HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

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

and

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

COLIN MICHAEL PARRAS
Third Respondent

APPELLANT'S REPLY

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet. They reply to the respondents' submissions dated 4 November 2022 (**RS**).

Part II: REPLY

2. Noting that the parties have expressed differing views as to the issues for determination,[1] the full gamut of issues can be captured as follows:

   (a) What is the proper construction of cl 50.1 of the Contract (as defined at RS [2])? This is described by the respondents as the "first issue" (RS [2]).

   (b) Relatedly, what is the nature of cl 50.1 – promissory obligation, warranty, or implied condition precedent to completion?

   (c) What was the effect of the Covid Orders (defined at AS [14]) on the Contract? More precisely, was cl 50.1 (and other obligations) suspended or breached?

   (d) Does the suspension of cl 50.1, or the appellant's breach of that term, preclude the giving of a notice to complete? This is the "second issue" at RS [4]; it only arises if (a) and (c) are answered unfavourably to the appellant.

Questions (a) and (b) – construction and nature of cl 50.1 (RS [14]-[16])

3. At the outset, key features of cl 50.1 should be highlighted. The clause is a promissory term, which contains promises to: (i) operate the hotel business in a certain manner; (ii) repair and maintain assets; and (iii) use reasonable endeavours to maintain the inventory.[2] Promise (i) is concerned with preserving goodwill, while promises (ii)-(iii) are directed at preserving certain tangible assets until completion.

4. Bathurst CJ commenced by stating that cl 50.1 "required the Business to be conducted in its usual and ordinary course"[3], but went further in viewing cl 50.1 as directed to ensuring the conveyance of a "going concern":[4]

> … it is evident from the terms of cl 50.1 itself that the parties' expectation was that the hotel be transferred as a going concern. Clause 50.1 was designed to preserve this position between contract and completion.

5. The respondents place central reliance upon this reasoning in characterizing cl 50.1 as a "going concern" obligation.[5] However, cl 50.1 is not concerned with ensuring the transfer of a "going concern".[6] Clause 58.2 of the Contract – a term that the primary

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1 See also the proposed notice of contention.
2 See CA [96] (CAB 97) – Basten JA.
3 CA [40] (CAB 81).
4 CA [74] (CAB 90). See also CA [49], [57], [72], [73] (CAB 83, 85, 89-90).
5 See RS [3], [18], [25], [38], [42].
6 A concept with GST consequences arising from s 38-325 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and reflected in cls 58.2 and 58.4 of the Contract.

judge construed and determined that the appellant did not breach (conclusions that were unchallenged on appeal)[7] – fulfils that role. Once this is appreciated, then the following fall away: (i) Bathurst CJ's contention that cl 50.1 is an essential term[8] of such importance that the respondents' obligations are conditioned on strict compliance with it;[9] and (ii) the respondents' submission that the appellant could not convey a going concern.[10] Those details reinforce Basten JA's compelling reasons for rejecting that compliance with cl 50.1 is an implied condition precedent to completion.[11]

6. Brereton JA adopted a somewhat different construction of cl 50.1. While describing the clause's operation and purpose as "assuring to the Purchasers the transfer of a business in the condition in which it was sold",[12] reliance was placed on certain authorities[13] and cl 57.2 (which provides that "[r]isk in the Assets passes to the purchaser on Completion") to conclude that the fundamental purpose of cl 50.1 was to allocate "the risk of a supervening legal impediment" to the appellant.[14] This reasoning is flawed for three reasons. *First*, cl 50.1 is a promise to conduct the hotel business in a certain way, not a representation that the business would be in a certain state when conveyed[15] – it is a standard promissory term, not a warranty as to a future state of affairs.[16] The appellant did not accept the risk that conducting its business in the ordinary course would become illegal by such a term, because that would have involved it promising to break the law.[17] *Second*, the concept of "passing of risk" needs to be applied with care with non-static intangible property like goodwill;[18] and is, in any event, distinct from rules which govern when a party has assumed the risk of the occurrence of an event that prevents or delays performance of a contact.[19] *Third*, the authorities relied on by Brereton JA do not assist

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7 See SC [86]-[88] (CAB 35-36) and CAB 61-62; cf CA [54], [72] (CAB 84, 89).
8 See CA [74] (CAB 90); cf SC [105] (CAB 42-43) – Darke J and CA [105] (CAB 102) – Basten JA.
9 CA [72]-[73] (CAB 89-90).
10 RS [4], [11], [40]-[42], [48].
11 See CA [102], [128]-[139] (CAB 90, 113-116).
12 CA [153], [161] (CAB 121, 124).
13 In particular *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 (***Scanlan's***) and *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments) Pty Ltd* (1976) 133 CLR 671 (***Meriton***).
14 CA [161] (CAB 124). See also Bathurst CJ's reasons at CA [76] (CAB 91).
15 See JW Carter, *Breach of Contract* (2nd ed, LexisNexis, 2018) at [2-15], [2-38], [4-04], [4-17]; JD Heydon, *Heydon on Contract* (Lawbook Co, 2019) at [7.330], citing *The Soerstad* 257 F 130 (1919); M Hogg, *Promises and Contract Law* (Cambridge University Press, 2011) at 48-50.
16 For the same reason, Brereton JA's contrasting of cl 50.1 with cl 48.8(r) is misguided (see CA [160]-[161] (CAB 123-124)). Further, it is controversial whether such a warranty as to legality would even be enforceable, see *Batra v Ephraim* [1982] 2 Lloyd's Rep 11 (Note) at 14 (Bridge LJ).
17 See E Peel, *Frustration and Force Majeure* (4th ed, Sweet & Maxwell, 2021) at [13-005]; *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287 (***Ralli Brothers***) at 301.
18 *Federal Commissioner of Taxation v Murry* (1998) 193 CLR 605 at [4], [12], [23], [31], [36]; *Commissioner of State Revenue v Placer Dome Inc* (2018) 265 CLR 585 at [52]-[71], [91], [96]-[100], [142]. See also Peel, *Frustration and Force Majeure* at [3-011]-[3-012].
19 See Peel, *Frustration and Force Majeure* at [3-011].

in interpreting cl 50.1 – those were cases where the contractual terms were clear but it was argued that frustration resulted when one party was deprived of the benefit for which they contracted.[20] Brereton JA's alternative reasoning,[21] which likewise relies heavily on cls 50.1 and 57.2, should be rejected for the same reasons. S125/2022

7. In summary, the appellant contends that cl 50.1 contains a promise by the appellant to conduct the hotel business in the usual and ordinary course as regards its nature, scope and manner, insofar as it is within its lawful control to do so. That promise did not require the appellant to act unlawfully or indeed to do the impossible or impractical.[22] While the clause provided that the appellant would take all steps within its control to protect the business's goodwill,[23] any warranty that the appellant would be able to convey a business of a certain scale or nature, or condition on completion, would require an implication that has not been justified[24] (though a fundamental breach of cl 50.1 would entitle the respondents to terminate and supervening illegality could frustrate the Contract[25]). The appellant's construction is consistent with the Contract's terms (in particular cls 38 and 55.2-3[26]) and the presumptions that: (i) parties intend their agreements to be performed lawfully;[27] and (ii) terms should be construed as promises rather than conditions.[28] Further, the more targeted scope of this obligation (as compared with the majority's constructions) more effectively protects the business's goodwill (as the appellant is not required to imperil the licence)[29] and reflects the parties' assumption that the hotel would be operated lawfully.[30]

Question (c) – what was the effect of the Covid Orders? (RS [20]-[24], [52]-[58])

8. If the appellant's construction of cl 50.1 is accepted, then the other issues in this appeal are straightforward: the commencement of the Covid Orders did not result in a breach of that clause, nor was the term suspended, and the appellant was entitled to require completion. By contrast, if cl 50.1 imposes an obligation on the appellant to carry on the business in the same manner as it did pre-contract, even if doing so was illegal, then the

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20 See *Scanlan's* (1943) 67 CLR 169 at 184, 198; *Meriton* (1976) 133 CLR 671 at 677-678.
21 See CA [167]-[170] (CAB 126-128).
22 Expressed differently, the "normal course" may be said to require modifying the nature and extent of one's trading activities to conform to law, rather than continuing to trade in defiance of it.
23 See SC [97] (CAB 40) – Darke J.
24 CA [102] (CAB 100) – Basten JA.
25 Cf RS [16], [19].
26 See CA [133] (CAB 114).
27 SC [81]-[83] (CAB 34) – Darke J, and the cases cited therein. See also *Ralli Brothers* [1920] 2 KB 287 at 301.
28 See *Maynard v Goode* (1926) 37 CLR 529 at 542. See also JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013) at [16-33].
29 See SC [85] (CAB 35) – Darke J.
30 CA [125]-[126] (CAB 112) – Basten JA. Assumed in the lease also: cls A2.1, 7.3, 8.1(a)-(b), 9.1.

picture becomes far more murky and legally unprincipled.

9. Bathurst CJ held that the Covid Orders suspended cl 50.1 (the appellant was excused from liability for damages and the respondents could not terminate for breach of that clause); from which, it seems, completion of the entire transaction of sale and purchase went into "suspended animation", awaiting the lifting of the Covid Orders and the passing of an indefinite period in which the appellant succeeded in restoring the goodwill of the business to its pre-Covid Orders condition.[31] This conclusion arises from his Honour's view that cl 50.1 was an essential term, compliance with which was a condition precedent to the respondents' obligations to complete.[32] However, neither of the two categories of cases to which he had earlier referred[33] supports the proposition that an obligation may be suspended where: (i) a counter-party has mutually dependent obligations to be performed at the same time; and (ii) the obligation is essential to the contract and its purpose.[34] In category one cases, a foreign regulation rendered it impossible for a bank lawfully to discharge obligations to pay out funds already owing a customer; illustrating that, where parties are discharged from obligations to perform an executory contract by reason of supervening illegality, accrued rights (eg the right to be paid a credit balance) may survive (albeit in suspended form).[35] In category two cases, leases contained ancillary covenants by the lessee to undertake some additional activity (beyond paying rent) which was rendered illegal;[36] illustrating that, where illegality does not affect the contract's "main purpose",[37] the parties' other obligations remained binding and enforceable.[38] Neither category is the present case.

10. In addition to being unsupported by authority, Bathurst CJ's development of this suspensory doctrine is fundamentally unsound. The extension of these principles to a term upon which completion of the Contract is conditioned comes dangerously close to trenching on the domain of the doctrine of frustration.[39] Further, it gives rise to

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31 CA [73] (CAB 90). It seems, on this view, neither party could require completion in the interim.
32 See CA [73]-[77] (CAB 90-91).
33 See CA [62]-[71] (CAB 86-89).
34 See CA [49], [74] (CAB 83, 90).
35 See *Arab Bank Ltd v Barclays Bank* [1954] AC 495 at 529, 532, 534-537, 540; *Libyan Arab Foreign Bank v Bankers Trust* [1989] QB 728 at 749.
36 *Gerraty v McGavin* (1914) 18 CLR 152 at 156; *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 (***Cricklewood***) at 232-233; *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 77 (***John Lewis***) at 78-79.
37 Peel, *Frustration and Force Majeure* at [8-063].
38 See *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) at [218], citing *John Lewis* [1993] 2 EGLR 77 at 82. See also *Cricklewood* [1945] AC 221 at 244; Peel, *Frustration and Force Majeure* at [8-066].
39 See CA [118] (CAB 108-109) – Basten JA. Note that the respondents did not appeal the primary judge's finding that the Contract was not frustrated: CA [60], [90] (CAB 86, 95).

irresolvable practical problems of the kind described at AS [75].

11. Brereton JA, in steering clear of suspension, concluded that the appellant was in breach of cl 50.1 due to its refusal to continue to operate the hotel business in a manner that would have breached the Covid Orders.[40] This assumption that a promise to perform an unlawful act (made or performed with knowledge of the illegality) can be enforced is wrong.[41] Provided that compliance with cl 50.1 is not a condition precedent to completion, then, to the extent that the term required it to breach the Covid Orders, the appellant should not be required to perform,[42] with the parties' other obligations remaining binding[43] (or the clause should be severed pursuant to cl 63.7).

Question (d) – could the appellant issue a notice to complete? (RS [25]-[38], [60]-[64])

12. Above, it is contended that: (i) cl 50.1 did not require operation of the hotel in violation of the Covid Orders; and (ii) completion was not conditional on compliance with cl 50.1 in this respect. Alternatively, if the appellant is wrong on (i) but correct on (ii), then the suspension or breach of cl 50.1 did not preclude issuance of a cl 51.7 notice. If cl 50.1 is suspended (or severed) then there is no default,[44] and the parties' non-suspended obligations remain enforceable.[45] If the appellant breached cl 50.1, it remained ready, willing and able (and thus could require completion) because: (a) that term is non-essential[46] (see [5] above) and was not breached fundamentally;[47] and (b) discretionary considerations should favour a party whose "breach" was caused entirely by its proper intent to comply with binding legal regulation.[48]

Dated: 24 November 2022

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40 Note repeated use of the language of "default": CA [147], [161], [165]-[166] (CAB 119, 124-126).
41 *Wetherell v Jones* (1832) 3 B & Ad 221 at 225-226, quoted in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 418; *Nelson v Nelson* (1995) 184 CLR 538 at 552; *Ralli Brothers* [1920] 2 KB 287 at 292, 296-297.
42 *Brewster v Kitchell* (1679) 1 Salk 198 at 199; *Cricklewood* [1945] AC 221 at 244; *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm) at [123]-[125]; Peel, *Frustration and Force Majeure* at [2-013], [8-067]-[8-068].
43 See the authorities cited at fn 38.
44 Cf CA 73 (CAB 90) – Bathurst CJ, citing *McNally v Waitzer* [1981] 1 NSWLR 294 at 303-304.
45 See again the authorities cited at fn 38.
46 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 619; *Mehmet v Benson* (1965) 113 CLR 295 at 307, 314.
47 See CA [137]-[138] (CAB 115) – Basten JA; cf the proposed notice of contention.
48 See SC [113] (CAB 45) – Darke J.