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

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

First Respondent

**QUARRYMAN HOTEL OPERATIONS PTY LIMITED (ACN 634 263 933)**

Second Respondent

**DAPHNE MARIA PARRAS**

Third Respondent

**COLIN MICHAEL PARRAS**

Fourth Respondent

# RESPONDENTS' SUBMISSIONS

## Part I: Certification for Internet Publication

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

## Part II: Concise Statement of the Issues

2. The first issue this case presents is the appropriate construction of cl. 50.1 of the contract for sale dated 31 January 2020 (**Contract**).[1] Clause 50.1 provides:

> "**50.1 Dealings Pending Completion**
>
> Subject to clause 50.2, from the date of this contract until Completion, **the**

[1] The Contract was between Appellant as vendor and the Respondents (Dyco Hotels Pty Ltd and Quarryman Hotel Operations Pty Ltd) as purchasers: CA [1]; CAB 72 (Bathurst CJ). A Condition Subsequent Deed dated 31 January 2020 was also entered into: CA [22]; CAB 76 (Bathurst CJ); CA [92]; CAB 95 (Basten JA).

> **Vendor must carry on the Business in the usual and ordinary course as regards its nature, scope and manner** and repair and maintain the Assets in the same manner as repaired and maintained as at the date of this Contract and use reasonable endeavours to ensure all items on the Inventory are in good repair and in proper working order having regard to their condition at the date of this Contract, fair wear and tear excepted." [emphasis added][2]

3. The bold text in the quotation above is referred to throughout these submissions as the "going concern" obligation.

4. The second issue concerns the effect of the *Public Health (Covid-19 Places of Social Gathering) Order 2020* (**Covid Order**) on the Contract, and whether the Appellant was entitled to issue a notice to complete in circumstances in which it was unable to convey the Business as a going concern.

5. The third issue concerns the effect of supervening illegality that does not amount to frustration on the Appellant's "going concern" obligation under cl. 50.1. This third issue encompasses the two issues identified by the Appellant in Part II of its Submissions.

## Part III: Section 78B of the *Judiciary Act 1903*

6. Notice is not required to be given by s 78B of the *Judiciary Act 1903*.

## Part IV: Contested Material Facts

7. The Respondents largely agree with the summary of material facts set out in the Appellant's Submissions (**AS**), subject to the points below.

8. First, the Respondents take issue with the statement at AS [11] that "[c]lause 50.1 was not a condition that the contract identified as essential, nor as a condition that was required to be satisfied or waived prior to completion, so that completion could occur". The Appellant draws this conclusion from Basten JA's dissenting judgment (CA [128]-[129]; CAB 113). Importantly, Basten JA's judgment only dealt with the question of construction. The Respondents accept that cl. 50.1 "does not expressly state that it imposes a precondition of completion" (CA [129] (Basten JA), CAB 113). However, whether the "going concern" obligation in cl. 50.1 was a pre-requisite for completion to occur is a question of construction on which members of the Court of Appeal differed. While Basten JA took the view outlined at AS [11], Bathurst CJ considered it

[2] CA, [6]; CAB 73 (Bathurst CJ).

to be evident from the terms of cl 50.1 that "the parties' expectation was that the hotel be transferred as a going concern" (CA [74]; CAB 90). His Honour characterised cl. 50.1 as "an essential term in that a purchaser would not have entered into the contract without the contractual assurance that the business would be maintained until completion" (CA [74]; CAB 90). Brereton JA found the Appellant to be in default of cl. 50.1 and precluded from giving a notice to complete on that basis (CA [166]; CAB 126).

9. Second, AS [22] states that the Appellant "terminated the contract for repudiation both by reason of the First Respondent's failure to complete and the communication of its refusal to perform the contract generally". While it is accepted that the Appellant purported to terminate the Contract, whether that termination was valid is a question for the Court.[3] The Respondents dispute that the Appellant validly terminated the Contract. The Respondents do not understand the Appellant to challenge the Court of Appeal's finding that the Respondents' conduct did not amount to repudiation of the Contract.

10. Third, at AS [27], the Appellant characterises the Respondents' argument below as being that "the Appellant was not entitled to issue a notice to complete because it was in breach of clause 50.1 (CA [90] CAB 95)". In fact, Basten JA states at CA [90] that the Respondents did not argue that the Appellant was in breach of the Contract. His Honour's summary of the Respondents' argument is that:

> "[T]he effect of the Public Health Order was to prevent the vendor complying with the condition of the contract as to the continued running of the business and was thus unable to deliver the property and business the subject of the contract. *Although it was not said to be in breach of the contract*, it was not entitled to enforce performance by the purchaser" [emphasis added].

The Respondents nonetheless note that in oral submissions below breach was raised in the alternative.[4] The alternative case on breach has the same result for the reasons at paragraph 23 below.

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[3] Darke J found that the notice of termination was effective to terminate the Contract (SC, [115]; CAB 46). In the Court of Appeal, Bathurst CJ and Brereton JA found that the Appellant was not entitled to call upon the Respondents to complete the Contract, and as such, issuance of the purported notice of termination constituted a repudiation (CA [78], [85]; CAB 91, 93 (Bathurst CJ); CA [147], [170]; CAB 119, 128 (Brereton JA)).
[4] Transcript, 20:34–46 (Hutley).

11. Fourth, at AS [33], the Respondents say that Bathurst CJ's finding turned not on the Appellant's inability to operate the hotel, but rather on its inability to deliver possession of the hotel as a going concern (CA [72]; CAB 89).

12. The Respondents also note minor typographical errors at AS [13](b),[5] AS [15],[6] AS [18],[7] and AS [24].[8]

## Part V: Statement of Argument

13. This Statement of Argument is divided into three parts. First, it sets out the Respondents' answer to the three issues identified in Part II above. Second, it responds to the specific arguments raised in the Appellant's Submissions. Third, it responds to the two issues raised in Part II of the Appellant's Submissions.

***Respondents' Argument on the issues identified in Part II above***

14. The **first issue** in this case is the appropriate construction of cl. 50.1 of the Contract. The Respondents submit that:

    a. the reference in cl. 50.1 is to the usual and ordinary course of the specific Business being conveyed under the Contract – to use Bathurst CJ's term, the "defined" business.[9] Under the Contract, "Business" means "the hotel business trading as the 'Quarrymans Hotel' which operates pursuant to the Licence".[10] Consequently, the focus of the "going concern" obligation is to ensure that that Business was being carried on "in the usual and ordinary course as regards its nature, scope and manner";[11]

    b. the way in which the Business was carried on from 23 March 2020 until the Contract's termination could not be said to amount to the carrying on of the business of the Quarrymans Hotel as regards its nature, scope and manner.

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[5] The relevant quote from cl. 55.2 should read: "Except as expressly stated in this contract, the Vendor gives no representation or warranties whatever about anything including without limit …" (see SC [17]; CAB 16).
[6] The letter referred to was sent on 25 March 2020 (SC [44]; CAB 24).
[7] The relevant quote should read "14 days after the removal of the existing COVID-19 related legal impediments…" (SC [55]; CAB 27).
[8] AS [24] states that the Cross-Claim was filed against the First Respondent and the Second and Third Respondents as guarantors. The Cross-Claim was filed against all four Respondents, and against the Third and Fourth Respondents as guarantors (see "Parties"; CAB 7 and SC [1]; CAB 9).
[9] CA [41]; CAB 81.
[10] CA [21]; CAB 76 (Bathurst CJ).
[11] See CA [41]; CAB 81 (Bathurst CJ).

15. The Court of Appeal's construction of cl. 50.1 was plainly correct,[12] and it was accordingly open to the Court of Appeal to find that the manner in which the Business was conducted after the Covid Order came into effect[13] until the termination of the Contract was inconsistent with the "going concern" obligation in cl. 50.1.[14] The obligation that the Business be carried on "in the usual and ordinary course as regards its nature, scope and manner" sets a threshold for non-compliance. Accordingly, it was open to Bathurst CJ to conclude that cl. 50.1 does not require the business to be carried on in an "identical" manner to the way it was carried on pre-contract, and "variations in the manner or extent the Business was carried on due, for example, to economic or regulatory requirements" would not necessarily breach the clause.[15] When, however, that threshold is passed and the Business cannot be said to be carried on "in the usual and ordinary course as regards its nature, scope and manner", the "going concern" obligation will not be met.[16]

16. The Respondents contest the approach to the construction of cl. 50.1 taken by Basten JA, in dissent. Noting the "highly regulated" nature of the hotelier business and the parties' consequent expectations, his Honour concluded that the parties "expected and understood that the business was one which was being carried on lawfully", such that the Covid Order "applied with respect to the business and affected [its] operation … for the purposes of cl. 50.1" (CA [125]-[126]; CAB 112). His Honour concluded that the manner in which the Business was conducted after the promulgation of the Covid Order involved neither breach of, nor non-compliance with, cl. 50.1 (CA [126]; CAB 112). Unlike Bathurst CJ's approach, this rigid logic contemplates no point at which regulation is so severe as to prevent a business from being characterised as "carried on in the usual or ordinary course having regard to its nature, scope and manner". Bathurst CJ's more nuanced and practical approach recognises that there is a point at which regulation may be so stringent as to affect whether the Business meets the description of a going concern and the principle of supervening illegality has a role to play.

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[12] Brereton JA agrees with Bathurst CJ that the appeal should be allowed for the reasons the Chief Justice gives, but also sets out his own "essential" reasoning (CA [143]; CAB 117–118).
[13] See CA [7]; CAB 73 (Bathurst CJ). His Honour noted at that from 30 March 2020, the hotel sold craft beer from a takeaway window and food was offered for sale only on select days (CA [9]; CAB 73-74).
[14] See CA [46]; CAB 82–83 (Bathurst CJ); CA [150]-[151]; CAB 120 (Brereton JA)).
[15] See CA [43]; CAB 82 (Bathurst CJ).
[16] See CA [43]; CAB 82 (Bathurst CJ).

17. The **second issue** concerns the effect of the Covid Order on the Contract. The Respondents submit that:

    a. the key question for this Court is whether the Appellant was ready, willing and able to proceed to complete (the substance of the Contract) at the time that it issued its notice to complete, as required by law and cl. 51.7 of the Contract;[17]
    b. not every departure from every provision in a contract will deprive one of readiness, willingness and ability – what is critical is whether a party is ready, willing and able to perform the substance of the contract;
    c. at the time the notice to complete was issued, the Appellant was not ready, willing and able to supply that which it had covenanted to. The way the Business was being carried on at the time the notice to complete was issued in this case was so substantially different that it cannot be said that the Appellant was ready, willing and able to complete;
    d. accordingly, the Appellant was not entitled to issue the notice to complete, and the Respondents were entitled to treat the Appellant's purported termination of the Contract as a repudiation and terminate the Contract.[18]

18. The Court of Appeal rightly found that the Appellant was not entitled to issue a notice to complete in circumstances in which, as a result of the Covid Order, it was unable to deliver the Business as a going concern.[19] The "purpose" of the transaction, as Bathurst CJ identified it, was "to sell the Business as a going concern" rather than "simply as a group of assets".[20]

19. Basten JA, in dissent, considered the "critical issue" to be whether compliance with the "going concern" obligation in cl. 50.1 involved a condition precedent to completion (CA [97]; CAB 98). His Honour held that it did not, referring in the course of his

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[17] Bathurst CJ considered the critical question to be whether "the [Appellant] was entitled to demand completion in circumstances where it was not able to deliver possession of the hotel as going concern" (CA [72]; CAB 89). Brereton JA considers the "essential question" to be "whether the Vendors were entitled, on 28 April 2020, to serve the Notice to Complete, and consequently to terminate the contract on 21 May 2020 for failure to complete in accordance with that notice" (CA [144]; CAB 118).

[18] CA, [85]; CAB 93 (Bathurst CJ).

[19] See CA [73]-[77]; CAB 90-91 (Bathurst CJ). Brereton CJ concluded that the Appellant was in default of cl. 50.1 and was not "ready, willing, and able to perform [its] obligation upon completion to convey, inter alia, a hotel business of substantially the same nature, scope and manner as that which existed at the date of the contract" (CA [147]; CAB 119).

[20] See CA [49]; CAB 83 (Bathurst CJ). Likewise, Brereton JA concluded that the Purchasers "contracted to acquire an operating hotel business of a nature, scale and manner of that in operation on the date of the contract" (CA [168]; CAB 127).

reasoning to the fact that Item 13 of Schedule 1 identified only two conditions precedent, being the Vendor granting the "Lease" and the Vendor satisfying condition 66.1 in relation to work to repair pipe and sewer lines (CA [98]-[101]; CAB 99–100).[21] His Honour also concluded that cl. 50 did not constitute an "essential provision" (CA [105]; CAB 102 and CA [140]; CAB 116). This position becomes untenable when taken to its logical extremes. If the Vendor were to shutter the Business from the date after exchange to the end of the completion period, it could hardly be said that the Purchaser was required to complete and limited to an action in damages. Damages would not be adequate compensation for what it had lost, being the opportunity to purchase a particular business, of a particular scale, as a going concern. Yet this is precisely the consequence of an argument that the obligation to carry on the Business "in the usual or ordinary course having regard to its nature, scope and manner" is not a precondition to completion. As will be argued in Part VI below, the "going concern" obligation on the example above could alternatively be quite properly seen as an intermediate term, the breach or default of which would give rise to a right of termination where the breach or default was sufficiently serious.[22] The Respondents reject the contention that all breaches of the "going concern" obligation can only sound in damages.

20. The **third issue** concerns the effect of supervening illegality that does not amount to frustration on the Appellant's "going concern" obligation under cl. 50.1. This issue encompasses the two issues identified by the Appellant in Part II of its Submissions.

21. Supervening illegality can constitute an excuse for non-performance of a contractual obligation in circumstances in which the threshold for frustration is not reached.[23] As Marcus Smith J noted in *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency*:[24]

> "It is clear that not every supervening illegality causes a contract to be frustrated. In the context of contracts and the English law of illegality and frustration, the following points must be noted: [...]
>
> (b) In cases of supervening illegality, it is quite clear that the law has a range of responses. [...] In some cases, the supervening illegality has no effect at all on

[21] The fact that cl. 50 was not included in Item 13 was considered by Basten JA to be "significant" but not "conclusive" (CA [102]; CAB 100).
[22] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 147.
[23] This is noted by Bathurst CJ (CA [66]; CAB 88).
[24] [2019] EWHC 335 (Ch) at [41]. A longer excerpt is cited by Bathurst CJ (CA [65]; CAB 87-88).

the enforcement of contractual obligations; in others, it renders the contract unenforceable by one party or the other but leaves the rest of the contract standing and enforceable; in yet others, neither party will be able to enforce the contract. In some cases, supervening illegality will cause the contract to be frustrated, but not in all." [footnotes omitted]

22. The effect of the supervening illegality, on the basis only of the proper construction of the Contract and not otherwise, was that:

a. The operation of cl. 50 was suspended, such that there was no "breach" and the Appellant was excused from any liability for damages for its non-compliance with the cl. 50.1 "going concern" obligation;

b. the Respondents had no entitlement to terminate the Contract on the grounds of the Appellant's failure to comply with the cl. 50.1 "going concern" obligation;

c. nonetheless, the Appellant's non-compliance with the cl. 50.1 "going concern" obligation in this case meant that it was not ready, willing and able to complete the Contract; and

d. as a result, the Appellant was not entitled to issue a notice to complete when it did.

23. On the alternate hypothesis of breach, one could conclude that the effect of the supervening illegality was only on the remedy for breach of cl. 50.1, such that no relief could be sought for a breach brought about by that illegality. There should be no substantive difference in outcome between these two scenarios on the facts. In both cases, the Respondents had no entitlement to terminate the contract on the basis of the Appellant's non-compliance or breach of cl. 50.1; and the Appellant had no entitlement to terminate as it was not ready, willing and able to complete. In cases of supervening illegality, one of the court's concerns is with "reaching a solution which may do justice between the contracting parties";[25] the justice here being that the Appellant cannot supply that which was objectively the substance of the bargain.

24. The consequences outlined above demonstrate that the Respondents should not be characterised as having sought the "extreme remedy" of discharge from its obligations

[25] Together with a concern for "the public interest [in seeing] that the law is observed": see *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd (Rev 1)* [2010] EWHC 2661 at [100], per Beatson J citing G Treitel, *Frustration and Force Majeure* (2nd edn 2004) 8-002 and 8-003.

(compare CA [118]; CAB 108 (Basten JA in dissent)). Were the Appellant not to have purported to issue a notice to complete and to subsequently terminate the Contract, the Respondents would have had no basis on which to terminate the Contract by reason of the Appellant's inability to comply with the "going concern" obligation in cl. 50.1.

Ready, Willing and Able

25. The Appellant was not ready, willing and able to complete as a result of its non-compliance with the "going concern" obligation in cl. 50.1. The majority of the Court of Appeal and Basten JA in dissent differed in their analysis of the scope of "ready, willing and able" in this case.

26. Bathurst CJ took the view that "the obligation to carry on the Business up to completion formed part of an indivisible whole by which the property and business of the hotel was to be transferred to the appellants as a going concern" (CA [57]; CAB 85). In His Honour's view, the Contract on its proper construction "require[d] the hotel licence and other assets to be conveyed as a going concern, which at the time of the Notice to Complete and termination was prevented by the Public Health Order" (CA [73]; CAB 90). Consequently, His Honour was of the view that the Appellant "was not ready or able to complete the contract at the time of the Notice to Complete or at the time it purported to terminate the contract in reliance on that notice" (CA [77]; CAB 91).

27. To Brereton JA, "[t]he essential question [was] whether the Vendors were entitled, on 28 April 2020, to serve the Notice to Complete, and consequently to terminate the contract on 21 May 2020 for failure to complete in accordance with that notice" (CA [144]; CAB 118). His Honour took the view that the Vendors were not entitled to give a notice to complete. One reason for that was that they were not "ready, willing, and able to perform *their obligation upon competition to convey, inter alia, a hotel business of substantially the same nature, scope and manner as that which existed at the date of the contract*" (CA [147]; CAB 119) (emphasis added). It is clear, therefore, that to Brereton JA, the notion of readiness and willingness encompassed the conveyance of "a hotel business of substantially the same nature, scope and manner". It was not to the point that the Vendors were ready and willing to convey the hotel Business in its current form, together with the freehold property, hotel licence and gaming machine

entitlements. What was necessary was that the Vendors were ready, willing and able to convey the "substance of the covenant".[26]

28. Basten JA implicitly takes a more restricted approach to the scope of readiness, willingness and ability as it applies in the present case. As noted above, His Honour did not consider compliance with cl. 50.1 to be an "essential condition or a condition precedent to completion of the contract" (CA [140]; CAB 116). Nor did he consider that that term had been breached, or that the Business transferred was "radically different from the business the purchaser had contracted to buy" (CA [126]-[127]; CAB 112-113). His Honour embraced Darke J's analysis at first instance (CA [91]; CAB 95). Darke J had found that the Appellant was entitled to serve a notice to complete, and could be characterised as "an innocent party, not relevantly in default, and ready, willing and able to perform its obligations as and when required up to and including completion" (SC [113]; CAB 45). Likewise, Basten JA considered the "final step" to be "the conveyance of the land", "conditioned on the transfer of the business assets and the satisfaction of the conditions precedent in item 13 of Schedule 1" (CA [139]; CAB 116). This language captures what, to Basten JA, constituted the requisite elements of being "ready, willing and able" to complete in the context of the Contract. His Honour's findings are premised on acceptance that the Appellant was ready, willing and able to complete when it served the notice to complete on 28 April 2020. Basten JA's implicit finding as to the scope of "ready, willing and able" is arguably a consequence of his Honour's finding that cl. 50.1 was not an essential term of the Contract. However, the distinction between the judges' approaches also draws attention to the more fundamental issue of the meaning of "ready, willing and able" and its appropriate scope.

29. The requirement that a party giving notice to complete is ready, willing and able has its origins in the equitable pleading of a suit for specific performance,[27] and should be given a similar meaning. [28] Accordingly, and relevantly in this case, the general maxim

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[26] Cited at CA [116]; CAB 108 (Basten JA).
[27] *McNally v Waitzer* [1981] 1 NSWLR 294, 296 (Reynolds JA) and 303 (Hutley JA); *Wilde v Anstee* (1999) 48 NSWLR 387 at 398 (Austin J); *Lynda Marie Slarke v Ultima Constructions Pty Ltd* [2005] ACTCA 1 at [21] (The Court); *Alexus Pty Ltd v Pont Holdings Pty Ltd* (2000) 10 BPR 18,371 at 18,374.
[28] *McNally v Waitzer* [1981] 1 NSWLR 294, 296 (Reynolds JA) and 303 (Hutley JA); *Lynda Marie Slarke v Ultima Constructions Pty Ltd* [2005] ACTCA 1 at [21] (The Court).

that those who seek equity must do equity[29] applies to a party issuing a notice to complete.

30. This section first addresses the meaning of ready, willing and able in the context of specific performance, before addressing it in the context of a party's entitlement to issue a notice to complete.

31. *Halsbury's Laws of England* (2nd edn) notes that a party seeking to enforce a contract must show that:

> "all conditions precedent have been fulfilled and that he has performed, or been ready and willing to perform, all the terms which ought to have been performed by him, and also that he is ready and willing to perform all future obligations under the contract; subject to certain exceptions…" [footnote omitted].[30]

32. A distinction is often made between essential and inessential terms, however expressed, when considering if a party is "ready, willing and able".[31] However Spry takes the view that the breach of an inessential term is also a relevant consideration in the exercise of the court's discretion as to whether to grant equitable relief, "especially where questions of hardship arise".[32]

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[29] See JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th edn 2015), [20-115].

[30] Viscount Hailsham (ed), *Halsbury's Laws of England being a Complete Statement of the Whole Law of England* (2nd edn 1938), Vol XXXI, 384. The phrase "ready and willing" is here taken also to imply the ability to perform the obligation: Viscount Hailsham (ed), *Halsbury's Laws of England being a Complete Statement of the Whole Law of England* (2nd edn 1938), Vol XXIX, 118n ("The words 'ready and willing' imply not only the disposition, but the capacity to do the act"). See also Storey, who notes that as a general rule, "to entitle a party to a specific performance, he must show that he has been in no default in not having performed the agreement, and that he has taken all proper steps towards the performance on his own part": W.E. Grigsby, *Commentaries on Equity Jurisprudence by Hon. Mr Justice Story, LL.D* (1st English edn, 1884; printed 1988) 514, §771.

[31] Dal Pont refers to the readiness and willingness of an applicant for specific performance to perform "the essential terms he or she ought to have performed" as well as "all future obligations under the contract": G E Dal Pont, *Equity and Trusts in Australia* (7th edn, Lawbook Co., 2019), [33.150] (footnote omitted). Fry's Treatise likewise distinguishes between essential and non-essential terms: GR Northcote, *A Treatise on the Specific Performance of Contracts by the Rt Hon Sir Edward Fry, G.C.B* (6th edn, Sweet & Maxwell in Co-operation with Ashford Press Publishing 1985) § 923; 935. See also, on specific performance, JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (5th edn 2015), [20-120], citing Barwick CJ in *Mehmet v Benson* (1965) 113 CLR 295 at 307–309.

[32] I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions and Equitable Damages* (6th edn 2001) 218 (footnote omitted). Spry takes the view that specific performance is "inappropriate" if a plaintiff is not ready and willing to perform an essential obligation: at 219. He distinguishes between "essential breaches that lead to the cessation of contractual rights at law" and "breaches that merely give rise to discretionary considerations" in the context of equitable relief: 217-218. Megarry & Wade notes that at common law, "[a] vendor who was unable to convey exactly what he or she had contracted to transfer had no remedy at law against a purchaser who refused to complete", though in equity, "a breach of contract is not necessarily a bar to relief" so long as a vendor can "comply substantially": S Bridge, E Cooke and M Dixon, *The Law of Real Property by the Rt Hon Sir Robert Megarry and Sir William Wade* (9th edn, Sweet & Maxwell 2019) 14-117 (footnotes omitted).

33. In *Green v Sommerville*, Mason J considered it to be well-settled that a party seeking specific performance "is not required to show that he has strictly complied with all his obligations under the contract; it is enough that he has performed and is ready and willing to perform *the substance of the contract*".[33] Similarly, in *Mehmet v Benson*, Barwick CJ stated:

> "[t]he question as to whether or not the plaintiff has been and is ready and willing to perform the contract is one of substance not to be resolved in any technical or narrow sense. It is important to bear in mind *what is the substantial thing for which the parties contract* and what on the part of the plaintiff in a suit for specific performance are his essential obligations … *it is the essential terms of the contract which he must be ready to perform*." [emphasis added][34]

34. The determination of which contractual terms are "essential" – or, to use another formulation, of which terms "go to the root of the contract" – is a matter of construction.[35]

35. These principles are equally applicable in the context of a notice to complete. In *Carrapetta v Rado*, Barrett JA (with whom Beazley P and Hoeben JA agreed) stated:

> "[t]he underlying concept is that a party who gives a notice to complete and thereby calls on the other party to adhere to the contract must be in a state of both present and prospective adherence to the contract. When it is the vendor who serves the notice, he or she must be seen to be willing and able to perform, on the day the notice fixes for completion, *the obligations that the vendor is required to perform on completion* […] and to have adopted up to the time of service of the notice a stance consistent with that future performance."[36]

36. The NSW Supreme Court of Appeal considers that a vendor wishing to issue a notice to complete will only be able to do so if:

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[33] *Green v Sommerville* (1979) 141 CLR 594 at 610 (Mason J) (emphasis added), citing *Fullers' Theatres Limited and another v Musgrove* (1923) 31 CLR 524 at 550 (Isaacs and Rich JJ).
[34] *Mehmet v Benson* (1965) 113 CLR 295 at 307–308; cited in part in *Green v Sommerville* (1979) 141 CLR 594 at 610 (Mason J) and in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 619–620 (Mason CJ and Dawson J).
[35] See *Loughridge v Lavery* [1969] VR 912 at 924 per Adam J ("Whether a term of a contract is essential and goes to the root of the contract or not depends, of course, on the interpretation of the particular contract"). That process of construction calls for the determination of "the mutual intentions reasonable people in the position of the actual parties would have had as to their respective rights and obligations, having regard to the nature of the contract as well as the language in which it was expressed": *Sterling Estates Development Corporation Pty Ltd v Malouf* (2003) 58 NSWLR 685 at 694 (McColl JA, Santow JA and Tobias JA agreeing).
[36] *Carrapetta v Rado* (2012) 16 BPR 30,997 at 31,003; [2012] NSWCA 202 at [27] (emphasis added).

> "(a) if it is free from any relevant breach of contract which may have provided the purchaser a good excuse not to complete by the due date; and (b) it is able to proceed to completion and *deliver to the purchaser all the purchaser is entitled to under the contract* no later than the expiry of the notice to complete."[37]

37. The key question facing the Court is whether, in the circumstances of the case, the Contract precluded the Appellant from issuing a notice to complete. The answer to that question turns on construction of the Contract. What, precisely, did the Appellant in this case contract to convey? Was it, as in *Carrapetta v Rado*,[38] nothing more than "a clear title in return for the money that the contract requires the purchaser to pay in cash on completion"? Or did the Contract, in substance, contemplate the sale of the Business as a going concern?

38. The Respondents adopt Bathurst CJ's conclusion that the *purpose* of the transaction "was to sell the Business as a going concern" (CA [49]; CAB 83). That purpose was evident through construction of the Contract at issue. What was required was that the Appellant be ready, willing and able to deliver the Business that it contracted to sell. The fact that the Appellant was excused from any liability for damages for its non-compliance with the cl. 50.1 "going concern" obligation does not have the effect of forcing the Respondents to take a Business for which it had not contracted. That supervening illegality does not affect the fundamental question of whether the Appellant was ready, willing and able "to perform *the substance of the contract*".[39]

***Respondents' Analysis of the Appellant's Submissions***

Contract (AS [38]-[52])

39. At AS [38]–[40] and [42], the Appellant's submissions appear to endorse Darke J's view in the Supreme Court and Basten JA's dissenting view in the Court of Appeal that cl. 50.1 is confined by an implied obligation of lawfulness (SC [84]; CAB 35; CA [126]; CAB 112). That argument should be rejected for the reasons set out in the judgment of

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[37] *Malouf v Sterling Estates Development Corporation Pty Ltd* [2002] NSWSC 920 at [36] (emphasis added), which was quoted with approval in *Carrapetta v Rado* (2012) 16 BPR 30,997 at 31,003; [2012] NSWCA 202 at [25] (Barrett JA; Beazley JA and Hoeben JA agreeing); and in *Barrak Corporation v Jaswil Properties Pty Ltd* (2016) 18 BPR 35,759 at 35,765; [2016] NSWCA 32 at [34] (Beazley P, Sackville and Emmett AJJA).
[38] *Carrapetta v Rado* (2012) 16 BPR 30,997 at 31,003; [2012] NSWCA 202 at [27].
[39] *Green v Sommerville* (1979) 141 CLR 594 at 610 (Mason J) (emphasis added), citing *Fullers' Theatres Limited and another v Musgrove* (1923) 31 CLR 524 at 550 (Isaacs and Rich JJ).

Bathurst CJ (CA, [44]-[46]; CAB 82-83).

40. At AS [41], the Appellant characterises the Covid Order as a regulatory change that would have been contemplated by the parties given their experience in the hotel industry. While the hotel industry is highly regulated, the Respondents dispute that it "was known to both contracting parties ….that the Appellant's *very ability to trade the Hotel* would be subject to any such change as might be ordered by the Government of the day" (AS [41] (emphasis added)). This submission conflates regulations that affect the activities of patrons or the hours of night-time operations with a regulation that resulted in the wholesale shuttering of the three-storey hotel Business, save for orders for alcohol from a takeaway window and occasionally takeaway food. An experienced hotelier would anticipate that new regulations may be announced (and later promulgated, allowing a suitable period for modifications to take place) that would affect the hotel Business. It would *not* have anticipated that a regulation would shutter the Business almost entirely. Bathurst CJ recognised that variations in carrying on the Business caused by the former kind of regulation would not be inconsistent with the "going concern" obligation in cl. 50.1, so long as the Business could still be seen to be carried on in the usual or ordinary course having regard to its nature, scope and manner (CA [43]; CAB 82). However, a regulation preventing the Business from operating as a going concern would not be consistent with cl. 50.1. The extreme nature of the Covid Order falls into the latter category.

41. In AS [43], it is not clear what is meant by the submission that the Contract was not rendered "inutile". As a result of the Covid Order, the Appellant was not in a position to convey the Business as a going concern. Bathurst CJ recognised that this was the purpose of the transaction (CA [49]; CAB 83). It is not to the point that the threshold of frustration had not yet been met at the time that the Contract was terminated. This misapprehends the role of supervening illegality.

42. At AS [44], the Respondents recognise that cl. 50.1 contains three categories of obligation (see CA [96]-[97]; CAB 97-98 (Basten JA)). The question for the Court only goes to the construction of the first limb (the "going concern" obligation) and whether being in default of that limb precluded the Appellant from issuing a notice to complete. Contrary to the Appellant's submission, damages are not the "obvious" remedy for a failure to deliver a Business as a going concern, when that is the purpose for which the Contract was made (AS [45]). The fundamental question is whether the "going

concern" obligation in cl. 50.1 is a covenant of sufficient importance that compliance is a pre-requisite to completion. In the Respondents' view, it is. Non-compliance with the "going concern" obligation in cl. 50.1 cannot, therefore, be reduced to a question of diminution of value (AS [49]-[51]).

43. In response to AS [52], the Respondents consider that severance could not operate for the reasons set out by Bathurst CJ (CA [54]-[57]; CAB 84-85). It also draws attention to cl. 65.1 of the Contract, which provides that "[t]he sale of the Property, Licence and 9 Gaming Machines is conditional upon, and interdependent with, the Sale of the Business Assets."[40]

Illegality (AS [53]-[58])

44. The Respondents agree that "[t]he Appellant was not required, in suing for damages for termination, to rely, in any way, on any illegality", and that it obeyed the law at all material times (AS [54]). However, this is not responsive to the issues posed by the Appellant for consideration in Part II of its Submissions. The issue is whether:

    a. the supervening illegality provided an excuse for the Appellant's non-compliance with the "going concern" obligation in cl. 50.1; and

    b. the Appellant's inability to comply with the "going concern" obligation in cl. 50.1 due to the supervening illegality prevented it from issuing a notice to complete.

45. It is not entirely clear what is meant by the proposition in AS [56]. If it is that the "going concern" obligation in cl. 50.1 only requires the Appellant to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" to the extent that it is legally permitted to do so, that argument should be rejected for the reasons articulated by Bathurst CJ (CA [45]-[46]; CAB 82-83). If, however, the Appellant is claiming that some form of severance under cl. 63.7 occurred during the period of illegality, that argument should also be rejected for the reasons articulated by Bathurst CJ ([54]-[57]; CAB 84-85).

46. At AS [57], the Appellant addresses the second issue identified in Part II of its Submissions. The Appellant's position appears to be that even if it were unable to comply with cl. 50.1 as a result of the supervening illegality, it would nonetheless be

[40] CA [108]; CAB 104 (Basten JA).

entitled to issue a notice to complete. The Appellant submits that "[t]he whole of the consideration was payable for the assets, the whole of the assets could be conveyed" and that "[t]he Covid Orders' limitation on the business conducted … did not affect the condition of any of the assets proposed to be transferred" (AS [57], [59]). This argument goes to whether the Appellant was ready, willing and able to complete the Contract, despite its inability to comply with the "going concern" obligation in cl. 50.1. The fundamental problem with the Appellant's submission is that it is not correct to submit that the condition of the assets was not affected by the Covid Order. The goodwill of the Business was clearly impaired, a point noted by Brereton JA which is not disputed in this Court (CA [142], [151]; CAB 117, 120).

47. As outlined above, the Respondents' position is that the Appellant was not entitled to issue a notice to complete. This is because the "purpose" of the transaction was "to sell the Business as a going concern" rather than "simply as a group of assets" (CA [49]; CAB 83 (Bathurst CJ)). If the item conveyed by the Contract is characterised as "the Business as a going concern", it is clear that the Covid Order *did* affect its condition. The Appellant was, to use Brereton JA's phrase, only in a position to convey a "modified, reduced and scaled-down version" of what was contracted for (CA [168]; CAB 127-128). The Appellant's argument that the Business, operating from a takeaway window with a skeleton staff, was "expand[ed]" by its ability to sell "Growlers" and "Squealers" is not tenable (AS [59]) – and it is not clear that this is a new legal entitlement.

48. The question is then whether the Appellant was prevented from enforcing the Contract because of its inability to convey the Business as a going concern. As outlined above, the Appellant was not ready, willing and able to complete, and therefore was not entitled to issue a notice to complete or subsequently to terminate the Contract.

Frustration (AS [60]-[66]

49. The Appellant spends some time in its submissions addressing principles of frustration. This issue does not arise in the appeal as the Respondents do not claim that the Contract was frustrated.

50. The Respondents do not accept the analogy proposed between the facts of the present case and *Scanlan's New Neon Limited v Tooheys Limited* (1943) 67 CLR 169 (AS [61]). The Covid Order did not merely affect the "value of the assets to be acquired"; it

prevented the Appellant from being able to deliver the object of the Contract (a Business which was a going concern). In contrast, Latham CJ determined in *Scanlan's* that both parties were able to "perform fully the contracts which they chose to make".[41]

51. Drawing comparisons with *Codelfa Construction Proprietary Limited v State Rail Authority of New South Wales* (1982) 149 CLR 337 is not necessary to resolve the appeal since frustration is not in issue. The Appellant's submission that the First Respondent "ought not to be entitled to complain that the Appellant was trading in a limited fashion in order to comply with the law" (AS [63]) is not disputed; the Respondents accept that they had no entitlement to terminate the Contract on the basis of the Appellant's failure to comply with the "going concern" obligation in cl. 50.1. The Respondents dispute the conclusion in AS [64], and as to severance (AS [65]-[66]), repeat the submissions in paragraph 43 above.

Suspension (AS [67]-[68])

52. The Appellant submits that the Court of Appeal relied on a "intermediate flexible response", short of frustration, which "operated to prevent the party whose obligation was suspended from enforcing the balance of the terms of the contract" (AS [67]). This formulation wrongly conflates the specific outcome in this case with the general principle identified by the Court of Appeal. The principle identified by Bathurst CJ is that "supervening illegality can constitute an excuse for non-performance of a contractual obligation whilst not frustrating the contract" (CA [66]; CAB 88). The consequence that the Appellant was precluded from enforcing the balance of the Contract followed from the Court of Appeal's construction of cl. 50.1 (CA [70], [72]-[74]; CAB 89-90). Suspension of an obligation substantial compliance with which was not a pre-condition to completion clearly would not prevent a party from issuing a notice to complete.

53. The Appellant sets out three contentions at AS [68] which relate to the three subsequent sub-headings of its pleadings; these are addressed in turn below.

Authorities relied upon by Court of Appeal majority (AS [69]-[74])

54. For the reason set out above, the principle applied by the Court of Appeal appears to be narrower than the Appellant's formulation in AS [67]. There is no clear rationale for

[41] *Scanlan's New Neon Limited v Tooheys Limited* (1943) 67 CLR 169 at 186; see also McTiernan J at 210, 216-217.

why that principle may not be applied to executory contracts. Indeed, Bathurst CJ notes its use in cases concerning covenants in leases (CA [66]; CAB 88).

Uncertainty of application (AS [75]-[78])

55. The Appellant contends that the effect of the "doctrine of suspension" adopted by the Court of Appeal is to leave the parties' "rights to terminate or compel completion … suspended for an uncertain time" (AS [75]). This is not the case. There are two possible end-points to the "suspension" that results from a supervening illegality. First, the illegality may be removed (by the repeal of the Covid Order, for example). In such a case, the relief from liability for non-compliance is removed and the parties are free to perform the Contract. Secondly, the illegality may continue until the threshold of frustration is reached and the Contract is discharged.

56. In the present case, the Covid Order was a supervening illegality that left the Appellant unable to perform the "going concern" obligation in cl. 50.1 while the Order remained in force. It had the effect of suspending performance until either the supervening illegality was removed or until it crystallised into frustration.[42]

57. This result is a consequence of the construction of the bespoke Contract. The intention of the parties was to convey the Business as a going concern. Accordingly, compliance with the "going concern" obligation in cl. 50.1 was rightly construed as a condition precedent to completion. Supervening illegality will not prevent the vendor of an executory contract from compelling settlement in all cases. Everything turns on the proper construction of the contract and the affected clause.

Suspension of obligations (AS [79])

58. The Appellant argues that cl. 50.1 was "not interdependent… with any of the essential terms or conditions" (AS [79]). The Respondents adopt Bathurst CJ's conclusion that the "going concern" obligation in cl. 50.1 is itself an essential clause (CA [74]; CAB 90). This obligation went the root of the Contract and identified the subject matter that the parties intended to convey. The Appellant's non-compliance with the "going

[42] Whether an event is frustrating turns on issues of fact, degree, and judgment. In *Woolworths Group Ltd v Gazcorp Pty Ltd* [2022] NSWCA 19, the Court of Appeal cited with approval Lord Wright's statement in *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265 at 274-275 that the "data" for the decision of a frustration issue "are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred": at [220] (Bell P, Bathurst CJ and Meagher JA agreeing).

concern" obligation in cl. 50.1 in the present case meant that it was not ready, willing and able to issue a notice to complete.

***Respondents' conclusions on the issues identified by the Appellant***

59. On the basis of the analysis above, the Respondents' answer to the two issues identified by the Appellant in Part II of its Submissions are as follows:

a. supervening illegality that does not amount to frustration results in a suspension of obligations that cannot be legally performed under the Contract, in the sense that it constitutes an excuse for non-compliance.

b. a party whose obligation is so suspended is not able to insist on performance of the remaining obligations by requiring completion of the Contract if its non-compliance means that it is not ready, willing and able to complete the Contract.

**Part VI: Respondents' Notice of Contention**

60. As regards **Grounds 1 and 2**, the Respondents contend that even if the obligation to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" in cl. 50.1 is not an essential term, the Appellant's non-compliance will still prevent it from demonstrating readiness, willingness and ability to complete the Contract.

61. Bathurst CJ concluded that the "going concern" obligation in cl. 50.1 was an essential term of the Contract (CA [74]; CAB 90). This conclusion was a step in His Honour's reasoning that the Appellant was not ready, willing and able to complete the Contract at the time of issuing the notice to complete (CA [73], [77]; CAB 90-91).

62. As noted above, the requirement that a party giving notice to complete is ready, willing and able has its origins in specific performance and should be given a similar meaning.[43] In the specific performance context, Spry notes that a plaintiff's inability or unwillingness to perform a non-essential obligation would not result in a refusal of specific performance "unless by reason thereof it would be unjust to grant that remedy, in view of hardship or unfairness, or for other such discretionary reasons."[44] In assessing hardship, regard should be had to "the extent to which the recovery of

[43] *McNally v Waitzer* [1981] 1 NSWLR 294, 296 (Reynolds JA) and 303 (Hutley JA); *Lynda Marie Slarke v Ultima Constructions Pty Ltd* [2005] ACTCA 1 at [21] (The Court).
[44] I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions and Equitable Damages* (6th edn 2001) 219 (footnotes omitted).

damages for breach of the non-essential term in question provides an adequate recompense and on other discretionary considerations."[45]

63. While Spry uses the term "breach", the Respondents submit that this principle can be extended to encompass non-compliance with cl. 50.1 in the present case. Even if the Court does not find the "going concern" obligation in cl. 50.1 to be an essential term, the Appellant's inability to comply should preclude its ability to issue a notice to complete because it was intermediate term, the breach or default of which would give rise to a right of termination because the breach or default was sufficiently serious.[46]

64. Although the Respondents were not in a position to seek damages for non-compliance due to supervening illegality, at a level of principle it is clear that they would not be an adequate remedy in the present case. The First and Second Respondents contracted to purchase the Business as a going concern; damages could not adequately recompense for the breach if they were required to complete.

65. As regards **Ground 3,** the Respondents refer to their submissions at paragraph 23 above.

**Part VII: Estimation of Time for Presentation of Oral Argument**

66. The Respondents estimate 2 hours for oral argument.

Dated 4 November 2022


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[45] ibid 219-220.
[46] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 147.