



HIGH COURT OF AUSTRALIA

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Details of Filing

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

BETWEEN: LAUNDY HOTELS (QUARRY) PTY LIMITED (ACN 159 364 342)
Appellant

and

10 **DYCO HOTELS PTY LIMITED (ACN 100 275 974) ATF The Parras Family Trust**
First Respondent

QUARRYMAN HOTEL OPERATIONS PTY LIMITED
Second Respondent

DAPHNE MARIA PARRAS
Third Respondent

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COLIN MICHAEL PARRAS
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions

2. On 31 January 2020, the parties entered into two agreements for the sale of a hotel business and the property from which it operated: CA [86] (**CAB 94**). Under the contract for sale and purchase (“the Contract”) the appellant was the “Vendor” and the first and second respondents were “Purchasers”: **JBFM 20**.
3. On 23 March 2020, the *Public Health (COVID-19 Places of Social Gathering) Order 2020* came into effect; a substitute order was made on 14 May 2020 – the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020*: CA [7]-[8] (**CAB 73**). These orders (“Covid Orders”) were made under the *Public Health Act 2010* (NSW) (**JBA 1, Tab 3**); they severely curtailed the extent to which the hotel business could operate in the manner of operation at 31 January 2020.
4. The four key questions for the Court to consider in this appeal are identified at [2] in the appellant’s reply and will be addressed in turn. Questions 3 and 4 only arise if the Court is against the appellant on the question of the construction of cl 50.1.

Question 1 – what is the proper construction of cl 50.1 of the Contract?

5. After reviewing the key provisions of the agreements, the critical provision is cl 50.1, which relevantly states (**JBFM 62.H-I**):
20 *Subject to clause 50.2, from the date of this contract until Completion, the Vendor must carry on the Business in the usual and ordinary course as regards its nature, scope and manner ...*
6. Clause 50.1 contains three promises as to how assets will be preserved for conveyance to the Purchasers at completion. The first is a promise to carry on the hotel business until completion in the usual and ordinary course as regards its nature, scope and manner insofar as it is within the lawful control of the Vendor to do so: **AR [3], [7]**.
7. That construction should be accepted for the reasons given by the primary judge (at PJ [80]-[88] **CAB 33-36**) and Basten JA (at CA [125]-[127] **CAB 112-113**), namely:
30 (i) the contrary construction would place the Vendor in the invidious position of being required to engage in unlawful behaviour; (ii) it would also run counter to the essential object of the clause, being the preservation of the business’s goodwill; (iii) the warranties in cl 48.8 and the terms of the lease annexed to the contract reflect the parties’ common assumption (cf cl 50.2(b)) that this business was to be in compliance with applicable laws up to and after completion; and (iv) given the highly-regulated

nature of the hotelier industry, the parties would have been alive to the prospect of regulatory change – the Court should not readily conclude that their response was to require operation in defiance of new regulations: **AS [38]-[52]; AR [7]**.

- *Langley v Foster* (1906) 4 CLR 167 at 180-1 (**JBA 3, Tab 18**).
- *Ralli Brothers* [1920] 2 KB 287 at 301 (**JBA 4, Tab 40**).

10 8. Bathurst CJ’s alternative approach to cl 50.1 (at CA [39]-[52] **CAB 81-84**) seeks to sidestep the above difficulties by resorting to the notion that clause 50.1 was “suspended” by the Covid Orders. In doing so, Bathurst CJ failed to take into account the significant practical difficulties that suspension would cause for both Vendor and Purchasers. It is improbable that the parties would have intended these results, given the inherent likelihood of regulatory change in the industry: **AS [75]-[78]**.

9. Brereton JA did not endorse suspension; instead concluding that, Covid Orders notwithstanding, cl 50.1 required the Vendor to deliver the hotel business at completion in its condition prior to contract (CA [147]-[161] **CAB 119-124**). His Honour placed reliance on Latham CJ’s judgment in *Scanlan’s New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 200 (**JBA 3, Tab 24**) and the contractual provisions that provide for the deferral of the passage of risk until completion. That reasoning fails to read Latham CJ’s judgment in context and overlooks the fact that rules about the passing of risk deal only with events that affect the physical integrity of assets and have no relevance to a promise as to how a business is to be operated: **AR [6]**.

- Peel, *Frustration and Force Majeure* at [3-010]-[3-011] (**JBA 5, Tab 54**).

Question 2 – what is the nature of cl 50.1 – promissory obligation, warranty, or implied condition precedent to completion?

10. The majority reasons fail to grapple properly with the character of cl 50.1 as an express promissory term. The clause is not a warranty – that is a term by which a party assumes responsibility for the occurrence or non-occurrence of an event that is not an element of the promisor’s performance – and so, on the Purchasers’ construction, it would actually require the Vendor to break the law: **AR [3], [6]**.

- Carter, *Breach of Contract* at [2-13]-[2-15] (**JBA 5, Tab 46**).

30 11. Equally, cl 50.1 does not require the *conveyance* of a business in a particular state as a pre-condition to completion. To adopt such a construction (as Bathurst CJ does at CA [49], [73]-[74] **CAB 83, 90** and Brereton JA does at CA [153], [167]-[169] **CAB 121, 126-128**) is to rely impermissibly on the perceived purpose of the clause to transform it from an obligation *to operate* up to completion into an obligation *to*

transfer the business in a particular state. As Basten JA explains (at CA [129]-[139] **CAB 113-116**), cl 50.1 is not expressed as an essential condition for completion; any attempt to treat it as such: (i) sits in tension with the questionable importance of the other two promises in cl 50.1; and (ii) would create uncertainties as to the beneficial ownership of the land dealt with under the contract: **AS [58]-[59]; AR [7]**.

- *Maynard v Goode* (1926) 37 CLR 529 at 542 (**JBA 3, Tab 20**).

12. Further, Bathurst CJ was wrong to characterize cl 50.1 as being concerned with ensuring the conveyance of the hotel business as a “going concern” – cl 58.2 fulfils that role. Clause 50.1 serves a distinct purpose that is protective of the business’s goodwill. This error significantly undermines his Honour’s conclusion that cl 50.1 is an essential term, compliance with which is a condition for completion: **AR [5]**.

- *Placer Dome Inc* (2018) 265 CLR 585 (**JBA 3, Tab 14**) at [91], [97]-[98].

Question 3 – what was the effect of the Covid Orders?

13. Bathurst CJ did not point to any cases in which supervening illegality has resulted in the suspension of an essential term on which completion of a contract with mutually dependent obligations was conditioned. The reasoning is unsupported by authority and is fundamentally unsound. On the other hand, Brereton JA’s approach leads to the unattractive and unsupported conclusion that the Vendor was in breach (and so liable to pay damages) by reason of its refusal to engage in illegal conduct. The difficulties that the majority reasons face in explaining how general contractual doctrines apply to the contract upon the occurrence of a regulatory change only serve to underscore the inherent implausibility of their construction of cl 50.1: **AS [69]-[74]; AR [8]-[11]**.

Question 4 – was the appellant entitled to issue a notice to complete?

14. If cl 50.1: (i) *did* require the Vendor to operate the hotel business in the usual and ordinary course despite the commencement of the Covid Orders; *but* (ii) is *not* an essential term or condition for completion, then the Vendor was not in breach of that term and remained “ready, willing and able” to perform its obligations under the contract. The Vendor was thus entitled to give a notice to complete on 28 April 2020 – see PJ [104], [113] (**CAB 42, 45**): **AR [12]**.

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Justin Gleeson SC
9 December 2022