerning Humpty Dumpty are referred to below, because they are of more general relevance.

9

On 24 February 2015, the Minister administering the Crown Lands Act 1989 ("the Minister") was granted leave to be heard in the proceedings On application made at the hearing on behalf of the 2013 Plaintiffs, I granted them leave to be heard without being joined as a party. I did not receive as evidence an affidavit sought to be read on their behalf (though I treated it as a submission), not only because it was largely inadmissible in form and of marginal relevance, but also because in an application for judicial advice the court proceeds on the material placed before it by the applicant trustee, and is not engaged in the resolution of controversial questions of fact. If it ultimately elsewhere transpires that the trustee has been guilty of fraud, wilful concealment or misrepresentation in obtaining the advice, it will not enjoy the protection otherwise afforded by judicial advice. Receipt of evidence on such an application from any source other than the applicant trustee confuses the nature of the application. Accordingly, the below summary of the factual background is based on the statement of facts filed by the plaintiffs in support of the application.

10 Although, pursuant to the leave granted, Mr J B Owens, solicitor, made written and oral submissions which were, as will appear, of considerable assistance to the Court, it must be borne in mind that neither he nor those he represented had been furnished with the summons, the statement of facts, or even the written submissions of the plaintiffs. Although I had the statement of facts read aloud in Court, that was in the course of the hearing and did not include the voluminous documents exhibited to it; and while he heard the plaintiffs' oral submissions, Mr Coles QC – who appeared for them – did not orally speak to significant parts of his written submissions. Mr Owens thus had to respond *ex tempore* to what he heard, for the first time, in Court.

11 Suggestions that it would not be lawful for the plaintiffs to consent involve two main propositions. The first is that there can be no sublease, because there is no valid head lease, by reason that (a) there was no proper decision under CLA89, s 102(1), to grant the lease; and/or (b) the lease is incompatible with the reserved purpose. The second is that there is no power to sublease, at all, or alternatively for a purpose other than the reserved purpose. There is a logically anterior question whether the case is one appropriate for judicial advice under *Trustee Act,* s 63 at all. However, it is preferable, for reasons which will appear, first to address the substantive issues, and then to return to whether s 63 is an appropriate vehicle for their resolution.

The legislative framework

12 The original 16 September 1949 reservation of the Talus Reserve for the purpose of public recreation was made pursuant to (NSW) *Crown Lands Consolidation Act* 1913, s 28. That Act was amended by (NSW) *Crown Lands and Other Acts (Reserves) Amendment Act* 1974*,* inserting into the 1913 Act a new Part 3B, which governed the

management of and dealings with reserved lands. The Talus Reserve thereupon became a “reserve” to which that Part applied, and by gazettal on 10 December 1976, the Council was appointed the trustee of the reserve, for public recreation. [6]

13 The 1913 Act was superseded by CLA89, s 6 of which relevantly provides that Crown land must not be occupied, used, leased, licensed or otherwise dealt with except as authorised by the Act: [7]

> **6 Crown land to be dealt with subject to this Act etc**
>
> Crown land shall not be occupied, used, sold, leased, licensed, dedicated or reserved or otherwise dealt with unless the occupation, use, sale, lease, licence, reservation or dedication or other dealing is authorised by this Act or the *Crown Lands (Continued Tenures) Act 1989*.

14 Section 10 contains a statement of objects, which include making provision for proper assessment, management, and development of Crown land, and the regulation of the conditions under which Crown land is permitted to be occupied, used, leased etc; the reservation or dedication of Crown land for public purposes; and the management and use of reserved or dedicated land. Section 11 contains a statement of principles of Crown land management, which include environmental protection, efficient use of natural resources; encouragement of public use and enjoyment; and, where appropriate, encouragement of multiple use:

> **11 Principles of Crown land management**
>
> For the purposes of this Act, the principles of Crown land management are:
>
> (a) that environmental protection principles be observed in relation to the management and administration of Crown land,
>
> (b) that the natural resources of Crown land (including water, soil, flora, fauna and scenic quality) be conserved wherever possible,
>
> (c) that public use and enjoyment of appropriate Crown land be encouraged,
>
> (d) that, where appropriate, multiple use of Crown land be encouraged,
>
> (e) that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources are sustained in perpetuity, and
>
> (f) that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.

15 CLA89 Part 4, Division 3 deals with leases of Crown land. Section 44 provides:

> 44 Transfer restrictions
>
> (1) The Registrar-General shall, at the request of the Minister, make a recording in the Register to signify:
>
> (a) that a lease specified in the request is held subject to the restriction that the lease may not be:
>
> (i) transferred or sub-leased, or
>
> (ii) dealt with in any other specified manner,
>
> without the consent of the Minister, or
>
> (b) that such a recording has ceased to have effect.

(2) If a recording under subsection (1) has been made in respect of a lease, the Registrar-General may not register under the *Real Property Act 1900* any dealing referred to in the recording if:

(a) the recording still has effect in respect of the lease, and

(b) the consent of the Minister to the dealing has not been given.

16 Section 44AA provides:

44AA Subleases

(1) The holder of a lease (whether granted under this Act or the *Crown Lands (Continued Tenures) Act 1989)* may grant a sublease to enable the carrying out of a filming project, but only with the consent of the Minister and on such terms and conditions as the Minister determines.

(2) Subsection (1) does not require the consent of the Minister if the terms of the lease permit the grant of a sublease without the Minister's consent and use of the land for the purpose of a filming project is authorised by the lease or is generally consistent with the purposes for which the land may be used under the lease.

(3) Consent may be given to the grant of a sublease under subsection (1) that will enable the carrying out of a filming project, and the sublease may be granted, despite any provision to the contrary in the lease.

17 Part 5, Division 3 deals with the reservation of land, and Division 4 provides for the formation of reserve trusts. Section 95 provides for the appointment of a corporation – including a council – to manage reserve trusts. Consequent upon the enactment of CLA 1989*,* the Talus Reserve became a "reserve" within Part 5 of that Act, [8] for the purpose of public recreation. [9] Upon commencement of CLA89 on 1 May 1990, the Talus Trust was taken to have been constituted as trustee of the Talus Reserve, [10] "charged with the care, control and management" of the reserve. [11] As the former trustee, the Council manages the affairs of the Talus Trust. [12] In that capacity it also has, in relation to the reserve, all the functions of a council under the (NSW) *Local Government Act* 1993 in relation to public reserves. [13]

18 By s 100(2), a reserve trust is not capable of granting leases or licences in respect of the whole or any part of the reserve, except in accordance with Part 5. The restrictions on the capacity of a reserve trust to grant a lease or licence (other than a temporary licence) of reserved land are imposed by s 102, the ultimate but not only control being the requirement for the consent of the Minister to the proposal:

102 Consent of Minister to sale, lease, easement, licence or mortgage

(1) A reserve trust may not sell, lease or mortgage land, or grant an easement or a licence (except a temporary licence) in respect of land, comprising the whole or any part of the reserve unless:

(a) the trust has decided that it is desirable to do so on the terms and conditions specified in the decision,

(b) …,

(c) the trust has (in the case of a proposed sale, not earlier than 14 days after the publication of the newspaper notice) applied to the Minister in writing for consent, giving full details of the proposal, and

(d) the Minister has consented in writing to the proposal.

(2) The Minister may not give a consent under subsection (1)(d) to:

(a) a sale,

(b) a lease for a term exceeding 5 years, or

(c) a lease for a term that, by the exercise of an option, could exceed 5 years,

unless at least 14 days have elapsed since notice of intention to give the consent has been published in a newspaper circulating in the locality in which the land is situated or in a newspaper circulating generally in the State.

(3) The Minister's consent may relate to the whole or part only of the land with which the application is concerned.

(4) If the application for consent proposes a sale, lease, easement or licence, the Minister's consent:

(a) may be general, authorising the proposal subject to such conditions, restrictions, reservations and covenants, and in such manner and within such time, as the Minister thinks desirable, or

(b) may be specific, approving of a particular contract of sale, lease or licence.

(5) If the application for consent relates to a mortgage, the Minister's consent can only be given to the specific terms of the mortgage.

(6) In giving consent, the Minister may:

(a) vary the terms and conditions to which the sale, lease, easement, licence or mortgage is to be subject, and

(b) impose such other terms and conditions as the Minister thinks desirable.

(7) The Minister may, at any time, wholly or partly withdraw the consent or vary its terms, but only if to do so would not prejudice the rights of third parties.

(8) …

19 Section 103 then provides the power to lease, in accordance with the terms of the Minister's consent:

103 Sale, lease, easement, licence or mortgage in accordance with consent

(1) A reserve trust may sell, lease, grant an easement or a licence in respect of or mortgage the reserve in accordance with the terms of the Minister's consent.

(2) If the Minister's consent to a sale, lease, easement or licence is general, the sale, lease, easement or licence must not proceed unless the price agreed on, the rent reserved, the terms of the easement or the charge for the licence has been submitted to and approved by the Minister.

(3) A mortgage under this Division may contain a power of sale.

(4) A lease or licence must not be granted under this Division for any purpose for which an authority, permit, lease or licence may be granted under the *Fisheries Management Act 1994*.

(5) Without limiting subsection (1), a reserve trust may grant a lease or licence under this Division for the purposes of enabling a filming project to be carried out, whether or not the project is in accordance with any plan of management adopted for the reserve under Division 6 or is consistent with the declared purpose of the reserve.

20

In November 2013, following the judgment of the Court of Appeal *in Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (Goomallee Claim), [14] CLA89 was amended, by (NSW) *Crown Lands Amendment (Multiple Land Use) Act* 2013, by the introduction of provisions permitting the creation of "secondary interests" in Crown reserves, and validating of such interests previously created ("the multiple use amendments"). Goomallee had been concerned with the power of the Minister to grant a grazing licence over land reserved for the purpose of public recreation. Basten JA (with whom Beazley, McColl and Macfarlan JJA and Sackville AJA agreed) stated that "where the use of land is restricted to a particular purpose, the use for some other unrelated purpose is not authorised". [15] It followed that as the grazing licence did not involve the use of the land for public recreation nor refer to public access, it was invalid.

21 The key provision introduced by the multiple use amendments is s 34AA, which provides that the power of the Minister to grant a lease, licence or permit in respect of Crown land is not limited by the land being a Crown reserve or by the reserved purpose, except that a lease, licence or permit (called a *secondary interest*) cannot be granted unless the Minister is of the opinion that the use or occupation of the Crown reserve pursuant to the secondary interest would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose. [16] Mandatory relevant considerations in that respect are set out. [17] The power to grant such a secondary interest is exercisable notwithstanding that the purpose for which the secondary interest is granted is not a public purpose and is not ancillary or incidental to the reserved purpose; [18] and notwithstanding that the use and occupation of the Crown reserve pursuant to the secondary interest may be inconsistent or incompatible with the reserved purpose: [19]

> **34AA Secondary interests in Crown reserves**
>
> (1) The power of the Minister under this Part to grant a lease, licence or permit in respect of, or an easement or right-of-way over, Crown land is not limited by the land being a Crown reserve or by the reserved purpose, except as provided by this section.
>
> (2) A lease, licence, permit, easement or right-of-way (a ***secondary interest***) cannot be granted unless the Minister is of the opinion that the use or occupation of the Crown reserve pursuant to the secondary interest would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose.
>
> (3) Without limitation, the following considerations are relevant to the question of whether the use or occupation of a Crown reserve pursuant to a secondary interest would not be likely to materially harm its use or occupation for the reserved purpose:
>
> (a) the proportion of the area of the Crown reserve that may be affected by the secondary interest,
>
> (b) if the activities to be conducted pursuant to the secondary interest will be intermittent, the frequency and duration of the impacts of those activities,
>
> (c) the degree of permanence of likely harm and in particular whether that harm is irreversible,

(d) the current condition of the Crown reserve,

(e) the geographical, environmental and social context of the Crown reserve,

(f) such other considerations as may be prescribed by the regulations.

(4) For the avoidance of doubt:

(a) the purpose for which a secondary interest is granted need not be a public purpose and need not be ancillary or incidental to the reserved purpose, and

(b) the fact that the use and occupation of the Crown reserve pursuant to the secondary interest may be inconsistent or incompatible with the reserved purpose does not of itself mean that its use or occupation pursuant to the secondary interest will materially harm its use or occupation for the reserved purpose, and

(c) the fact that the Crown reserve may be used or occupied for the grazing of animals pursuant to the secondary interest does not of itself mean that that use or occupation will materially harm its use or occupation for the reserved purpose of public recreation or of future public requirements.

(5) If a secondary interest has not been validly granted because of this section, the Minister can validate the grant of the secondary interest by making such changes to the purpose for which the secondary interest was granted, or to the terms and conditions on which it was granted, as may be necessary to ensure that the secondary interest is valid.

(6) When a secondary interest is validated under this section:

(a) the secondary interest is taken to have been validly granted from the date of original grant, and

(b) the use and occupation of Crown land in accordance with the secondary interest prior to its validation under this section is taken to be and always to have been valid.

(7) In this section, ***grant*** includes purported grant.

Note. This section applies also to a lease, licence or easement granted by a reserve trust under Part 5. See section 102B.

22 As the note foreshadows, by s 102B, s 34AA is made applicable to secondary interests granted by reserve trusts:

> **102B.** Sections 34AA and 35A apply to and in respect of a lease, licence or easement granted in respect of a reserve by a reserve trust as if a reference in those section to a Minister were a reference to a reserve trust.

23 Provision was also made for the validation of pre-existing secondary interests in Crown reserves, by savings and transition provisions inserted in CLA89 Sch 8 (Savings, transitional and other provisions), Part 8, cl 59 of which provides as follows:

> **Part 8 Provisions consequent on Crown Lands Amendment (Multiple Land Use) Act 2013**
>
> **59 Validation of existing secondary interests**
>
> (1) Section 34AA extends to a secondary interest granted before the commencement of that section (an ***existing secondary interest***), including any such secondary interest that is an existing interest under section 187 of the *National Parks and Wildlife Act 1974*.
>
> (2) It is to be conclusively presumed that when an existing secondary interest was granted the Minister was of the opinion that use or occupation of the Crown reserve pursuant to the secondary interest would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose.

(3) An existing secondary interest that would have been validly granted had section 34AA been in force at the time of the grant is taken to be and always to have been validly granted.

(4) The power of the Minister under section 34AA to validate a secondary interest as referred to in that section extends to an existing secondary interest.

(5) A reference in section 34AA to the use and occupation of Crown land in accordance with a secondary interest prior to its validation under that section extends to use and occupation before the commencement of that section.

(6) This clause does not affect any decision of a court made before the commencement of section 34AA.

(7) This clause does not affect any land claim (within the meaning of the *Aboriginal Land Rights Act 1983*) made before 9 November 2012 (the date of the decision in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council (Goomallee Claim)* [2012] NSWCA 358).

(8) The validation of a secondary interest by operation of section 34AA and this clause is taken to be an act to which section 104A (Saving of native title rights and interests etc) of the *Native Title (New South Wales) Act 1994* applies.

(9) This clause extends to the operation of section 34AA pursuant to section 102B.

NSTC, NSTA and the 2000 Lease

24 On or about 5 April 1978, the Council, which was then the trustee of the Talus Reserve, granted a lease of the reserve to NSTC for a term of 20 years. With effect from its expiry, the 2000 Lease was granted by deed of lease dated 6 December 2000 between the Talus Trust and NSTC, pursuant to a resolution of the Council made on 12 July 1999, and was consented to by the Minister (under CLA89 s 102(1)(d)) on 18 January 2001.

25 By the 2000 Lease, the Talus Trust as lessor demised to NSTC as lessee “the whole of Reserve No. 73306 for public recreation together with the works, buildings and structures erected thereon” for a further term of 20 years, commencing from 5 April 1998. [20] The 2000 Lease was rent-free for the first three years, and for the fourth year the rent was thereafter $14,000 if the lessee continued its involvement with the Humpty Dumpty Foundation (or some other charitable organisation approved by the Lessor), and otherwise $20,000, with market reviews in the sixth, eleventh and sixteenth years (cl 3). [21] Thus there was a rental concession if Humpty Dumpty Foundation continued to occupy a portion of the premises. The lessee relevantly covenanted that the premises would not be used “for any purpose other than that of tennis courts, clubhouse and associated activities except with the prior written consent of the Lessor and subject to such conditions of consent as the Lessor and the Council may impose” (cl 4(a)); that it would arrange for first class tennis coaching to be conducted on the premises every Saturday morning for the instruction of children under 16 years old, at charges to be set by it (cl 4(g)); that except with the written approval of the lessor, it would allow members of the public to view without charge tennis matches played on the premises (cl 4(i)); and that during the term of the lease, the membership of NSTC

should be open to any resident or ratepayer of the City of Willoughby and subject to rules of NSTC such resident or ratepayer would be given priority in respect of membership (cl 4(k)). Clause 4(q) prohibited sub-letting without prior written consent of the Talus Trust and the Minister:

> The Club shall not, during the continuance of this lease, assign, transfer, demise, sublet or part with the possession or by any act or deed procure the premises or any part thereof to be assigned, transferred, demised, sublet unto or put into the possession of any person or persons without the consent of the Lessor and the Minister in writing being first had and obtained.

26 NSTC is obliged to hire out the tennis courts to respectable and responsible persons, and during normal school hours schools in the City of Willoughby, at such times as the courts are not required by members of NSTC, at charges set by NSTC (albeit subject to a degree of control by the lessor) (clause 5). Provision is made that notwithstanding anything else in the lease, the lessor shall retain the care, control and management of the premises as a public reserve in accordance with the provisions of the *Local Government Act* 1993, and that the lease is subject to the provisions of CLA89, including s 109 (which provides for termination of an interest under the Act where the dedication or reservation ceases to be operative or is revoked) (clause 6). The lease is conditional upon the granting of the Minister's consent, and was void and of no effect unless and until such consent was granted (clause 12). The lease was executed by NSTC, and the Common Seal of the Council of the City of Willoughby was affixed on 6 December "pursuant to resolution on 12 July 1999"; [22] and it bears a stamp "Approved" and the signature of the delegate of the Minister administering the Crown Lands Consolidation Act, dated 18 January 2001, from which date the lease became valid and effective, but with retrospective effect from 5 April 1998.

27 By deed dated 18 July 2001, between the Talus Trust, NSTC and NSTA, the Talus Trust consented to the assignment of the 2000 Lease by NSTC as tenant to NSTA as assignee, and NSTA covenanted with the Talus Trust that it would perform and observe all the terms covenants and conditions contained in or implied by the lease. The Minister's delegate granted consent to the assignment on 11 September 2001.

Love 'n Deuce and the Management Agreement

28 LnD was established in 1975 by its managing director Mr Paul Francis, and operates five tennis centres and two schools, with Talus Street St Leonards serving as its main headquarters. It claims to be the largest tennis business in Australia, with over 60 staff, and top quality courts and facilities.

29 Although there appears to have been an earlier arrangement between NSTC and LnD from about 1992, NSTA first entered into a management agreement with LnD in relation to the Talus Reserve in 2005. The 2005 agreement was replaced in October 2008 by another, between NSTA, LnD and Mr Francis, whereby LnD agreed to manage the

tennis centre at the Talus Reserve on behalf of NSTA (cl 1) from 1 September 2008 until 5 April 2018 (cl 2) – that is to say, for the remaining duration of the 2000 Lease. LnD is obliged to pay NSTA a base monthly fee of $7,990.36 plus GST per month, which is indexed annually and subject to market review in 2010 and 2015 (cl 3). [23] LnD is obliged to keep the centre open daily, between 7am and 10.30pm Monday to Friday, and 8am and 6.30pm Saturday and Sunday (cl 15). NSTA is entitled to the exclusive use of varying numbers of courts at various times (cl 12), but subject thereto LnD is entitled to use or hire the tennis courts, and otherwise use the reserve, at such charges as it considers fit, for all purposes permitted under the lease, including permanent and casual hire, tennis coaching and conducting tennis competitions (cl 7, cl 8 and cl 9), and may also utilise the clubhouse (with some exceptions) for the running of its business (cl 11). The manager's responsibilities include keeping the centre open at defined times and on each day, and paying all normal expenses involved in management. NSTA must continue to pay the rent under the head lease to the council, and the council and water rates (cl 20). Notwithstanding that the agreement in several places refers to the fees payable by LnD as “rent”, it was stated that the management agreement was not intended to operate as a sublease (cl 34). As has been noted, each of the original September 2005 and the later October 2008 management agreement was entered into without the prior consent of the Council, the Talus Trust or the Minister.

30 LnD maintains the tennis courts, clubhouse, and car park at the reserve; conducts tennis programmes, tennis coaching clinics and tennis competitions, school coaching clinics and school holiday tennis camps; it also conducts “Humpty squads” for children between two and a half and five years of age for the development of multi-sport and gross motor skills. It takes bookings for the courts by members of the public when they are not required by NSTA or LnD, and it also operates a cafe and a small shop from which it sells tennis equipment. The plaintiffs say that they are satisfied with the services that LnD is providing at the Talus Reserve.

Humpty Dumpty

31 From at least 1998 – and even prior to the current lease – Humpty Dumpty occupied, until recently, a portion of the clubhouse situated on the Talus Reserve. As mentioned above, Humpty Dumpty’s occupation was referred to in the 2000 Lease, which provides for a reduced rent so long as the lessee continues its involvement with Humpty Dumpty. Although there was no formal licence, Humpty Dumpty paid an annual fee of $28,710 to LnD.

The proposed sublease to LnD

32

The proposed sublease is between NSTA as lessor, LnD as lessee, and Mr Francis as guarantor. It is expressed to be subject to and conditional upon NSTA obtaining the consent of the head lessor (the Talus Trust) and the Minister (cl 2.1). A number of covenants in the head lease are incorporated in the sublease, including relevantly cl 4(i) (to allow members of the public to view without charge tennis matches played on the premises). LnD is granted a sublease of the property (being the whole of the Talus Reserve and the works, buildings and structures thereon) for a term expiring on 3 April 2018 (cl 3.1 and Schedule item 5). The sublessee must only use the property for the permitted use, defined as first "in relation to the whole of the property (other than any portion of the club house licenced to the Humpty Dumpty Foundation) for the purpose of public recreation including use of the tennis courts and club house for associated activities …", secondly the licence of a portion of the club house of Humpty Dumpty, and thirdly such other uses as agreed by the Talus Trustee, NSTA and the Minister provided same is in accordance with CLA89 (cl 7.1 and Schedule Item 8). Some restrictions are imposed on LnD's use to accommodate the requirements of NSTA (cl 7.3(a)), and LnD is obliged, during such times as the premises are not being used by it, to maintain regular public use of the tennis courts for active sporting and recreational purposes (cl 7.3(g)); if so directed by the Talus Trust to make two or more courts available for hire by respectable and responsible persons at times other than when competitions and tournaments are being conducted by NSTA (cl 7.3(h); and to make one court available for hire when competitions and tournaments are being conducted (cl 7.3(i)). The rent is $106,750 per annum or the amount determined by a valuer as market rental, whichever is the greater (Schedule item 7).

The proposed licence to Humpty Dumpty

33 As the proposed licence by LnD to Humpty Dumpty is no longer required, it is unnecessary to consider its terms in detail. It suffices to note that LnD would have granted to Humpty Dumpty the non-exclusive right to occupy four offices in the club house for administrative activities associated with Humpty Dumpty, at an annual rental of $462.

Was there a proper decision under CLA89, s 102?

34 The first issue is whether, as Mr Owens submitted, there is no valid head lease, in respect of which a sublease could be granted, by reason that there was no valid decision by the Talus Trust under CLA89, s 102(1)(a), to grant the 2000 Lease. The execution page of the 2000 Lease records that the common seal of Willoughby Council was affixed to it pursuant to a resolution of the councillors of 12 July 1999.

35 Section 102(1)(a) provides:

> (1) A reserve trust may not sell, lease or mortgage land, or grant an easement or a licence (except a temporary licence) in respect of land, comprising the whole or any part of the reserve unless:
>
> > (a) the trust has decided that it is desirable to do so on the terms and conditions specified in the decision, …

36 Mr Owens submitted that the effect of s 102(1)(a) was that if there were to be a valid lease, there must be a decision *by the Talus Trust* that it is desirable to grant the lease, and the decision must specify the *terms and conditions* of the lease, but that:

(1) at no time has the Talus Trust made a decision under s 102(1)(a) to grant a lease, as the decision made by the Council on 12 July 1999 was a decision made by the Council when it was trustee, before the Talus Trust existed as an entity, and that decision became irrelevant, absent effective ratification by the Talus Trust, once the Council ceased to be the trustee; and

(2) the 12 July 1999 decision did not specify all the "terms and conditions" of the lease, as required by s 102(1)(a).

37 There are thus two limbs to this argument, the first concerning the identity of the decision-maker, and the second concerning compliance with the procedural requirements. A subsidiary procedural matter was that there was no evidence that the requisite notice referred to in s 102(2) had been given – which was required because the 2000 Lease was for a term in excess of five years. [24]

38 As to the first limb, Mr Owens submitted that s 102(1)(a) speaks of a decision of the Reserve Trust; that upon its commencement, CLA89 created what was essentially an entity at large without identity, the intention being that the then existing trustee (the Council) remained as trustee until the Talus Trust was nominated; that the Talus Trust came into existence only with the gazettal of 30 July 1999 – after the Council's decision of 12 July 1999; that the Council was the trustee until 30 July 1999; that the decision to enter into the 2000 Lease was made at a Council meeting on 12 July 1999 when the Council was the trustee; that on 30 July 1999, when the Talus Trust became the trustee, that decision became irrelevant; that there has been no subsequent relevant decision of the Talus Trust prior to the grant of the lease, by the Talus Trust, 18 months later on 6 December 2000; and thus that there has been no decision of the relevant entity within the terms of s 102(1)(a). Mr Owens submitted that the decision made by the Council on 12 July 1999 was its own decision as trustee (not as manager), which ceased to be relevant once it was replaced as trustee by the new entity, which although managed by the Council is a discrete legal entity, and that the new trustee had to direct its own mind to the relevant issues and make its own decision for the purposes of s 102(1)(a), but never did.

39 However, the Talus Trust did not come into existence only on 30 July 1999. As the submission of Ms Wong, who appeared for the Minister, demonstrated, the Talus Trust came into existence on 1 May 1990, upon the commencement of CLA89, [25] and the Council as the former trustee was thereupon appointed to manage the affairs of the trust. [26] The notification in the Gazette on 30 July 1999 merely gave a name to an

entity which had already been created upon commencement of the legislation. Thus the decision of 12 July 1999 was made by the Council in its capacity as manager of the Talus Trust.

40 Although the entities of "manager" and "trust" are discrete, it is the clear intent of the legislation that the entity appointed to manage the affairs of a reserve trust be the body charged with and responsible for the execution of all the functions of the reserve trust. While the legislation authorises the appointment of various persons or entities, including councils, "to manage the affairs of the trust", [27] it does not separately define the powers or responsibilities of the manager (although where a Council is a manager, it also has the functions of a Council under the *Local Government Act* 1993 in relation to public reserves). [28] Although a manager is subject to the supervision of the Minister, [29] there is no other organ to discharge the functions of the trust. There is no provision relating to delegating of functions by the reserve trust, but there is in relation to reserve trust managers. [30] And provision is made that a document is sufficiently executed by a reserve trust managed by a corporation if it is executed under the seal of the corporation instead of the seal of the trust. [31] Thus from 1 May 1999, a decision of the Council in relation to the use and management of the reserve was made in the capacity of the manager of the affairs of the Reserve Trust, but was nonetheless a decision of the Reserve Trust. It follows that the decision of 12 July 1999 was made by the relevant entity, namely the Talus Trust.

41 As to the second limb, Mr Owens submitted that there had been no decision meeting the requirements of s 102(1)(a), because the 12 July 1999 resolution did not record all the necessary terms and conditions of the proposed lease. In effect, he submitted that the requirement was a condition of validity of the decision.

42 There is force in the submission that compliance with the several requirements of s 102(1) and (2) is an essential condition of validity of the transaction – or, in the formerly popular language, "mandatory" as distinct from "directory". In *Cudgen Rutile (No 2) Pty Ltd v Chalk,* [32] the Privy Council held that the Crown could not contract for the disposal of any interest in Crown lands except in accordance with powers conferred by statute and accordingly, where a statute prescribed a mode of exercise of the statutory power, that had to be observed. Their Lordships referred *inter alia* to the statement of Rich J in *State of New South Wales v Bardolph* (emphasis added): [33]

> When the administration of particular functions of Government is regulated by statute and the regulation expressly or impliedly touches the power of contracting, *all statutory conditions must be observed* and the power no doubt is no wider than the statute contemplates.

43 This is supported by the terms of s 102(1) which (like s 102(2)) is expressed in prohibitory terms: dealing with the land is not permitted *unless* the specified conditions are satisfied. There is no basis for differentiating between the listed conditions, nor is there any reason to think that any could be dispensed with as merely "directory": they

are all expressed as conditions of any permission to deal with the land. This applies to the requirement for advertisement in s 102(2) as well as to the several requirements in s 102(1).

44 Thus it is insufficient for a reserve trustee merely to decide that it is desirable to lease; it must specify the terms and conditions of the proposed lease. However, that does not mean *all* the terms and conditions of the proposed lease, but the essential terms; and the decision may admit some room for movement within the parameters it establishes, so that the lease will be validly made if it contains the specified terms and conditions, even if it also contains some additional terms and conditions not inconsistent with those specified in the decision.

45 On the question of advertisement, the plaintiffs ultimately tendered a letter from the Land and Water Conservation to the Council dated 20 March 2000, which establishes that the requisite notice was published. On the question of the sufficiency of the decision, a copy of the resolution of 12 July 1999 was ultimately tendered. It is captioned “Renewal of Lease of Talus Street Reserve”, refers to “renewal of the lease” to NSTC, and specifies the term (20 years) and the rent (including the concession for Humpty Dumpty, and the provision for indexation and market review). In my view, it sufficiently identifies (1) the land the subject of the lease, (2) the commencing date and duration of the grant, and (3) the rent, as to specify the essential terms and conditions of the proposed lease.

46 Accordingly, I am satisfied that the 2000 Lease is not void or invalid for want of a relevant decision compliant with CLA89, s 102(1).

Is the 2000 Lease consistent with or ancillary to public recreation?

47 The next question is whether, as Mr Owens submitted, there is no valid head lease, in respect of which a sublease could be granted, by reason that the 2000 Lease is not for, but inconsistent and incompatible with, the reserved purpose of public recreation.

48 At least before the multiple use amendments of 2013, it was established – and the plaintiffs accepted – that the nature of a reserve trust, whereby Crown land is reserved for a particular purpose, involved legal restrictions on the use to which the land could be put, and that a use which was not consistent with, ancillary to or related to the reserved purpose would be unlawful, in the sense of being beyond the lawful powers of the trustee. [34] In *Goomallee,* the Court of Appeal rejected the Minister’s argument that the correct test for determining lawfulness of a licence granted under s 34 of the Act was not whether the use and occupation of land under the licence was for, or incidental to, the reserved purpose, as had been found by the trial judge, but merely not inconsistent or incompatible with that purpose. The Court held that the scope of the power conferred on the Minister by CLA89, s 34, to grant a licence over reserved land did not depend on the use of the land, actual or potential, but on the terms of the

restraint imposed by the reservation, and since those terms did not refer to the manner in which the land could be used, but the purpose for which it could be used, the Minister's proposed test wrongly conflated purpose with activity, as restraints on power. [35] This is unaffected by s 102, which does not enlarge, but restricts, the scope of the general powers to deal with Crown land, in the particular case of Crown reserves. The power to lease or licence the reserve is conferred in order to effectuate the reserved purpose. [36]

49 In the terms expounded by Windeyer J in the High Court in *Council of the Municipality of Randwick v Rutledge*, [37] for land to be used for public recreation, two conditions must be fulfilled: the land "must be … open to the public generally as of right; and it must not be a source of private profit". [38] The issue in that case was whether Randwick racecourse was rateable land, or exempt as "land which is vested in the Crown or in a public body or in trustees and is used for a public reserve". The High Court held that in order to be exempt the land had to be both dedicated for purposes which made it a public reserve, and used as such. The dedication for the purposes of public recreation expressly permitted use of land as a racecourse and for the training of horses, and the trustees were expressly authorised to grant the Australian Jockey Club ("AJC") the exclusive right to use and occupy the land. The AJC used the land for the purposes of a racecourse, and derived very large profits from doing so. Members of the public were admitted on race days upon payment of reasonable admission charges, but members of the AJC enjoyed special facilities on the land, access to which was denied to the general public. The High Court held that the land was not dedicated for purposes which made it a public reserve, given the wide variety of authorised uses some of which (such as training of horses) were not for "public recreation". Nor was it actually used for public recreation: while acknowledging that it was not incompatible with use for public recreation that use of the land be regulated, having regard to the particular form of recreation and enjoyment which takes place there (so, as it seems to me, there is no objection that there be some system for booking use of public tennis courts, so that only those who have made a booking can use the court at that time), Windeyer J continued:

> But, as Walsh J said in the Supreme Court, "the enjoyment of special privileges by members of the club, differing in kind from any which the general public enjoy, is to be regarded as a material consideration in ascertaining whether the land is used for public purposes".

50 Accordingly the land was not used for public recreation, and was not entitled to a rating exemption. [39]

51 That use for public recreation involves availability to the public generally also appears from the following statement of R Brereton J in *Attorney-General v Cooma Municipal Council,* [40] which has been often cited with approval [41] (emphasis in original):

> To my mind the dedication of land 'for purposes of public recreation' necessarily involves the use of such land *by the public* for their recreation; land used by an individual or a council to manufacture or provide entertainment media for subsequent enjoyment by the public or to disseminate information as to where recreation may be found is not land used for public recreation. It is obviously not necessary that the public must at all times have access to all parts of the land; indeed the type of recreation provided on it may require the exclusion of the public from parts of it, but any restriction upon the public's access to the whole of the area for the purpose of recreation can be justified only on the basis that it is in the interest of the public and to provide for their recreation *within the area* that they are so excluded from part of it."

52 In *Storey v Council of the Municipality of North Sydney*, [42] the High Court held that land reserved for the public could not be leased to the Boy Scouts Association for a Scout hall and scouting purposes generally, as to do so would mean that the land would not be open to the public generally. In *Waverley Municipal Council v Attorney-General*, [43] the question was whether the council had power (under the *Local Government Act*) to erect a building in Bronte Park, the upper floor of which would be occupied by a swimming club but available for use by other community groups. The Court of Appeal held that the power to erect improvements was limited to those which would promote or be ancillary to the use and enjoyment of the public park for public recreation, and the proposed upper floor did not meet that description because it would not be accessible by the general public as of right, and would be used to carry on particular activities by particular persons which were unrelated to the use of the park as a public park or for public recreation.

53 In *Brush Park Bowling Club Limited v Ryde Municipal Council*, [44] the club leased land from the Council, which it used as the site of bowling greens and a club house. The land formed part of a Crown reserve for public recreation. Under the lease the club covenanted that members of the public should have free right of access to the demised premises other than the bowling greens and buildings, for the purpose of viewing games in progress, and that provision should be made to enable the general public to view games in progress. The club claimed a rating exemption on the grounds that the land was used for public recreation, or that the land was owned by the Crown and not held under a lease "for private purposes". Assuming (without deciding) that the lease was valid, Hardie J, as he then was, held (on the authority of *Rutledge*) that the land must be regarded as being used and occupied by the club and its members to the exclusion of the public, and so was not used for public recreation; and that the lease must be regarded as one "for private purposes". In an analysis which is pertinent to the present case, His Honour said: [45]

> Counsel for the appellant stressed that the lease preserved and/or conferred rights upon members of the public to go onto the leased premises and watch games in progress and that in fact members of the public from time to time exercised and enjoyed those rights; also that any qualified bowler belonging to any other club was able to sue the greens and the other facilities of the club. Counsel for the respondent pressed the point that the bowling greens and club premises occupied approximately ninety per cent of the total leased area. He stressed that the right of a member of the public to go upon the remaining ten per cent of the area was only available on days

> when and whilst games were in progress. He also relied upon the fact that the bowling club premises constituted one extremity of the total park area and that being separated by the gully from the rest of the park, members going to the club went direct to the area and not through the park.
>
> The conclusion I have reached is that the subject land is in fact and in law being used and occupied by the club and its members, that there is no significant use or occupation of it by the public, that it is impossible, having regard to the area of the subject land and the nature and extent of the improvements on it both structurally and otherwise and its position in relation to the other sections of the park given over to public recreations to ignore the private use and enjoyment and control of the subject area or to treat it as being merely ancillary or incidental to the use of the rest of the park for public recreation and thus as a case appropriate for the application of a principle similar to that applied in *Trustees of Royal Botanic Gardens v Sydney City Council* (1965) 11 LGRA 407; accordingly I do not accede to the submission of counsel for the appellant that the subject area is being used for public recreation within the meaning of s. 132(1)(c).

54 In *Swan Yacht Club Inc v Town of East Fremantle*, [46] the Western Australia Court of Appeal held that for a purpose to be a public purpose, it must relate or pertain to the people of the State of some particular region or locality as a whole, and so relate or pertain in the sense of the provision of some service, utility or benefit not otherwise provided, and which is not provided with the primary purpose of producing profit (although profitability might result from charges or fees in respect of such provision). The predominant use of the subject land was as a yacht club, which by its constitution confined use to members and therefore excluded members of the public. Pullin JA, with whom the other members of the Court agreed, said – again, pertinently to the present case:

> 44 The appellant points to the fact that the public are permitted access to the grounds of the yacht club. There was evidence that they used the ablutions which are attached to the club buildings on Reserve 27376, that members of the public at times park motor vehicles on the yacht club parking area when they are using the public boat ramp which is located near the subject land, that the appellant built a gazebo for the use of the public and that the public have access to other open areas. The perimeter of the subject land is not fenced.
>
> 45 In my view however, in relation to Reserve No 27376, the predominant use of the land is as a yacht club which by its constitution excludes members of the public. It is no answer to say that persons could pay a relatively small sum of money to become a social member and thereby gain access to all of the land on this reserve. In doing so they would not be gaining access to the land “as of right” to use the words of Windeyer J in the *Randwick Municipal Council* case. They would be gaining access to the land because they were a member of the club and then subject to the direction of the committee. Furthermore, the club building is not available to the public. This covers a significant part of Reserve 27376. In my opinion, in relation to Reserve 27376, the predominant and primary sue of the land is as a yacht club, which by tis constitution confines use of the subject land to members which means that members of the public are excluded.
>
> …
>
> 47 I now turn to consider Reserve No 27377. I have already noted that the lease and the Order in Council contemplate two uses for Reserve 27377 one as a yacht club and one for public pedestrian access. Although the Order in Council and the lease provides that the whole of the land encompassed by this reserve should be available for public pedestrian access, the reality is that the public is encouraged to use the

> limestone and concrete footpath constructed around the perimeter of the foreshore. A substantial portion of the land is taken up with the yacht club's paving, car parks, a limestone wall and slipways. These are permanent installations. There is also a grassed are. In my opinion the appellant did not prove that the predominant and primary use of the area of this Reserve was for public pedestrian access. I have already held that the use of land by the yacht club is not use for a public purpose. The existence of permanent facilities in fact leads me to the conclusion that the predominant and primary use of this Reserve is use by the yacht club.

55 The plaintiffs invoked *Friends of Pryor Park Incorporated v Ryde City Council*, [47] and *Seaton v Mosman Municipal Council*, [48] as authority for the proposition that *Rutledge, Storey* and *Waverley* had been displaced by amendments made to the *Local Government Act* with the intent of amplifying the powers of councils in relation to public reserves. So far as they relate to public reserves which are not Crown reserves, that is correct. But the point of those cases is not that the notion of what amounts to use for public recreation has changed, but that additional powers given to councils means that, within limits, they can authorise activities on *public* reserves which might not fall within traditional notions of public recreation. As the plaintiffs acknowledged, neither *Pryor Park* nor *Seaton* concerned Crown land. In respect of a Crown reserve, CLA Part 5 prevails over the *Local Government Act* in the event of any inconsistency. [49] No question of any power under the Local Government Act arises in the present case. *Pryor Park* and *Seaton* do not affect the authority of *Rutledge, Storey* and *Waverley* as to the essential elements of use for public recreation in the context of a Crown reserve.

56 On the authorities to which I have referred, it is manifestly clear that the demise of the whole of the Talus Reserve to a private club (whether NSTC or NSTA) is plainly not a use of the reserve for public recreation. The Talus Reserve comprises eight tennis courts, a club house and a car park, which together occupy practically the whole reserve. The reserve is fenced, and there is signage "Restricted parking area – Parking for patrons of the Northern Suburbs Tennis Association Club only", and another sign "End of restricted parking area". While the 2000 Lease contains some cosmetic concessions to the public interest – that the lessee is to allow members of the public to view without charge the tennis matches played on the premises; that during the term of the lease, the membership of the club should be open to any resident or ratepayer of the City of Willoughby, and that subject to rules of the club priority would be given in respect of membership to such residents, they are insubstantial. The tennis courts, clubhouse and car park occupy virtually the entirety of the reserve; there is no stadium or other like facility from which tennis matches could be observed by any substantial number; and even if membership is "open" to residents of the municipality, they still have to join the association, pay such dues as may be required, and comply with the rules of the association. It was submitted that there was nothing to suggest that the membership requirements were unduly restrictive. The submission overlooks the point that on an application of this kind it is for the applicant trustee to put before the court all relevant information, and the plaintiffs have provided no information about the terms

and conditions of membership. But even if the submission were correct, entitlement to use the reserve actively by engaging in playing tennis (except at confined times when not required by NSTA or LnD) would derive from membership of the association, not of the public, and would be limited to those who chose to become members. The demise of the whole of the Reserve to a private association, whose members have priority rights to use of the Reserve, is plainly not a use for public recreation.

57 Accordingly, in my view, at least but for the multiple use amendments of 2013, the lease to NSTC/NSTA would be unlawful and void, as not being for or ancillary to the reserved purpose of public recreation.

Is the 2000 Lease validated by the multiple use amendments?

58 However, the plaintiffs submit that the effect of CLA89 s 34AA, s 102B, and Sch 8, Pt 8, cl 59, is that (1) the 2000 Lease is an existing secondary interest, to which s 34AA extends; (2) it must be conclusively presumed that when the Talus Trust granted the 2000 Lease to NSTA it was of the opinion that use or occupation of the Talus Reserve pursuant to the lease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose of public recreation; and (3) the 2000 Lease is taken to be, and always to have been, validly granted.

59 If the 2000 Lease is a "secondary interest", it is clearly enough "an existing secondary interest" for the purposes of CLA89 Sch 8, Part 8, cl 59, in which case, pursuant to cl 59(3), it must be taken to have been validly granted, *if it would have been validly granted had s 34AA been in force at the time of the grant*; for which purpose it must be conclusively presumed that when the lease was granted the Minister was of the opinion that use of the reserve pursuant to the lease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose. Thus cl 59 does not validate every existing secondary interest, but only those which would have been validly granted had s 34AA been in force at the time of the grant. It does not and was not intended to validate "existing secondary interests" which would not have been validly granted even if s 34AA had been in force. Contrary to the plaintiffs' submissions, cl 59 does not give conclusive validity to the 2000 Lease; the only conclusive presumption is that the Minister (or, relevantly, the Reserve Trustee) in fact held the requisite opinion.

60 The condition of the valid grant of a secondary interest is the holding of the requisite opinion on the part of the Minister or the Reserve Trust as the case may be. Had s 34AA been in force at the time of the grant, and assuming (as I must, because of the conclusive presumption) that the Reserve Trust held the requisite opinion at the time of the grant, the lease would nonetheless not have been validly granted if that opinion, though actually held, was unreasonable in the *Wednesbury* sense.

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The requisite opinion was that use of the reserve pursuant to the lease would be in the public interest (which does not have to bear any relation to the reserved purpose), but also *that it would not be likely to materially harm its use or occupation for the reserved purpose*. Thus the grant of a grazing licence in the Snowy Mountains would not materially harm the use of the Snowy Mountains National Park for its reserved purpose of public recreation. But if the use pursuant to the secondary interest dominates or practically excludes the reserved purpose, it is impossible to see how it can be said not materially to harm its use or occupation for the reserved purpose. Mr Coles QC submitted that s 34AA(4)(b) addressed this by providing that the fact that the use and occupation of the Crown reserve pursuant to the secondary interest may be inconsistent or incompatible with the reserved purpose does not of itself mean that its use or occupation pursuant to the secondary interest will materially harm its use or occupation for the reserved purpose; but the words “of itself” are important: a secondary interest which involves the transient use, or the use of a small part, of a reserve for a purpose incompatible with the reserved purpose may well not materially harm its use or occupation for the reserved purpose, while one that involves the permanent use of substantially all of the reserve for an incompatible purpose will self-evidently do so.

62 These proceedings are not constituted as involving a challenge to the deemed decision of the Talus Trust to grant the 2000 Lease, and necessary parties to any such proceedings – in particular NSTA – are not before the Court. In those circumstances, a conclusion that the 2000 Lease is not valid will not bind NSTA. However, granted that the Talus Trust must be deemed to have held the requisite opinion that use or occupation of the Talus Reserve pursuant to the 2000 Lease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose of public recreation, in my judgment that opinion was not, having regard to the relevant considerations referred to in s 34AA(3), reasonably open, and it follows that the head lease is not valid.

63 An alternative analysis leads to the same conclusion. The term “secondary interest” is not defined, beyond the context in which it appears in s 34AA(2):

> (2) A lease, licence, permit, easement or right-of-way (a ***secondary interest***) cannot be granted unless the Minister is of the opinion that the use or occupation of the Crown reserve pursuant to the secondary interest would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose.

64 However, that it is denoted a *secondary* interest imports that it is secondary to the reserved purpose. This is reflected in the requirement that the Minister has the opinion that use pursuant to the secondary interest *would not be likely to materially harm its use or occupation for the reserved purpose.*

65

This view derives some support from the Explanatory Memorandum and the second reading speeches for the *Crown Lands Amendment (Multiple Land Use) Act* 2013. In the Explanatory Memorandum, the object of the Bill is stated to be "to provide that a secondary interest (a lease, licence, permit, easement or right-of-way) can be granted in respect of Crown land that is reserved for a public purpose (a ***Crown reserve***) so long as use and occupation of the land under the secondary interest would not be likely to materially harm the use and occupation of the land for the public purpose for which it is reserved". In the Second Reading speech, [50] the Minister said, "the bill will validate all existing secondary tenures but only if they are not causing or likely to cause material harm to the primary purpose of the reserve". While it is clear, from the references to the Goomallee Claim, and to concerns about its consequences – in particular, in relation to the disruption of community and business activities – that one objective of the multiple use amendments was to avoid the disruption and uncertainty occasioned by the Goomallee decision, neither the explanatory memorandum nor the second reading speech contemplates that a use that is harmful to the reserved purpose will be validated, or that a secondary interest may be created to the practical exclusion of the primary reserved purpose. Indeed, the requirement that the Minister be of opinion that the secondary interest will not materially harm use for the reserved purpose points to the contrary.

66 The legislative intent was to permit use pursuant to a secondary interest alongside the use for the (primary) reserved purpose, but not the substitution of a different primary purpose for the primary reserved purpose. The legislation was intended to address the proposition in *Goomallee* that where there is a grant for a specified purpose, use for any other purpose is excluded, by permitting concurrent use for other purposes – but not so as to dominate or exclude the primary reserved purpose. An interest which effectively obliterates the reserved purpose is not a "secondary interest" within the meaning of the legislation.

67 Here, the primary reserved purpose has been obliterated. While the multiple use amendments mean that a grant which would have been valid had they been in place at the time is retrospectively validated, the 2000 Lease would not have been valid had s 34AA then been in place, because it is not a grant of a secondary interest. By way of illustration, a lease of a room in the clubhouse to Humpty Dumpty would have been validated; likewise a lease of a couple of tennis courts to NSTA. But a demise of the whole reserve for 20 years to a private club is not capable of being a mere secondary interest, because it substantially excludes use of the reserve for the reserved purpose.

68 Accordingly, in my view, despite the multiple use amendments, the 2000 Lease is invalid, and thus there is no valid head lease in respect of which the proposed sublease to LnD could be granted. I hasten to add that this conclusion is reached for the purpose of these proceedings only, and is not binding on NSTA.

Can the lessee of a Crown reserve grant a sublease?

69 The next question is whether the lessee of a Crown reserve can grant a sublease. Mr Owens submitted that the answer was in the negative, because Crown land could be dealt with only in accordance with and in conformity with the applicable legislation, [51] and the applicable legislation did not authorise anyone other than the Minister or the Reserve Trust to deal with a Crown reserve.

70 It will be recalled that CLA89, s 6, provides that Crown land shall not be occupied, used, leased, licensed, or otherwise dealt with unless the occupation, use, lease, licence, or other dealing is authorised by that Act. Mr Owens submits that the scheme of CLA89 is that only the Crown or the Minister or (in the case of a reserve, the reserve trust) can grant an interest to occupy Crown land; and that there is no provision in CLA89 which permits the Minister or the Reserve Trust to delegate to another person such as a tenant their powers to grant rights to use or occupy Crown land. He referred to s 44AA – which expressly gives a right to a lessee of Crown land to sublease for the specific purpose of filmmaking (albeit only with Ministerial consent), and submits that if a lessee were otherwise entitled to sublease, s 44AA would be superfluous.

71 However, it is implicit in CLA89, s 44 (Transfer restrictions) that, absent a recording in the register of the type referred to in s 44(1), a lease can be transferred or sublet; and even with such a recording, it can be transferred or sublet with the consent of the Minister. The better explanation of s 44AA is that it addressed a particular issue, so as to provide authority to sublease even where no such authority was given by the head lease. Accordingly, I do not accept that as a matter of general principle, a lessee of Crown land has no power to grant a sublease.

72 However, s 44 and s 44AA apply in respect of leases of Crown land generally. *Goomallee* held that the mere fact that reserved land remains Crown land does not mean that the Minister (and it follows, where relevant, the reserve trust) could exercise a power which was inconsistent with the terms of the reservation, although it would otherwise be available in respect of Crown land which was not so reserved, [52] and that, notwithstanding that reserved land may be dealt with, any such dealing must be for the reserved purpose. As the Court of Appeal concluded: [53]

> Where the use of land is restricted to a particular purpose, the use for some other unrelated purpose is not authorised.

73 That must now be seen in the light of the multiple use amendments, the consequence of which is that a use other than for the reserved purpose may be authorised, but only if the reserve trust is of the opinion that such use is in the public interest *and not likely to be materially harmful to use of the reserve for the reserved purpose*. Put alternatively, it would be a breach of trust for the reserve trust to permit a use for a purpose other than the reserved purpose, except where it held the relevant opinion.

74

Accordingly, a lessee of a Crown reserve can, subject to the terms of the lease, grant a sublease, provided that use of the reserve pursuant to the sublease will be for the reserved purpose, or (in the reasonable opinion of the reserve trust) in the public interest and not likely to be materially harmful to use of the reserve for the reserved purpose.

Can the Talus Trust lawfully and properly consent to the sublease?

75 The final question is whether, assuming that there is a valid head lease, the Talus Trust could lawfully and properly consent to the proposed sublease. For the purpose of addressing this question, I assume that the 2000 Lease has been validated by the multiple use amendments.

76 It will be recalled that the 2000 Lease contains a provision that prohibits subletting without prior written consent of the Talus Trust and the Minister. That not only the lessor's but also the Minister's consent is required is significant, as it recognises the ongoing interest of the trustee and the Crown in the use of the reserve.

77 If the 2000 Lease has been validated, that has been because of a conclusive presumption that when it was granted the Talus Trust held the opinion that use pursuant to it would not materially harm use of the reserve for the reserved purpose of public recreation. Even if – contrary to my opinion – that opinion cannot now be impugned for manifest unreasonableness, that conclusive presumption applies only to existing secondary interests, and not to future grants.

78 The 2000 Lease is expressed to be subject to the provisions of CLA89 (cl 6). Under CLA89, the Reserve is reserved for public recreation, although, now, other uses pursuant to secondary interests may be permitted. The Talus Trust is in the nature of a trust for a purpose, namely public recreation. While the creation of secondary interests which, in the opinion of the Talus Trust, are in the public interest and will not materially harm use of the Reserve for the reserved purpose are now permissible, a use of the Reserve pursuant to a secondary interest which would (in the Talus Trust's opinion) materially harm use for the reserved purpose is not. To consent to such a use would be contrary to the obligations of the Talus Trust as trustee of the Reserve, and contrary to CLA89 – to which the 2000 Lease is expressly subject – by authorising a use and occupation not permitted by the Act.

79 Even if now constrained by the transitional provisions to suffer the continuation of the 2000 Lease, [54] it does not follow that the Talus Trust should consent to creation of any further interest which would materially harm the use of the Reserve for the reserved purpose. To the contrary, having regard to its obligations as trustee, and bearing in mind that the 2000 Lease provides that the lease is subject to the provisions of CLA89, the Talus Trust, in exercising its power to consent to a proposed sublease, would be bound not to consent to a sublease unless it involved a use of the reserve (a)

for the reserved purpose, or (b) it held the opinion that the use pursuant to the sublease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose.

80 For reasons already advanced in respect of the 2000 Lease, that opinion is not reasonably open, since use by LnD pursuant to the proposed sublease would practically exclude, for the duration of the sublease, use for the reserved purpose. In this respect, it is noteworthy that use and occupation of the reserve by LnD is a substantial step further removed from public recreation than use and occupation by NSTA under the 2000 Lease – not only because of the commercial character of LnD's activities, and that it uses the reserve as its headquarters for its commercial operations elsewhere, [55] but also because it results in the generation of substantial private profits to NSTA, which would receive annual rents of $106,750 from LnD, while paying only $27,145 to the Talus Trust.

81 It follows that in my opinion, even if the 2000 Lease has been validated by the multiple use amendments, the Talus Trust would not act lawfully and properly, but would be in breach of trust, in giving consent to the proposed sublease to LnD, because use of the reserve pursuant to the proposed sublease could not reasonably be considered as other than materially harmful to its use for the reserved purpose of public recreation.

82 While, as it is no longer required, it is unnecessary to express a concluded opinion in respect of the proposed licence to Humpty Dumpty, it seems to me that it would have been open to the Talus Trust to form the opinion that the non-exclusive licence of four offices to Humpty Dumpty would have been in the public interest and not likely materially to harm use of the reserve for the reserved purpose, and thus it would have been open, consistent with the trust and CLA89, to consent to the proposed occupation by Humpty Dumpty.

Is the case an appropriate one for judicial advice?

83 (NSW) *Trustee Act* 1925, s 63(1), provides that a trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument. By s 63(2), a trustee who acts in accordance with such advice is deemed to have discharged its duty as trustee (and thus is exonerated from liability for breach of trust), provided that the trustee is not guilty of any fraud or wilful concealment or misrepresentation in obtaining the advice.

84 The Talus Reserve is a 'statutory trust' for public purposes, rather than a trust as understood in private law. [56] The trustee of a statutory trust has standing to apply for judicial advice. [57]

85

Historically, courts have declined to give judicial advice on matters of basic controversy, or where the rights of beneficiaries will be affected, as distinct from matters of management and administration. Thus in *Harrison v Mills*, [58] Needham J observed that it was not a function of the Court, by advice under s 63, to determine matters of basic controversy between trustees, not least because the essential basis of the jurisdiction is the provision of private advice to a trustee, who is then deemed to discharge its duty if it acts in accordance with it; the proper remedy was to take proceedings, in which the beneficiaries might be joined, for declaratory and other relief. As Gzell J summarised it *Auspac Corporate Managers Pty Ltd v J Noble Pty Ltd*: [59]

> 19 The *Trustee Act* 1925, s 63 is largely declaratory of this inherent jurisdiction. A useful historical analysis of the legislation is to be found in *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547.
>
> 20 However, the Court will not always exercise power to give advice. It will not do so in contentious situations. As Needham J explained in *Harrison v Mills* [1976] 1 NSWLR 42 at 45, there are many reasons for a Court refusing to hear a summons under the *Trustee Act* 1925, s 63 to determine matters of basic controversy. An immediate reason is that the proceedings are essentially private advice given by the Court *ex parte* to a trustee upon information supplied by the trustee. His Honour went on to say at 46, that where there is controversy, it is undesirable that the rights of the parties should depend to any degree upon facts that have not been established in the normal manner.
>
> 21 Needham J was asked to deal with a dispute between trustees. He concluded that the proper remedy for the applicant was to take proceedings against her co-trustees for administration of the trust and for declarations as to the interpretation of the instrument in question and the respective rights of the trustees thereunder.

86 Similarly, in *In the matter of International Art Holdings Pty Ltd (admin apptd); International Art Holdings Pty Ltd (admin apptd) & ors v Adams & ors,* [60] Ward J (as her Honour then was) observed (at [38]):

> As a general rule, however, (see *Jacobs' Law of Trusts in Australia* (7th edn) [at 2134]), where the question concerns the respective rights of beneficiaries or their identity, it is not considered appropriate to give a trustee opinion or advice under s 63; rather the proper procedure is by way of originating summons where all parties are served and have the opportunity to be heard (the authors there referring to *Re Kirkegaard* [1950] St R Qd 144; *Re Petersen* [1920] St R Qd 42).

87 Courts have become somewhat less reluctant to give advice in some circumstances where previously they might have declined as a matter of discretion to do so, following the judgment of the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand,* [61] which emphasised that the only jurisdictional prerequisite for the exercise of jurisdiction under s 63 is that the applicant must point to the existence of a question respecting the *management or administration of the trust property or a question respecting the interpretation of the trust instrument*, and that no other limitation confines a court's discretion to exercise its power to give judicial advice, other than the subject-matter, scope and purpose of the legislation. [62]

Nonetheless, while judicial reluctance to give advice in some situations has been mitigated by *Macedonian Church*, that does not mean that the court should or may never, as a matter of discretion, decline to give advice.

88 First, the High Court itself observed that there may be factors justifying a decision not to grant judicial advice, [63] and that it may be the case that the Court would properly decline judicial advice if, for example, a contested construction suit constituted by the disputing parties and resolved by a judge acting on evidence appeared to be more apt to the resolution of a question. [64] This has been reflected in subsequent decisions. Thus in *Jones v Hirst*, [65] Young AJ observed that despite *Macedonian Church*, the court still had a discretion to decline to give advice. And in *Re Estate Late Chow Cho-Poon*, [66] Lindsay J said:

> 196 Not unnaturally, the High Court's observations have been taken as an encouragement to trustees to make a s 63 application whenever confronted by an element of doubt about steps to be taken in the due administration of a trust; as an encouragement to courts of first instance to exercise s 63 jurisdiction liberally; and as an encouragement to them not to withhold judicial advice by adoption of a restricted view of the operation of s 63.
>
> …
>
> 198 However, if the jurisdiction of the Court to aid the due administration of trusts is to be exercised fairly, efficiently and beneficially, care needs to be taken to ensure that an application to the Court is not made unnecessarily, prematurely or without due engagement of persons who may have an interest in the outcome of a s 63 application.

89 His Honour identified two policy reasons for this approach, the first being that s 63 reflects a compromise between affording private advice to trustees and the need for affected persons to be given a hearing; and the second being that the Court's ability to provide well measured advice may be affected because it is not afforded the arguments of competing interests. [67]

90 Accordingly, even though the jurisdictional threshold is met, judicial advice when sought will not always be given. As Pembroke J observed in *Alexander v Perpetual Trustee Company Limited*, [68] the question whether any particular case is an appropriate vehicle for judicial advice is ultimately a matter for the exercise of the Court's discretion, and depends very much on the particular circumstances.

91 Secondly, while *Macedonian Church* establishes that it is not necessarily a bar to giving advice that the context is "adversarial", it is critical to understanding *Macedonian Church* that it involved an application by a trustee against whom there were allegations of breach of trust for an order that it would be justified in having resort to the trust assets to defend the proceedings that were brought against it. As the High Court explained, deciding whether it would be proper for a trustee to institute or defend proceedings (or resorting to trust assets to do so) is radically different from deciding the issues that are to be agitated in the principal proceeding, and the two should not be elided; in particular, the judicial advice proceedings are not to be treated as a trial of the

issues that are to be agitated in the principal proceedings. [69] The need to avoid straying into the latter area so that the judicial advice application becomes a rehearsal of the substantive proceedings has been often emphasised, as s 63 applications are not an opportunity for the opposing party in the substantive proceedings, if permitted to be heard, to have a preliminary judicial examination of the case; the question is whether the trustees would be justified in bringing or defending the proceedings in their capacity as such, not whether they will ultimately succeed. [70]

92 Underlying the present case there is a substantial underlying public controversy, including a factual and legal dispute as to whether there is a valid head lease, as well as whether the sublease and licence would be lawful. Such disputes do not lend themselves to resolution by private advice on an ex parte application. Although because of the nature of this trust there may be no beneficiary in the conventional sense, there is a substantial public interest in the trust purpose of public recreation.

93 Mr Coles submitted that there was no factual controversy about the facts in the statements of facts, but there was at least a suggestion that there were additional facts, not contained in the statement of facts that might bear on the validity of the decision to enter into the 2000 Lease. While counsel responded that if that were so, the suggestion so vague and general that it should not deter the court from giving the advice sought, that overlooks that those who would wish to so contend have not been joined and do not even have the relevant documents. Similarly Ms Wong, for the Minister, submitted that this was a simple case, of the type that was intended to be addressed by the multiple use amendments, and that any issues regarding the validity of the head lease had not been appropriately articulated – which rather overlooks that those who want to articulate them were not joined as parties.

94 Moreover, the issues in respect of which advice is sought are in suit in the 2013 Proceedings. The plaintiffs are not seeking advice as to whether they are justified in defending the 2013 Proceedings – a matter on which judicial advice would probably be entirely appropriate; rather, they are seeking advice on whether they should consent to a sublease, which on the case advanced by the 2013 Plaintiffs would involve an excess of power and a breach of trust. Thus through these proceedings, the plaintiffs would potentially gain immunity in respect of any breach of trust involved in giving such consent, and thus pre-empt the 2013 Proceedings, without a proper hearing.

95 Ms Wong submitted that the judicial advice application was made in the context of the 2013 Proceedings having been adjourned indefinitely, with the consent of the 2013 Plaintiffs to permit what she characterised as “what was perceived by all to be a mutually advantageous application for judicial advice”. The 2013 Proceedings were adjourned in May 2014, after the Council resolved to seek judicial advice in respect of Mr Finkelstein’s advice. However, the 2013 Plaintiffs would not have acceded to that course had they known that work would proceed to implement new arrangements

engaging the multiple use amendments that would effectively destroy at least a large part of the utility of the 2013 Proceedings, and that they would have no standing in that application, and that they would not even be given a copy of the evidence relied on or the submissions advanced in it. Ms Wong submitted that it was intended by all that the judicial advice application would be a process to assist the parties in the other proceedings, not hinder them; but I cannot see how it would do that unless the 2013 Plaintiffs at least had a full opportunity to be heard on it. To accede to the plaintiffs' view of the multiple use amendments and their consequences, even if correct, without properly hearing those who are interested in the question, would understandably arouse enormous resentment.

96 There is no real contradictor. It was suggested that the public interest was sufficiently represented by the Minister; but the Minister supported the plaintiffs' application. Mr Owens' opportunity to be heard was significantly constrained by the plaintiffs' decision not to provide to him a copy of the statement of facts or submissions. Mr Owens has not had a proper opportunity to address the arguments – even after the hearing he still did not know the whole of the trustee's case, because he was not provided with much relevant material, in particular the statement of facts in written form, the exhibits to it, and the written submissions of the Council.

97 The plaintiffs say that they seek advice because they are in doubt as to whether they can lawfully give consent to the proposed transactions, and wish to clarify the status of LnD's occupation without prior consent, and whether and if so how the position should be regularised, and that not resolving the matter would leave the trust property in a less organised and a more precarious position than if advice were given, which was said to be an important consideration when dealing with a public trust. They say that they are in a dilemma as to whether to leave LnD in occupation unofficially and without consent until 2018, or commence proceedings to terminate that occupation, or grant new lease relying on the powers now conferred by CLA89, s 34AA; and that they should not be left without guidance as to what they may do with the reserve between now and 2018 when the 2000 Lease expires. However, the plaintiffs did not present a case in which advice was sought, in the alternative, that they would be justified in terminating LnD's occupation. Nor did any such element of doubt appear in their presentation of the case, as they contended that the factual position was uncontroversial, and the legal position clear and obvious – an approach which was shared by the Minister. As will by now be evident, I do not regard the matter that way, and in any event what might appear clear *ex parte* may not once there is a proper contradictor. It was submitted that plaintiffs ought not be left to tolerate the criticism which was being directed at them – but it is not the function of judicial advice to quell a controversy of that kind.

98

In my view s 63 is plainly an inappropriate vehicle to resolve this dispute. The 2013 Proceedings, in which there can be a proper and public examination of the issues, with the benefit of proper contradiction, provide a plainly more appropriate vehicle for their resolution. There is no good reason why they should be decided on a private *ex parte* application when it is in issue in contested litigation, and all the more so when public interest is involved. There is no benefit to the trust estate (as distinct from the trustee personally) in giving the advice sought in these proceedings.

99 When these views were articulated, provisionally, during the hearing, the plaintiffs pressed earnestly that I should give advice as sought, but that if I were not inclined to do so, I should not simply dismiss the application, but explore alternatives that would preserve the utility of the hearing and avoid leaving the Council without guidance, if necessary by reconstituting the proceedings or joining additional parties. Mr Owens was invited to state the attitude of the 2013 Plaintiffs as to whether judicial advice should be given, with an indication that if they supported the position that – for reasons of efficiency and economy – I should in this application decide the issues and give advice, that would significantly impact on the otherwise strong argument that I should decline to do so, leaving the issues to be resolved in the 2013 Proceedings. I also indicated that an alternative mid-course might be to reconstitute the present proceedings with the addition of claims for declaratory relief and the joinder of appropriate contradictors.

100 At the hearing, Mr Owens appeared inclined to favour that alternative mid-course. After the hearing, he conveyed to the Court that, being appraised that there was a not remote risk that the Court would decline to give judicial advice, and in an effort to contain legal costs in connection with the dispute generally and preserve the utility of the hearing, his clients were willing to cooperate in any endeavour to allow the matter to be resolved, through a more complete statement of facts and amendment of the summons, or in any other way the Council or the Court might think appropriate. I was invited to delay giving judgment while those possibilities were explored; however, nothing appears to have come of it.

101 Had I been inclined, on the current state of the proceedings, in favour of the position for which the plaintiffs contend, I would not have given advice under s 63, but would have required the proceedings to be reconstituted as a claim for declaratory relief, joining the 2013 Plaintiffs as defendants, and requiring advertisement of the proceedings to enable other interested persons to apply to be joined or heard. However, as I have concluded that the plaintiffs would not be justified in consenting to the proposed sublease, such advice can be given without reconstitution of the proceedings. It does not of course bind NSTA or LnD, nor materially harm their rights, as their ability to sustain proceedings to compel the plaintiffs to give consent is unaffected.

Conclusion and Orders

102 My conclusions may be summarised as follows:

103 The decision of 12 July 1999 was made by the Council in its capacity as manager of the Talus Trust, and was a decision of the Talus Trust. The decision sufficiently specified the essential terms and conditions of the proposed lease. The 2000 Lease is not void or invalid for want of a relevant decision compliant with CLA89, s 102(1).

104 The demise of the whole of the Reserve to a private association, whose members have priority rights to use of the Reserve, is plainly not a use for public recreation. At least but for the multiple use amendments of 2013, the lease to NSTC/NSTA would be unlawful, as not being for or ancillary to the reserved purpose of public recreation.

105 The multiple use amendments do not validate every existing secondary interest, but only those which would have been validly granted had s 34AA been in force at the time of the grant. While the Talus Trust must be deemed to have in fact held the opinion that use or occupation of the Talus Reserve pursuant to the 2000 Lease would be in the public interest and would not be likely to materially harm its use or occupation for the reserved purpose of public recreation, that was an opinion that was not, having regard to the relevant considerations referred to in s 34AA(3), reasonably open, and accordingly the 2000 Lease would not have been validly granted, even if s 34AA had then been in force. Alternatively, an interest which dominates or excludes the primary (reserved) purpose is not a “secondary interest” within the legislation. Accordingly, despite the multiple use amendments, the 2000 Lease is unlawful, and thus there is no valid head lease in respect of which the proposed sublease to LnD could be granted. (This conclusion, which is reached for the purpose of these proceedings only, does not bind NSTA).

106 The lessee of a Crown reserve can, subject to the terms of the lease, grant a sublease, provided that use of the reserve pursuant to the sublease will be for the reserved purpose, or (in the reasonable opinion of the reserve trust) in the public interest and not likely materially to harm its use for the reserved purpose.

107 Even if the 2000 Lease has been validated by the multiple use amendments, the Talus Trust would not act lawfully and properly, but would be in breach of trust, in giving consent to the proposed sublease to LnD, because use of the reserve pursuant to the proposed sublease could not reasonably be considered as other than materially harmful to its use for the reserved purpose of public recreation. While, having regard to the relatively small part of the reserve affected by the proposed licence to Humpty Dumpty, I would have inclined to the view it would have been open, consistent with the trust and CLA89, to consent to the proposed occupation by Humpty Dumpty, that licence is no longer required.

108 An application for judicial advice was not an appropriate vehicle for determination of the issues raised. Had I been inclined, on the current state of the proceedings, to favour the position for which the plaintiffs contended, I would not have given advice under s 63,

but would have required the proceedings to be reconstituted as a claim for declaratory relief, joining the 2013 Plaintiffs as defendants, and requiring advertisement of the proceedings to enable other interested persons to apply to be joined or heard. However, as I have concluded that the plaintiffs would not be justified in consenting to the proposed sublease, advice to that effect can be given without reconstitution of the proceedings. Such advice does not bind NSTA or LnD.

109 The Court orders that:

(1) the Talus Trust would not be justified in giving its consent to, or seeking and obtaining the Minister's consent to, the proposed sublease of the Talus Reserve to Love 'n Deuce Pty Ltd.

(2) Reserve leave to the parties to apply within seven days by arrangement with my Associate for any consequential orders.

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Endnotes

1. Notifications on the title record that the land is a reserve within the meaning of CLA Part 5, and that there are restrictions on its transfer and other dealings which may require the minister's consent.
2. Pursuant to CLA89 s 186 and Schedule 8, cl 4(1),
3. Pursuant to CLA89 s 92(6)(c), s 95 and Schedule 8, cl 5.
4. The opinion of Mr Finkelstein QC, dated 3 June 2013, was prepared before and did not refer to the enactment of the multiple use amendments, referred to below, which came into effect in November 2013.
5. Although, almost at the end of the hearing, counsel for the Minister announced that the Minister did not consider that the operating of a business in relation to tennis centres or schools not located on the reserve would fall within the purpose stated in the proposed sublease, and that the proposed sublease would not authorise the use of the reserve for that purpose.
6. (NSW) Crown Lands Consolidation Act 1913, as in force immediately prior to its repeal, ss 37M and 37P.
7. (NSW) Crown Lands (Continued Tenures) Act 1989 has no relevance for present purposes.
8. CLA89 s 78 defines "reserve" to include "land … which immediately before the commencement of this section was a reserve within the meaning of Part 3B of the Crown Lands Consolidation Act 1913".
9. CLA89 Sch 8 cl1(1) and (2) have the effect that a reservation in force under the Crown Lands Consolidation Act 1913 has effect as if made under CLA89, for the same purpose and on the same terms as the original reservation.
10. Pursuant to CLA89 Sch 8 cl 4(1). Pursuant to CLA Sch 8 cl 4(3), it was named Talus Street (R73306) Reserve Trust by gazettal on 30 July 1999.
11. CLA89 s 92(5).
12. Pursuant to CLA89 ss 92(6), 95 and Sch 8 cl 5(2).
13. CLA89 s 98(1). The Talus Reserve is a "public reserve" for that purpose: Local Government Act 1993, Dictionary, "public reserve" (g)(i).
14. (2012) 84 NSWLR 219; [2012] NSWCA 358.
15. (2012) 84 NSWLR 219; [2012] NSWCA 358, at [37].
16. CLA89 s 34AA(1), (2). By s 33A, "reserved purpose" means the public purpose for which the land was reserved under Part 5, in this case public recreation.
17. CLA89 s 34AA(3).
18. CLA89 s 34AA(4)(a).
19. CLA89 s 34AA(4)(b).

20. Although the 1978 Lease contained an option to renew, the 2000 Lease was effected by a new lease, commencing with effect from the expiry of its predecessor.

21. The current rental paid by NSTA under the lease is $27,145 per annum.

22. Pursuant to CLA89 s 95(4), a document is sufficiently executed by a reserve trust managed by a corporation if executed under the seal of the corporation instead of the seal of the trust.

23. The fees payable by LnD to NSTA are currently $106,750 per annum.

24. It was said that the issue of advertising was not raised by Mr Owens as being any impairment to the validity of the head lease; but that submission tends to overlook the nature of the proceedings – an ex parte application for private advice on such material as is put before the court by the trustee.

25. CLA89, Sch 8, cl 4(1).

26. CLA89, Sch 8, cl 5(2).

27. CLA89 s 95(1).

28. CLA89 s 98(1).

29. CLA89 s 98A.

30. CLA89 s 97A.

31. CLA89 s 95(4).

32. [1975] AC 520 (PC).

33. (1934) 52 CLR 455 at 496.

34. Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council [2009] NSWCA 138 at [171] (Basten JA), citing Attorney-General v Cooma Municipal Council (1962) 8 LGRA 111 at 121; Waverley Municipal Council v Attorney-General (1979) 40 LGRA 419 at 428.

35. (2012) 84 NSWLR 219; [2012] NSWCA 358 at [1], [2], [26], [42].

36. (2012) 84 NSWLR 219; [2012] NSWCA 358 at [30].

37. (1959) 102 CLR 54

38. (1959) 102 CLR 54 at 88.

39. Mr Coles submitted that the factors which denied the AJC a rating exemption did not found any contention that the whole occupation of the racecourse was illegal and contrary to the public purpose; but that was because the uses which extended beyond public recreation – included horse training, and a grant of exclusive use to the AJC – were authorised by the grant and ancillary legislation. It was not a reserve for public recreation alone.

40. (1963) 63 SR(NSW) 287 at 294; (1962) 8 LGRA 111 at 118.

41. For example, in Goomallee at [31]; Waverley Municipal Council v Attorney General (1979) 40 LGRA 419

42. (1970) 123 CLR 574.

43. (1979) 40 LGRA 419; [1970] 2 NSWR 342.

44. (1970) 19 LGRA 380.

45. (1970) 19 LGRA 380 at 383.

46. (2005) 30 WAR 193; [2005] WASCA 99 (Wheeler, Roberts-Smith and Pullin JJA).

47. (1996) 91 LGERA 302.

48. (1998) 98 LGERA 81.

49. CLA89 s 98(3).

50. Hansard, Legislative Assembly, 12 September 2013, Crown Lands Amendment (Multiple Land Use) Bill 2013.

51. Cudgen Rutile No 2 Pty Ltd v Chalk [1975] AC 520.

52. (2012) 84 NSWLR 219; [2012] NSWCA 358 at [1]; [2]; [20]; [42]; [43].

53. (2012) 84 NSWLR 219; [2012] NSWCA 358 at [37].

54. Although there must be some prospect that the Talus Trust could now terminate for breach on account of the purported subletting to LnD without prior consent.

55. As already noted, counsel for the Minister announced towards the end of the hearing that the Minister did not consider that the operating of a business in relation to tennis centres or schools not located on the reserve would fall within the purpose stated in the proposed sublease, and that the proposed sublease would not authorise the use of the reserve for that purpose. While use of the reserve as LnD's headquarters for its operations elsewhere is a factor in my ultimate conclusion that use of the reserve by LnD under the sublease could not conceivably be considered other than materially harmful to its use for the reserved purpose of public recreation, removal of that factor would not alter the conclusion.

56. Bathurst CC v PWC Property Pty Limited (1998) 195 CLR 566 at 592 [67]; St Alder v Waverley Local Council [2010] NSWCA 22; (2010) 172 LGERA 147 at [56].

57. Re North Sydney Council (1997) 96 LGERA 227 (Local council as trustee of a park under (NSW) Public Parks Act 1912 granted judicial advice); cf Re Estate late Chow Cho-Poon [2013] NSWSC 844 at [180] (Lindsay J: the legislation may apply to statutory trusts); Australian Pipeline Limited (2006) 60 ACSR 625 at [2] (Barrett J: the responsible entity of a managed investment scheme is a trustee, by virtue of (CTH) Corporations Act 2001, s 601FC(2), and thus eligible to apply for judicial advice); In the matter of Purchas as Liquidator of Astarra Asset Management Pty Ltd (in liq) [2011] NSWSC 91 at [39]-[42] (Ward J); In the matter of MF Global Australia Ltd (in liq) [2012] NSWSC 994 at [2] and [9] (Black J).

58. [1976] 1 NSWLR 42.

59. [2003] NSWSC 548.

60. [2011] NSWSC 164.

61. [2008] HCA 42; (2008) 237 CLR 66.

62. [2008] HCA 42; (2008) 237 CLR 66 at [58]-[59].

63. [2008] HCA 42; (2008) 237 CLR 66 at [106].

64. [2008] HCA 42; (2008) 237 CLR 66 at [60].

65. [2013] NSWSC 163 at [22].

66. [2013] NSWSC 844.

67. [2013] NSWSC 844 at [199].

68. [2015] NSWSC 1815 at [4].

69. [2008] HCA 42; (2008) 237 CLR 66 at [74]

70. Application of Lenyco Pty Ltd [2010] NSWSC 1094 at [7]; see also Lenyco Pty Ltd; In the matter of the Daquino Family Trust [2009] NSWSC 846 at [8]; Application of Uncle's Joint Pty Ltd [2014] NSWSC 321.

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