

CITATION: *Commonwealth of Australia v Trepang Services Pty Ltd (No.2)* [2019] NTCA 6

PARTIES: Commonwealth of Australia

v

Trepang Services Pty Ltd
(ACN 149 489 065)

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL from the SUPREME
COURT exercising Territory jurisdiction

FILE NO: AP 2 of 2019 (21819597)

DELIVERED: 25 July 2019

HEARING DATE: 29 March 2019, 9 May 2019, then
Determined on the papers

JUDGMENT OF: Barr J, Mildren AJ and Riley AJ

CATCHWORDS:

APPEAL – Consequential orders – Construction of contract – Court previously held that defined term ‘Contract Material’ included all material, including documents or records in hard copy or electronic form created by the respondent in performing the contract – Creator of the document need not be the respondent or the Commonwealth – Respondent obliged to deliver ‘all Copies’ on expiration or termination of the contract – Obligation automatically arises – No requirement for direction – Contract term enforceable as exception to the general principle that contractual rights or obligations do not survive termination – order for specific performance granted

McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457; *Re Dingian and ors; ex parte Wagner and anor* (1995) 183 CLR 323, distinguished

Commonwealth of Australia v Trepang Services Pty Ltd [2019] NTCA 2, considered

REPRESENTATION:

Counsel:

Appellant: D Robinson SC, B Ilkovski, M Spain
Respondent: N Christrup SC

Solicitors:

Appellant: Clayton Utz
Respondent: HWL Ebsworth Lawyers

Judgment category classification: B
Number of pages: 14

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Commonwealth of Australia v Trepang Services Pty Ltd (No.2) [2019]
NTCA 6
No. AP 2 of 2019 (21819597)

BETWEEN:

COMMONWEALTH OF AUSTRALIA
Appellant

AND:

TREPANG SERVICES PTY LTD
(ACN 149 489 065)
Respondent

CORAM: Barr J, Mildren AJ and Riley AJ

REASONS FOR JUDGMENT

(Delivered 25 July 2019)

THE COURT:

- [1] After separate Reasons for Decision in this appeal were published on 22 March 2019,¹ formal orders were made that the appeal be allowed and that the judgment in favour of the respondent given 18 December 2018 be set aside. Consideration of consequential and further orders was adjourned to a date to be fixed.
- [2] The matter came before Barr J for mention on 29 March 2019, by which time the respondent had formulated seven issues or questions said to be

necessary for resolution of the appeal in terms of the relief sought in paragraph 11 of the supplementary notice of appeal filed 6 February 2019.² Orders were made for the appellant and respondent to serve written outlines of submissions, and the matter was adjourned for further mention to 9 May 2019. On 9 May 2019, Barr J informed the parties that the Court would consider the written submissions and make a decision as to consequential relief or orders on the papers. Orders were made for the filing and serving of supplementary submissions by the respondent and submissions in reply by the appellant.

[3] The court has now received and considered the parties' written submissions.

[4] Of the seven further issues or questions for determination formulated by the respondent, referred to in [2],³ the following six are pressed:

1. Whether on the proper construction of clause 5.3.4, Trepang Services was required to deliver the Copies to the Commonwealth automatically on expiration or termination of the agreement or only if directed to do so by the Commonwealth.
3. If the answer to 1. is that the Commonwealth was required to give a direction, whether:
 - a) the Commonwealth's letter dated 18 August 2016 amounted to a direction to the respondent to deliver the Copies to the Commonwealth; or
 - b) the direction in the Commonwealth's letter dated 28 February 2018 was of no legal effect because it was issued after the agreement had come to an end, alternatively, after a

1 *Commonwealth of Australia v Trepang Services Pty Ltd* [2019] NTCA 2.

2 Appeal Book p.311.

3 See Attachment 'A' to the order made by Barr J on 29 March 2019.

reasonable time had lapsed since the agreement came to an end.

4. Whether in respect of any given document:
 - a) Trepang Services is required to deliver all copies of the documents of the Commonwealth, but is entitled to create and retain an additional copy of the documents for its own records; or
 - b) Trepang Services is entitled to retain one copy of the documents for itself, and is only required to deliver any excess copies (if any exist) to the Commonwealth.
5. Whether any order for delivery should be confined to documents still in the possession of Trepang Services.
6. The wording of any order requiring the delivery of documents, including proper identification of the documents ordered to be delivered and the manner of delivery.

The time for delivery of the documents.

Construction of sub-clause 5.3.4 – question 1

- [5] We set out below clause 5.3 of the contract, with subclause 5.3.4 underlined for emphasis:-

5.3 Dealing with Copies

- 5.3.1 For the purposes of this Clause 5.3, Copy (or Copies) means any document, device, article or medium in which Commonwealth Material, Contract Material or the Commonwealth's Confidential Information is embodied.
- 5.3.2 Property in each Copy vests or will vest in the Department and must be delivered to the Department on demand within a timeframe designated by the Department.
- 5.3.3 The Services Provider agrees to establish and maintain procedures to secure all Copies against loss and unauthorised access, use, modification or disclosure.
- 5.3.4 Upon the expiration or termination of this Agreement, the Services Provider agrees to deliver to the Department or otherwise deal with all Copies as directed by the Department.
- 5.3.5 Notwithstanding Clause 5.3.2, the Services Provider may retain for its normal business purposes a full copy of Material used in the course of providing Services under this Agreement, which

may include copies of extracts from or references to the Commonwealth Material, Contract Material and Confidential Information, subject to the confidentiality obligations in Clause 6.1.

[6] The respondent contends that, on a proper construction of subclause 5.3.4, it is only obliged to deliver the Copies if the Commonwealth directs it to do so. We reject that contention. The obligation to deliver automatically arises upon the expiration or termination of the contract. There is no requirement for any direction; the respondent has an obligation to deliver all the Copies to the Department, albeit an obligation which the Commonwealth may waive or vary by direction. We agree with the submissions of the appellant that the use of the word “or” in clause 5.3.4 is a true disjunctive, with the result that if the Commonwealth is minded to give some “otherwise” direction, it may do so. Thus, the expression “or otherwise deal with” simply means otherwise than delivering all the Copies to the Department. Even if, contrary to the given construction, the words “as directed by the Department” were also to apply to the obligation to deliver “all Copies”, such direction would necessarily be limited to the mechanics of performance of the substantive obligation.

[7] We make some further observations. The Commonwealth could give a direction to deliver some of the Copies; or to deliver them to a recipient other than the Department, or even to destroy them. However, it is implied that the direction must be reasonable and could not, for example, be a direction to retain the Copies in storage indefinitely. Although it would

appear in the present case that the respondent retained the Copies, it could have returned all of the Copies after expiration or termination of the contract; it was not obliged to wait for a direction.

- [8] Under the contract, the Copies were the property of the Commonwealth even if they were embodied (stored) in the hard drive of a computer or other device. The word “Copies” was defined to include any device in which the electronic documents were embodied, and that would even include devices which were originally the property of the respondent. It may be noted that sub-clause 5.3.2 provided for progressive vesting in the Department of the property in each Copy, as the contract was performed. The property vested under that sub-clause included both tangible and intangible property.

Question 3

- [9] By its formulation of question 3, the respondent has limited the Court’s consideration to the situation where the Commonwealth was required to give a direction. In [6] above, we found that there was no such requirement. In the alternative, however, we consider in [10] to [13] below the position if (contrary to our finding) there were such a requirement.
- [10] We are satisfied that the letter dated 26 February 2018 from the Acting Assistant Secretary, Detention Services Division, Department of Home Affairs, to Mr John Robinson, Director of the respondent, was a valid

direction.⁴ The letter referred to clause 5.3 of the contract and to the Department's entitlement "to any document, device, article or medium in which Commonwealth Material, Contract Material or the Commonwealth's Confidential Information [was] embodied". The letter requested the immediate delivery of the material for the whole of the term of the contract.⁵

[11] The respondent contends that the request or direction contained in the letter referred to in [10] was of no legal effect because the contract had by that stage expired or terminated. The respondent submits that it was not obliged to perform a contractual obligation which, it says, had not accrued at the time the contract came to an end.⁶ The respondent relies on the decision of the High Court in *Re Dingjan and ors; ex parte Wagner and anor*,⁷ which applied the Court's earlier decision in *McDonald v Dennys Lascelles Ltd*,⁸ in support of the proposition that "generally speaking, no contractual right or obligation survives termination so as to be enforceable as such". However, the statement of Brennan J in *Re Dingjan* relied on by the respondent was subject to an important qualification as to the meaning of "generally speaking", namely "... leaving aside contracts which contain clauses intended to survive termination of the substantive provisions of the

⁴ Appeal Book, pp. 92-93.

⁵ Consideration of the Commonwealth's letter dated 18 August 2016 (Appeal Book 95) thus becomes irrelevant. However, for reasons which can be briefly stated, we consider that that letter was not a direction within the meaning of subclause 5.3.4, or a request for delivery up of "all Copies". The letter put the respondent on notice that the contract would terminate on 30 November 2016, and stated an intention to work collaboratively with the respondent to ensure the return of all Commonwealth Material and the delivery of all Copies, as well as management of the closure and making good of the site.

⁶ Respondent's Outline of Supplementary Submissions, 3 May 2019, par 24.

⁷ *Re Dingjan and ors; ex parte Wagner and anor* (1995) 183 CLR 323 at 341, per Brennan J.

contract”, specific examples being clauses relating to arbitration, confidential information and restraint of trade.⁹ We consider that a provision relating to the obligation of one party to deliver up the property of another on expiration or termination of a contract is likewise an obvious exception to the general position.

[12] The respondent acknowledges that parties to a contract are free to agree that certain clauses survive termination, whether by express provision or by implication, but contends that there is no express provision in respect of sub-clause 5.3.4; further that it cannot be implied that the Commonwealth’s right to direct return may be exercised after the contract expired. That contention must be rejected. Sub-clause 5.3.4 is concerned with the position after the expiration or termination of the contract; it is only then that the respondent’s delivery obligation comes into existence. A construction which rendered a sub-clause 5.3.4 direction invalid if not given before the expiration or termination of the agreement would not only be artificial but also inconsistent with the obvious purpose of the sub-clause.

[13] In the present case, the contract expired on 30 November 2016. The Commonwealth’s letter, referred to in [10] above, was sent within 15 months of that date. There is no evidence that the 15-month lapse of time caused any prejudice to the respondent or anything adverse to happen to “the Copies”. In relation to whether or not the request was made within a reasonable time,

8 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 469-470, 476-467.

we accept the respondent’s submission that the respondent knew from 18 August 2016 that the Commonwealth wanted to work collaboratively to secure the return of all Commonwealth Material and the delivery of all Copies.¹⁰ The respondent submits that “a reasonable time” for the purposes of clause 5.3.4 should be measured in weeks, not months, but does not support that submission other than to assert a requirement for the time to be determined objectively and as at the time the original contract was entered into in September 2011 or the deed of variation in mid-2015.¹¹ That submission is hardly compelling. Far more compelling, indeed determinant, is that the letter of 28 February 2018 was written and sent (1) at a time when the respondent still had the Copies, and (2) well within any possible limitation period.¹² Those are both very relevant considerations. We agree with the appellant’s submission that the Commonwealth had – from the expiration of the contract until the end of any relevant limitation period – an enforceable right for the delivery of its property.

Question 4

[14] As we made clear in [6], the respondent has an automatic obligation to deliver “all Copies” to the Department. In relation to sub-clause 5.3.5, the respondent contends that paragraph (b) of question 4 states the correct construction; that, since the word ‘retain’ ordinarily means “to *keep*

9 *Re Dingjan and ors; ex parte Wagner and anor* (1995) 183 CLR 323 at 341, footnote 57.

10 See footnote 5 above.

11 Respondent's Final Submissions dated 16 May 2019, pars 39 to 41.

12 Appellant’s Reply Submissions dated 23 May 2019, par 10.

possession of, *continue to have*” [emphasis added], the effect of sub-clause 5.3.4 is that the respondent is only obliged to return any additional or excess copies. The argument proceeds that, if the respondent only has one copy of a document, it is not required to deliver that to the Department. We reject that contention. The words “may retain” in sub-clause 5.3.5 do not have the consequence that if there is only one copy, the respondent may keep it. Such an outcome would make no sense, given the clear purpose of sub-clause 5.3.4. We expect that there would probably be only one copy of most of the documents coming within the description of “all Copies”. Sub-clause 5.3.5 is a concession to the respondent to enable it to make and keep copies of any documents, whether in paper or electronic form, which it may need for its own purposes, for example, for taxation purposes or other business purposes such as preparation of its balance sheet and profit and loss account, or for the purpose of protecting itself against litigation. In this context, the inclusion of the words “may retain” pre-supposes that the respondent will make copies of those documents it considers important, and will be entitled to keep such copies.

- [15] In conclusion in relation to sub-clause 5.3.5, paragraph (a) of question 4 states the correct construction, namely, the respondent is entitled to create and retain an additional copy of documents for its own records.

Question 5

- [16] The respondent contends that, given “the significant lapse of time between [the contract] coming to an end and the Commonwealth’s direction for compliance with clause 5, there is a distinct possibility that the respondent has lost or misplaced some of the documents caught by clause 5”. It contends that any order for specific performance should be confined to documents still in the possession of the respondent and which it has located after making a reasonable search.
- [17] The appellant contends in response that, although a similar submission as to “distinct possibility” was made in the Supreme Court,¹³ the issue was not the subject of evidence at trial. The theoretical possibility of documents being lost or misplaced was advanced in the absence of any evidence as to (1) location and other circumstances of the storage (of hard copy and electronic documents), (2) the results of preliminary searches, if any, undertaken for relevant documents, (3) document retention policies and procedures, or (4) actual destruction of documents (if that had occurred).
- [18] While there is some force to the appellant’s submission, we consider that that the order of this Court should be confined to all Copies still in the possession of the respondent. However, we do not restrict the notion of “possession” to actual custody; we include those documents which are in the legal possession of the respondent, that is, within its possession, custody, power or control.

13 Appeal Book p.244: Defendants Written Submissions, 3 August 2018, par 71.

Question 6

[19] Subject to the concession referred to in [21], the appellant asks for an order in terms of paragraph 11B contained in the supplementary notice of appeal,¹⁴ namely that the respondent deliver to the Commonwealth the documents listed in attachment 'A' to the summons on originating motion, within such time as the court specifies.

[20] Attachment 'A' reads as follows:

All copies (as defined in the Services Contract) including correspondence, meeting minutes and attendance notes by or between one or more of Trepang, Serco and/or the Department within the following categories:

- Facility maintenance plans or documents in the nature of facility maintenance plans prepared in relation to the care, maintenance and repair of the Premises (as defined in the Services Contract).
- Environment management plans or documents in the nature of environment management plans prepared in relation to environmental management of the Premises (as defined in the Services Contract).
- Itemisation reports of loose assets in the Premises or documents in the nature of itemisation reports of loose assets in the Premises.
- Requests for and provision of services to the Commonwealth by Trepang or on its behalf in relation to the services under each of Items A1, A2, B, E, F1, F2 and J of Schedule 2 to the Services Contract identifying for each Copy to which Item or Items it relates.
- Invoices rendered by or to Trepang in relation to each of the services referred to in the previous paragraph.

14 Appeal Book, p.311.

- The Substantive reports and log book records required to be prepared by Trepang under Item J of Schedule 2 to the Services Contract.
- All agenda and minutes of monthly meetings under Item U of Schedule 1 to the Services Contract.

[21] The appellant concedes that the delivery obligation in respect of the fourth bullet point does not extend to the respondent being required to identify or state for each Copy the particular services in items A1, A2, B, E, F1, F2 and J of Schedule 2 to the contract to which it relates. That is an appropriate concession.

[22] The respondent notes that attachment ‘A’ appears to capture documents created by third parties, including contracts created by Serco pursuant to its contract with the Commonwealth and by the subcontractors engaged by the respondent pursuant to their individual subcontracts. Indeed it does. The respondent submits that the definition of “Contract Material” contemplates only documents created by the respondent for the purposes of the service agreement, not those created by third parties, and that the court should restrict the respondent’s obligation accordingly.

[23] The respondent also relies on what was said by Barr J and Riley AJ in the Court’s earlier decision¹⁵ in this appeal:

The express terms of the contract thus made clear that the documents referred to in Item C were “Contract Material” within the agreed definition (and, by logical inference, were “Material”). The meaning of “Contract Material” thus extends well beyond the limited

15 *Commonwealth of Australia v Trepang Services Pty Ltd* [2019] NTCA 2 at [17].

categories contended for by the respondent. Further, the notion of “Material” is not to be confined to intangible things, as contended by senior counsel for the respondent on appeal; it includes all material created by the respondent in performing the contract (“created for the purpose of this agreement”). [underline emphasis added]

[24] The respondent’s submission cannot be accepted. The definition of “Contract Material” was, relevantly, “all Material: (a) created for the purposes of this Agreement, including the Contract Material specified in Item C ...”. The definition itself and the underlined remarks of Barr J and Riley AJ do not say or imply that the creator of the document must be either the respondent or the Commonwealth. We consider that the expression “Contract Material” is defined sufficiently widely to include documents created by persons, corporations or agencies other than the respondent or the Commonwealth.

Conclusion

[25] We allow the appeal and make orders as follows:

1. That the order made on 18 December 2018 dismissing the originating motion and granting judgment in favour of the respondent be set aside.
2. That the order made on 29 January 2019 that the Commonwealth pay the respondent’s costs of the proceeding, to be taxed in default of agreement, be set aside.
3. That the respondent deliver to the Commonwealth the documents listed in attachment ‘A’ to the summons on originating motion, save that, in relation to dot point 4, the respondent is not required to identify for each Copy the item or items to which it relates.
4. That, with the exception of the documents coming within the description in dot point 4 of attachment ‘A’, the respondent deliver the documents within 28 days from today.

5. That the respondent deliver the documents coming within the description in dot point 4 of attachment 'A' within three months of today.
6. That the documents be delivered to the offices of Clayton Utz Lawyers, Level 1, 17-19 Lindsay Street, Darwin.
7. Both parties have liberty to apply.
8. That the respondent pay the Commonwealth's costs of this appeal, and in the Supreme Court, to be taxed in default of agreement.

[26] We direct that the solicitors for the appellant prepare and file a draft order in the registry for settling.
