SUPREME COURT OF QUEENSLAND

CITATION:	*Sentinel Robina Office Pty Ltd v Clarence Property Corporation Ltd* [2018] QCA 314
PARTIES:	**SENTINEL ROBINA OFFICE PTY LTD ACN 608 262 291 AS TRUSTEE FOR THE SENTINEL ROBINA OFFICE TRUST** (appellant) **v** **CLARENCE PROPERTY CORPORATION LTD ABN 67 094 710 942 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE WESTLAWN PROPERTY TRUST ASRN 095 611 804** (respondent)
FILE NO/S:	Appeal No 5865 of 2018 SC No 4329 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 95 (Jackson J)
DELIVERED ON:	13 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2018
JUDGES:	Sofronoff P and Philippides JA and Davis J
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties are in a commercial arrangement akin to a joint venture – where that arrangement is regulated by a deed – where that deed requires the parties act in "utmost good faith" – where the appellant contends that the respondent recruiting a particular employee breached that requirement – where the primary judge found that the deed and the requirement of utmost good faith related to dealings between the parties and not other matters – whether the primary judge erred *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268, followed
COUNSEL:	J Bell QC, with T Pincus, for the appellant P L O'Shea QC, with F Lubett, for the respondent

SOLICITORS: Russells for the appellant
AJ & Co for the respondent

[1] **SOFRONOFF P:** The appellant and respondent are joint owners of an office building at Robina on the Gold Coast. They are also parties to a deed which regulates their respective rights and obligations in relation to their shared ownership of the building. It would not be inaccurate to describe the relationship between the parties as a joint venture. For example, as is common in joint venture agreements, the deed contains a restriction upon alienation. This restriction recognises that the parties each regard the identity of their counterparty as vital to the relationship. Accordingly, clause 10 provides for rights of pre-emption. Clause 12.2 provides for the appointment of a manager of the property. Some of the duties of the manager are referred to in clause 12.1. They include duties to insure the building, to ensure the preparation of a budget and matters of that kind. No doubt the manager would also be required to deal with tenants who rent space in the building.

[2] Clause 12.2 obliges the parties to appoint Sentinel Property Services Pty Ltd as the manager (subject to certain qualifications that are immaterial). That is a company that is controlled by the appellant. Mr Simon Kennedy was an employee of yet another subsidiary of the appellant and he was appointed to act as the most senior representative of the managing company. It was Mr Kennedy who was principally responsible for the carrying out of the manager's duties. Therefore, his role was an important one in the operation of the parties' business.

[3] Clause 16.9 of the deed is central to this appeal. It provides, as follows:

> "**16.9 Good faith and conflicts of interest**
>
> (a) Without limiting the generality of any other provision of this deed the parties agree that in the performance of their respective duties and the exercise of their respective powers under this deed and in their respective dealings with each other, they shall act in the utmost good faith.
>
> (b) Without limitation to the provisions of clause 16.9(a), each Co-Owner must:
>
> (i) declare any conflict of interest between its interest as a co-owner of the Property and the other business affairs of that Co-Owner's Group; and
>
> (ii) use all reasonable endeavours to manage its affairs so as to minimise the impact of any conflict of interest between its interest as a co-owner of the Property and the other business affairs of that Co-Owner's Group.
>
> (c) For the avoidance of doubt, no Co-Owner may use any information relating to a prospective tenant or a proposal to a prospective tenant for other purposes relating to other buildings in which it may have an interest."

[4] Both the appellant and respondent are substantial owners of commercial real estate other than the building. In early February 2017 the respondent was looking for somebody to fill the role of property manager to look after commercial property that it owned elsewhere. Mr Peter Fahey is a director of the respondent and is its Chief

Executive Officer. After a brief meeting with Mr Kennedy and an exchange of emails, Mr Fahey offered Mr Kennedy a position as the respondent's Head of Property with an increase in pay. Mr Kennedy resigned from his position within the appellant's group of companies and took on his new employment. None of this was disclosed to the appellant until it was too late to prevent Mr Kennedy's departure.

[5] Mr Warren Ebert is the sole director and shareholder of the appellant. He is the Managing Director and Chief Executive Officer of the Sentinel Group of companies. When he learned of Mr Kennedy's defection he strongly objected to how the respondent had gone about employing Mr Kennedy.

[6] The appellant contends that the respondent's recruitment of Mr Kennedy was a breach of the respondent's duty under clause 16.9 to act in the utmost good faith. If that contention is correct then, pursuant to the terms of the deed, the respondent was in "Default". Clause 11 thereupon entitled the appellant to acquire the respondent's interest in the building. Acting upon that basis, the appellant invoked the acquisition process under clause 11.

[7] This provoked the respondent to issue proceedings to vindicate its own position. It sought a declaration that it was not in Default under the deed. In its defence to this claim the appellant maintained its stance that the respondent had breached clause 16.9. The learned trial judge, Jackson J, summarised the appellant's pleaded case about the breach as follows:[1]

(a) Mr Kennedy was an employee of Shield Property Services Pty Ltd;

(b) Shield is a part of the respondent's "Co-owner's Group" within the meaning of the deed;

(c) Mr Kennedy attended weekly or fortnightly meetings concerning the management of the building;

(d) The respondent enticed Mr Kennedy to leave Shield's employ;

(e) That enticement was done in the course of the co-owners' respective dealings with each other within the meaning of clause 16.9(a);

(f) Mr Fahey knew that Mr Kennedy held an important role in relation to aspects of Sentinel's business including the building;

(g) The respondent did not disclose to the appellant its intention to entice Mr Kennedy to leave the employ of the appellant's co-owners' group.

[8] The first, second, third, sixth and seventh of these propositions were not in dispute. The respondent denied that it had secretly enticed Mr Kennedy to leave his employment but Jackson J found that it had done so. The substantial issue between the parties was then whether this enticement occurred "in the course of the co-owners' respective dealings with each other" and whether it constituted a breach of the duty of good faith.

[9] Jackson J concluded that the respondent's secret recruitment of the appellant's representative did not constitute a breach of clause 16.9(a). It was therefore not a "Default" that could trigger the operation of clause 11. His Honour made a declaration accordingly.

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1 *Clarence Property Corporation Limited v Sentinel Robina Office Pty Ltd* [2018] QSC 95 at [90].

[10] The appellant submits that Jackson J was wrong in reaching that conclusion. Mr Bell QC, who appeared with Mr Pincus for the appellant, candidly and correctly acknowledged that there was no general legal impediment that would have prevented the respondent's approach to Mr Kennedy with an offer of employment. Mr Bell also accepted that it was no part of the appellant's case that Mr Kennedy's departure had caused any detriment to the appellant, or to Shield, or to the joint venture parties or to the joint venture business itself. Rather, the gravamen of the appellant's complaint was that the respondent acted secretly and thereby denied the appellant any opportunity to make a counter offer to Mr Kennedy to persuade him to remain with the appellant. This, it was submitted, corroded the parties' relationship of trust and, for this reasons there had been a breach of the duty of utmost good faith.

[11] Jackson J observed that:

(a) The appellant had no right at common law to prevent Mr Kennedy's termination of his employment with the appellant;

(b) Mr Kennedy was not obliged to reveal to his employer that he was looking for work elsewhere;

(c) There was no allegation that Mr Kennedy had breached his contract of employment with the appellant;

(d) There was no allegation that the respondent had induced Mr Kennedy to breach his contract of employment with the appellant.

[12] Further, as I have said, the appellant neither alleged nor tried to prove that Mr Kennedy's departure had caused it any harm or had caused any harm to the business of the parties.

[13] None of these matters are challenged on appeal. Jackson J held, and I respectfully agree, that the obligation to act in utmost good faith imposed by clause 16.9(a) is concerned with the relationship between the parties created by the deed and with their respective dealings with each other under the deed. It is not concerned with other matters. His Honour also held, and I agree, that the respondent's enticement away of Mr Kennedy was not done in the course of the co-owners' dealings with each other.

[14] The appellant and respondent both rely upon a decision of the New South Wales Court of Appeal, *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*.[2] That case was concerned with a clause which provided as follows:

> "Without limiting the generality of any other provision of this lease the parties agree that in the performance of their respective duties and the exercise of their respective powers under this lease and in their respective dealings with each other, they shall act in the utmost good faith."

[15] With the single exception that the clause in *Macquarie* uses the term "lease" and the clause in the present case uses the term "deed" the two provisions are identical. Allsop P said:

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2 [2010] NSWCA 268.

> "[12] The usual content of the obligation of good faith that can be extracted from *Renard Constructions (ME) Pty Ltd v Minister for Public Works*, *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*, *Burger King Corporation v Hungry Jacks Pty Ltd*, *Alcatel Australia Ltd v Scarcella* and *United Group Rail Services Limited v Rail Corporation New South [Wales]*[3] is as follows:
>
> (a) obligations to act honestly and with a fidelity to the bargain;
>
> (b) obligations not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for;
>
> (c) an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained.
>
> [13] None of these obligations requires the interests of a party to be subordinated to those of the other. It is good faith or fair dealing between arm's length commercial parties by reference to the bargain and its terms that is called for.
>
> [14] …
>
> [15] …
>
> [16] Further, in contracts such as these in a context such as this, the obligation of utmost good faith necessarily requires for its fulfilment a degree of co-operation between the parties in a reasonable way in the furtherance of their contractual objectives."

[16] I respectfully agree with Allsop P's summary. At the heart of these propositions is that the duty of good faith is directed towards the bargain between the parties and their mutual contractual objectives. The very subject matter of the protection afforded by the duty of good faith is the contract between the parties. Unless the impugned conduct is directed towards the bargain, or has an effect upon the bargain, or was intended to have an effect upon the bargain, it is contractually irrelevant.

[17] The respondent's recruitment and employment of Mr Kennedy had nothing whatsoever to do with the relationship of the appellant and respondent under the deed. It was purely incidental that Mr Kennedy was employed in the management of the joint venture business. His duties under that contract of employment were in fact not limited to management of the jointly owned building. He was also engaged in the management and oversight of other properties owned by the appellant. He was not recruited because he was the manager of the joint venture business; he was recruited because the respondent judged him to be an able manager of commercial property.

[18] Nor did his departure from the appellant's group of companies have any effect upon the appellant *vis a vis* the venture business or, indeed, the appellant's own business.

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3 Citations omitted.

That being so, the respondent's conduct did not relate to the parties' dealings in the course of their relationship under the deed.

[19] The appellant submitted that clause 16.9(a) should not be read as imposing a duty of good faith limited to dealings between the parties in relation to the deed. The appellant submits that the words "under the Deed", where they appear in clause 16.9(a) to expressly qualify the scope of the duty of good faith in relation to the parties' performance of duties and the parties' exercise of powers, imply that the absence of that expression as an express qualification of the duty with respect to "dealings" means that that duty is not limited to dealings with respect to the contract.

[20] This submission cannot be accepted. The words "under the Deed" define the relevant duties and powers by reference to their presence in the deed. The absence of those words when the clause refers to "dealings" is explained by the fact that any such "dealings" would not be "under the Deed".

[21] Clause 16.10 provides that the terms of the deed are not to be taken to establish a partnership between the parties to the deed. For this reason, clause 16.9(a) cannot be understood to impose a general duty of good faith upon the parties of the kind that partners owe to each other. The effect of clause 16.9(a) is to ensure that, notwithstanding the absence of a relationship of partnership, a more limited duty of good faith binds the parties and that limited duty is a duty to act in good faith in their dealings in relation to their contract and not in relation to matters outside it. What acts can be regarded as bearing a sufficient relationship to the contract to engage the duty will depend on the circumstances.

[22] The dealing that the respondent had, and about which complaint is made, was not a dealing between the respondent and the appellant. In relation to the contract, the respondent did not, by employing Mr Kennedy, "deal" with the appellant. The respondent dealt with Mr Kennedy. It is, in fact, the respondent's dealing with Mr Kennedy that so offended Mr Ebert. Mr Ebert, naturally and understandably, felt aggrieved upon discovering that one of the company's valuable employees had been poached by the respondent. However, the fact that he felt that way, as a senior officer of the appellant, did not convert the respondent's negotiations with, and employment of, Mr Kennedy into a "dealing with" the other party to the deed. If the departure of Mr Kennedy had prejudiced the business or, perhaps, the appellant, it might have been possible to argue that the respondent had "dealt" with the appellant.

[23] In terms of the *dicta* of Allsop P to which I have referred, the respondent's conduct did not bear any relationship to the contract or to the bargain between the parties or to the contractual objectives which each sought to achieve. The duty was not engaged.

[24] For these reasons as well as for the reasons given by Jackson J, with which I agree, I would reject grounds 1, 2 and 3 of the appellant's notice of appeal. This makes it unnecessary to consider grounds 4, 5, 6 and 7 of the notice of appeal, which depended upon the appellant's success on the first three grounds. Nor it is necessary to consider the respondent's notice of contention.

[25] I would dismiss the appeal.

[26] **PHILIPPIDES JA:** I agree with the order proposed by Sofronoff P for the reasons given by his Honour.

[27] **DAVIS J:** I agree with the reasons of Sofronoff P and the order proposed by his Honour.