

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, GLEESON AND JAGOT JJ

LAUNDY HOTELS (QUARRY) PTY LIMITED

APPELLANT

AND

DYCO HOTELS PTY LIMITED ATF THE PARRAS
FAMILY TRUST & ORS

RESPONDENTS

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited
[2023] HCA 6
Date of Hearing: 9 December 2022
Date of Judgment: 8 March 2023
S125/2022

ORDER

1. *The appeal be allowed with costs.*
2. *The orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2021 be set aside and, in their place, order that the appeal be dismissed with costs.*
3. *Within 28 days of the date of these orders, the respondents repay to the appellant the whole of any sum paid by the appellant to the respondents under or in accordance with Order 2(b) of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2021 (the deposit and interest thereon).*
4. *If, within 14 days of the date of these orders, the parties agree upon the amount of further interest to be paid by the respondents to the appellant on the sum referred to in Order 3 of these orders, the parties are to file a minute of consent and the respondents are to pay the appellants that further sum of interest forthwith. Failing agreement, the issue and calculation of interest be remitted to the Supreme Court of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with L G Moretti for the appellant (instructed by JDK Legal)

N C Hutley SC with C D Freeman and E C Dunlop for the respondents
(instructed by A.C. Comino & Associates)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited

Contract – Construction – Where clause in contract for sale and purchase of property and assets of hotel business obliged vendor from contract date until completion to carry on business in "usual and ordinary course as regards its nature, scope and manner" – Where hotel business operated pursuant to licence and gaming machine entitlements – Where hotel business subject to variable licence conditions imposed under *Liquor Act 2007* (NSW) and regulations – Where operation of business prior to completion restricted by public health order in response to COVID-19 pandemic – Whether vendor obliged to carry on business in manner conducted as at time of contract to extent lawful – Whether vendor "ready, willing and able to complete and ... not in default" at time vendor served notice to complete.

Words and phrases – "breach", "carry on the business", "contractual construction", "contractual obligation", "COVID-19", "lawful operation", "nature, scope and manner", "ready, willing and able to complete", "reasonable businessperson", "usual and ordinary course", "warranty".

1 KIEFEL CJ, GAGELER, GORDON, GLEESON AND JAGOT JJ. This appeal involves a contractual dispute arising from the effects of the COVID-19 pandemic in Australia. The issue is one of contractual construction. Under a contract for the sale and purchase of the property and assets of a hotel business, the Vendor was contractually obliged from the contract date until Completion to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner". During that period, the operation of the business was restricted by a public health order in response to the COVID-19 pandemic. The question raised by this appeal is whether, while operating on the restricted basis required by the public health order, the Vendor was "ready, willing and able to complete and ... not in default" at the time the Vendor served a notice to complete.

2 As these reasons will explain, the Vendor was "ready, willing and able to complete" and was not in default of its contractual obligations at the time it served the notice to complete. The Vendor was obliged to carry on the Business in the manner it was being conducted at the time of contract to the extent that doing so was lawful. There was no obligation (and could not have been an obligation) imposed on the Vendor to carry on the Business unlawfully. It follows that the appeal should be allowed, and consequential orders sought by the appellant should be made.

The contract

3 The contract was dated 31 January 2020. It provided for the sale of freehold hotel property in Pyrmont, Sydney (the Quarrymans Hotel) ("the Property"), together with an associated hotel Licence (being a specified hotel licence under the *Liquor Act 2007* (NSW) and nine Gaming Machine Entitlements allocated to that Licence) and the Business¹. The Business was defined as the hotel business trading as the Quarrymans Hotel which operates pursuant to the Licence (cl 33.1). The appellant was the Vendor. The first and second respondents together were the Purchaser. The first respondent was the purchaser of the Property and the Licence. The second respondent was the purchaser of the Goodwill, Plant and Equipment and remaining Business Assets². Under cl 65.1 of the contract, the sale of the

1 The Property, Licence, and Gaming Machine Entitlements were defined as the "Assets" under cl 33.1. The Assets also included Plant and Equipment and the Business Assets.

2 The Business Assets were defined under cl 33.1 as the Business Records, the Goodwill, the Contracts, Stock, Business name, Domain name, Facebook & Instagram Account, and the Lease.

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Property, Licence, and Gaming Machine Entitlements was conditional upon, and interdependent with, the sale of the Business Assets. The total purchase price was \$11,250,000.

4 The Completion Date (specified in item 2 of Sch 1 to the contract) was 55 days after the contract date³ in respect of the assets to be purchased by the second respondent and 56 days after the contract date in respect of the assets to be purchased by the first respondent. The parties agreed these dates to be 30 and 31 March 2020 respectively.

5 Clause 35.1 identified that until each of the Conditions Precedent in item 13 of Sch 1 to the contract was satisfied or waived, the parties were not obliged to complete the contract. There were two Conditions Precedent. One condition required that on the day of completion of the sale of the Business Assets, the Vendor (as lessor) and the second respondent (as lessee) were to enter into a Lease of the Quarrymans Hotel, as required by cl 65.6. The second condition was the satisfaction of cl 66.1, concerning a notice from Ausgrid requiring water and sewer works to be completed.

6 Clause 38 excluded warranties by the Vendor including, under cl 38.1(b)(iv), any warranty as to the "present and future financial or income return to be derived from the Property or the Business". By cl 38.1(d)(ii), the Purchaser was not entitled to rescind, terminate or delay Completion because of any matter referred to in cl 38. In addition, cl 55.2(a) relevantly provided that the Vendor gave no representation or warranties about "future matters, including the future financial position or performance of the Business".

7 Clauses 48.1 to 48.7 concerned the transfer of the Licence (the liquor licence and associated Gaming Machine Entitlements) from the Vendor to the Purchaser.

8 Clause 48.8 contained the Vendor's warranties. The warranties specific to the Licence included that: the Vendor had authority to transfer the Licence (cl 48.8(o)(p)); the Licence would be subsisting and available to the Purchaser on Completion and was not liable to suspension or cancellation (cl 48.8(o)(q)); the Licence would not be subject to any conditions other than those already imposed (or automatically imposed) under the *Liquor Act* and the Regulations under that Act from time to time (cl 48.8(o)(r)); and there were no conditions on the Licence which had not been disclosed (cl 48.8(f)). The Vendor also warranted that: there

3 The contract date was 31 January 2020.

<i>Kiefel</i>	<i>CJ</i>
<i>Gageler</i>	<i>J</i>
<i>Gordon</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

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were no current, threatened or proposed police actions or proceedings and that there were no judgments, orders or convictions which were likely to render the Licence liable to cancellation, forfeiture, suspension or the subject of action under the *Liquor Act* (cll 48.8(o)(t), (v), (w)); and that the Vendor was not aware of any conditions of the Licence that had not been complied with and not disclosed in the contract (cl 48.8(o)(u)).

9 Clause 50 is the key provision. It was headed "Management Prior to Completion". Clause 50.1, headed "Dealings Pending Completion", provided that:

"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* 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)

This appeal concerns the first limb of cl 50.1. The exceptions provided for in cl 50.2 may be put to one side. In general terms, they permitted the Vendor to deal with contracts to which it was a party, other than specified contracts. Under cl 50.4, the Purchaser could give prior written consent to the Vendor not complying with an obligation in cl 50.1.

10 Clause 51 concerned Completion. By cl 51.2, at Completion, the Vendor had to transfer the Assets to the Purchaser in exchange for the Purchaser paying the Purchase Price (less the deposit).

11 Clause 51.7 dealt with notices to complete. It provided that completion of the contract was to take place on the Completion Date and that if completion did not occur, a party which was ready, willing and able to complete, and was not in default, was permitted to serve the other party with a notice requiring the other party to complete the contract not less than ten business days after the date of that notice and making time of the essence.

12 Clause 57 dealt with title, risk, and insurance. It provided that title to and risk in the Assets passed to the Purchaser on Completion and that, until Completion, the Vendor was required to take out and maintain current insurance policies in respect of the Assets covering such risks and for such amounts as would be maintained in accordance with prudent business practice.

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13 Clause 58 concerned the goods and services tax ("GST"). Under cl 58.1, the parties agreed that the sale of the Assets under the contract constituted the supply of a going concern for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ("the GST Act"). Under cl 58.2, the Vendor undertook "that it will carry on the enterprise transferred under this contract until the day that the supply is made for the purposes of the A New Tax System (Goods and Services Tax) Act 1999".

The public health orders

14 Section 7 of the *Public Health Act 2010* (NSW) enabled the Minister by order to give directions if the Minister considered that a situation had arisen that was, or was likely to be, a risk to public health. Under s 10 of that Act, a failure to comply with such a direction was a criminal offence with, relevantly, a maximum penalty of a fine, including a fine for each day the offence continued.

15 On 23 March 2020, the Minister made an order giving directions in response to the COVID-19 pandemic⁴. The order directed that pubs (meaning licensed premises under the *Liquor Act*) "must not be open to members of the public ... except for the purposes of ... selling food or beverages for persons to consume off the premises"⁵. The order applied to the Quarrymans Hotel.

16 In response, the Quarrymans Hotel was closed on 23 March 2020 to enable a shift to a takeaway-only operation. By 26 March 2020, the Quarrymans Hotel had re-opened, but only for the purpose of selling takeaway craft beer and food.

17 Two further public health orders were made on 14 and 29 May 2020 respectively⁶. The order made on 14 May 2020 permitted pubs to sell food or drinks for not more than ten persons to consume on the premises, as well as food or drinks for persons to consume off the premises⁷. The order made on 29 May

4 *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW).

5 *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW), s 5(1)(a)(i).

6 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (NSW); *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW).

7 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (NSW), s 7(2)(a)-(b).

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2020 permitted 50 persons in a separate seated food or drink area or the total number of persons calculated by allowing four square metres of space per each customer in a pub, whichever was the lesser⁸. The Quarrymans Hotel continued to offer takeaway food and alcohol only until 1 June 2020 when it re-opened in accordance with the customer number restrictions in the 29 May 2020 order (which commenced on 1 June 2020).

18 In the meantime, on 25 March 2020, the Purchaser informed the Vendor that it would not complete the contract as the Vendor was not ready, willing and able to complete the contract as the Vendor was in breach of cll 50.1, 58.1 and 58.2. On 27 March 2020, the Purchaser wrote to the Vendor asserting also that the contract had been frustrated or that the Purchaser could issue a notice to complete with which the Vendor could not comply, enabling the Purchaser to terminate the contract and sue for damages. The Vendor responded on the same day that it was ready, willing and able to perform its contractual obligations and called upon the Purchaser to complete the contract.

19 As noted, Completion was due to occur on 30 and 31 March 2020. On 31 March 2020, the Vendor confirmed that all Conditions Precedent to Completion prescribed by cl 35.1 had been satisfied and said it was "ready, willing and able to settle". The Vendor reiterated this position on 6 April 2020. On 22 April 2020, the Purchaser obtained an updated valuation of the hotel business of \$10,250,000, being \$1 million less than the contracted purchase price.

20 Ultimately, the Vendor served a notice to complete on the Purchaser on 28 April 2020 calling for completion of the sale of the Business Assets by 12 May 2020 and of the Property, Licence, and Gaming Machine Entitlements by 13 May 2020. In response, the Purchaser commenced proceedings seeking declaratory relief to the effect that the contract had been frustrated or alternatively that the Vendor was not entitled to issue the notice to complete. On 21 May 2020, the Vendor served a notice of termination on the Purchaser on the basis of the Purchaser's failure to complete in accordance with the notice to complete. On 23 May 2020, the Purchaser responded to the effect that the contract was frustrated but, if that were not so, the Vendor was not entitled to issue the notice to complete and its issue of the notice of termination constituted a repudiation of the contract which the Purchaser accepted.

8 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW), Sch 1, item 22.

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The primary judge's decision

21 In the Supreme Court of New South Wales, the primary judge (Darke J) concluded that the contract had not been frustrated⁹, and cl 50.1, properly construed, required the Vendor to "carry on the Business in the usual and ordinary course" as far as it remained possible to do so in accordance with law. It followed that the Vendor was not in breach of cl 50.1¹⁰. Accordingly, the Vendor was entitled to serve the notice to complete, which was effective to make the time for completion essential¹¹. As the Purchaser failed to complete, the Vendor was entitled to terminate the contract and was able to seek damages for loss of the bargain¹².

The Court of Appeal's decision

22 The Purchaser appealed. The Purchaser alleged that the primary judge misconstrued cl 50.1 and ought to have held that from the coming into force of the first public health order the Vendor was unable to comply with cl 50.1 and, thereby, was not entitled to issue the notice to complete or to terminate when the Purchaser failed to comply with that notice. Accordingly, the Vendor's purported termination constituted a repudiation of the contract, which was accepted by the Purchaser. There was no appeal against the primary judge's conclusion that the contract was not frustrated. The Purchaser also did not allege that the Vendor was in breach of cl 50.1. Rather, the Purchaser's case on appeal was that as the Vendor could not comply with cl 50.1, the Vendor was not ready, willing and able to complete the contract, and therefore could not serve the notice to complete or terminate for the Purchaser's failure to complete.

9 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403 at 41,426 [112].

10 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403 at 41,420 [84], 41,421 [88].

11 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403 at 41,426 [113]-[114].

12 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403 at 41,426-41,427 [115], 41,427 [117]-[118], 41,429 [129].

7.

23 A majority of the Court of Appeal of the Supreme Court of New South Wales (Bathurst CJ and Brereton JA) allowed the appeal and set aside the orders of the primary judge.

24 Bathurst CJ concluded that cl 50.1 was not to be construed as if the Vendor's obligation to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" was limited to the extent permitted by law¹³. Bathurst CJ therefore considered that the public health order made on 23 March 2020 was a supervening event rendering the Vendor's compliance with cl 50.1 illegal¹⁴. By analogy to cases involving the enforceability of contracts during wartime restrictions¹⁵ and covenants in leases¹⁶, his Honour considered that the supervening illegality suspended the relevant contractual obligation in cl 50.1¹⁷. His Honour concluded that cl 50.1 was an essential term with which the Vendor could not comply at the time it served the notice to complete. The purported termination relying on the Purchaser's failure to comply with the notice to complete, accordingly, involved a repudiation of the contract by the Vendor¹⁸.

13 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 349-350 [51]-[52].

14 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 351 [60], 353-354 [73].

15 *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495 and *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728, cited in *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 351 [62]-[63].

16 *Canary Wharf (BP 4) T1 Ltd v European Medicines Agency* (2019) 183 ConLR 167, *Gerraty v McGavin* (1914) 18 CLR 152, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 and *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 77, cited in *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 352-353 [65]-[71].

17 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 352 [66].

18 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 354 [77].

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Brereton JA agreed with Bathurst CJ¹⁹, but also considered that the Vendor was in breach of cl 50.1 at the time it purported to serve the notice to complete²⁰.

25 Basten JA (in dissent) considered that the obligation in cl 50.1 meant that the Vendor had to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" as permitted by law. Accordingly, in complying with the public health order, the Vendor was not in breach of cl 50.1²¹. It followed that the appeal had to fail²².

The proper construction of the contract

26 This case is to be resolved on the proper construction of the contract, specifically cl 50.1.

27 "It is well established that the terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract. In a practical sense, this requires that the reasonable businessperson be placed in the position of the parties. It is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it²³."

28 It is not necessary to do more than construe cl 50.1 in its context to conclude that the obligation on the Vendor to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" incorporated an inherent requirement to do so in accordance with law. That is, the obligation imposed on

19 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 371 [143].

20 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 372 [147].

21 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 368 [126].

22 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 368 [127].

23 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 [16], citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35] and the cases therein cited at fnn 58 and 60.

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the Vendor was to carry on the Business in the manner it was being conducted at the time of contract to the extent that doing so was lawful. There was no obligation (and could not have been an obligation) imposed on the Vendor to carry on the Business unlawfully. It is not necessary to have recourse to either the doctrine of implied contractual terms to impose on the Vendor an obligation to carry on the business to the extent that it was lawful, or the possible consequences of supervening illegality resulting in suspension rather than frustration of the contractual obligation imposed by cl 50.1.

29 The obligation in cl 50.1 was for the Vendor to carry on the Business. The "Business" was defined to be "the hotel business trading as the 'Quarrymans Hotel' which operates pursuant to the Licence". The Licence, annexed as Sch 5 to the contract, stated that "Licence conditions imposed by the Liquor Act and Regulation apply". That legislative scheme contains an extensive regime of conditions applying to hotel licences²⁴, for the regulation and control of licenced premises generally²⁵ (including powers of the Independent Liquor and Gaming Authority to cancel, suspend, and impose new conditions on Licences²⁶), and offences for non-compliance²⁷.

30 The centrality of the lawful operation of the Business pursuant to the Licence is also exposed by other provisions of the contract. The Gaming Machine Entitlements were not free-standing. They were allocated to the Licence under the *Gaming Machines Act 2001* (NSW)²⁸. The Assets included the Licence and the Gaming Machine Entitlements. It was the Assets which were to be purchased (cl 51.2). The Vendor's obligation to procure approval for the transfer of the Licence to a transferee nominated by the Purchaser was intended to occur "on the morning of the Completion Date" (cll 48.3 and 48.6). The Vendor's warranties all related, directly or indirectly, to the past, current, and anticipated future lawful operation of the hotel, including in relation to the Licence (cl 48.8)²⁹. In particular,

24 *Liquor Act 2007* (NSW), Pt 3 Div 2.

25 *Liquor Act 2007* (NSW), Pt 5.

26 *Liquor Act 2007* (NSW), Pts 9 and 9A.

27 *Liquor Act 2007* (NSW), Pt 6.

28 Under s 16 of the *Gaming Machines Act 2001* (NSW), gaming machine entitlements are "held in respect of a hotel licence or club licence".

29 See above at [8].

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<i>Gordon</i>	<i>J</i>
<i>Gleeson</i>	<i>J</i>
<i>Jagot</i>	<i>J</i>

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the warranty that as at the Completion Date the Licence would not be subject to any conditions "other than any condition already imposed on the Licence or *automatically imposed by virtue of the Liquor Act and the Regulations under that act from time to time*" (emphasis added) (cl 48.8(o)(r)) was an express acknowledgment that the requirements for the lawful operation of the Business were variable.

31 Accordingly, a reasonable businessperson in the position of the parties would have understood cl 50.1 to mean that from the date of the contract until Completion, the Vendor was required to carry on the Business "in the usual and ordinary course as regards its nature, scope and manner" in accordance with law. The past, current, and anticipated future lawfulness of the operation of the Business was objectively essential and a commercial necessity to the parties. Without the Licence and associated Gaming Machine Entitlements, there would be no "Business". The Vendor's obligation to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner", on the proper construction of that provision, could never extend to an obligation on the Vendor to act illegally. The Vendor's obligation was necessarily moulded by, and subject to, the operation of the law from time to time.

32 Clause 50.1 is not a provision which, on its proper construction, has a "double intendment"³⁰, in the sense of contemplating an operation both within and against the law so that the provision should be construed as meaning only the former intendment. Clause 50.1 has a single intendment – that the Vendor's obligation to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" is moulded by, and subject to, the law as in force from time to time. The contrary construction would require "intractable language"³¹ giving effect to an inferred objective intention of the parties that the Vendor be obliged to "carry on the Business in the usual and ordinary course as regards its

30 *Langley v Foster* (1906) 4 CLR 167 at 181, citing Sheppard, *The Touchstone of Common Assurances being a Plain and Familiar Treatise on Conveyancing*, 8th ed (1826), vol 1 at 88.

31 *Global Network Services Pty Ltd v Legion Telecall Pty Ltd* [2001] NSWCA 279 at [102].

nature, scope and manner" contrary to the law as in force from time to time and thereby place at risk the continuation of the Licence³².

33 This conclusion is reinforced by the description that the Business is to be carried on in its "usual and ordinary course". The Business, which operates pursuant to the Licence, in its usual and ordinary course must operate in accordance with law. The further description "as regards its nature, scope and manner" reflects the objectively assumed common position of the parties at the date of the contract that the nature, scope and manner of the Business at that time was in the usual and ordinary course – that is, in "the undistinguished common flow"³³ of the business – which inherently encompasses that the business was lawful.

34 The relevant obligation of the Vendor in cl 50.1 cannot be construed as if one part (the "usual and ordinary course") incorporates a requirement of lawfulness, but the other part (the "nature, scope and manner") does not. Otherwise, in the event of supervening illegality, the clause would contain potentially irreconcilable obligations in that the Vendor would be obliged to carry on the Business both in the "nature, scope and manner" that it operated at the contract date (on this hypothesis, unlawfully) and "in the usual and ordinary course" that it operated at the contract date (that is, lawfully). Construed as it must be, as a single obligation subject to an overriding qualification of lawfulness, the relevant part of cl 50.1 reflects the commercial reality that ongoing legal compliance was essential to the Business.

35 The arguments against this construction are unpersuasive. It is appropriate to deal with each in turn.

36 The requirement for the carrying on of the Business to be lawful did not need to be expressly stated in cl 50.1. Nor does it need to be implied. It is inherent within the words "the usual and ordinary course as regards its nature, scope and manner" construed in the context of the whole contract. This context includes that the subject-matter of the contract is a hotel business that required specific legal

32 Under Pts 9 and 9A of the *Liquor Act*, a failure to comply with a public health order could have engaged the disciplinary powers of the Independent Liquor and Gaming Authority which included cancellation, suspension, and the imposition of new conditions on the Licence.

33 *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (In liq)* (1948) 76 CLR 463 at 477.

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authority to continue to operate and which, by the terms of the Vendor's warranties in cl 48.8, the parties accepted was and would be subject to ongoing and potentially changing regulatory requirements.

37 The Vendor's warranties in cl 48.8 expose that the regulatory environment within which the Business operated was dynamic. The operation of the Business in the "usual and ordinary course as regards its nature, scope and manner" was subject to potential police actions, infringement notices, the consequences of assaults, and new or amended conditions on its Licence. The warranties that the Vendor could and did give were that, to the best of its knowledge, there were no such matters existing, proposed or likely. The Vendor could not warrant more, given the dynamic nature of the regulatory environment. Clause 50.1 was only a promise by the Vendor to act in a certain way between the contract date and Completion, and it did so.

38 Further, the dynamic nature of the regulatory environment of the Business under the *Liquor Act* is inconsistent with the proposition that the Vendor might be in breach of or unable to comply with cl 50.1, or that the Purchaser would be permitted to delay Completion, because of any change in the law which, as in this case, did not have the effect of frustrating the contract³⁴. Accordingly, the fact that cl 50.1 might be complied with in circumstances where the lawful carrying on of the Business before or at the Completion Date bore little resemblance to the

34 Regulatory actions available under the *Liquor Act* included: written directions from the Secretary of the Department of Industry "concerning any matter relating to the licensed premises (including any conduct on the licensed premises)" (s 75(1)); short-term or long-term closure orders if certain circumstances arise (ss 82 and 84); a late hour entry declaration to prevent patrons entering licensed premises during late trading hours even though the premises are authorised to trade during that time (s 87(2)); notices restricting or prohibiting the licensee selling or supplying a specified liquor product (s 101(1)), or restricting or prohibiting an activity that promotes the sale or supply of liquor in certain circumstances (s 102), or restricting or prohibiting conduct likely to encourage misuse or abuse of liquor (s 102A(1)); as well as regulations which enable declarations of a "restricted alcohol area" in respect of an alcohol free zone, or where the sale, supply, possession or consumption of liquor on any premises (whether or not licensed premises) may be restricted (s 115).

carrying on of the Business at the contract date also does not support a different construction of the provision³⁵.

39 The capacity of the Purchaser in cl 50.4 to agree not to require the Vendor to comply with its obligations in cl 50.1 is not inconsistent with the overarching requirement of lawfulness conditioning the Vendor's obligation to carry on the Business as specified until Completion. The Purchaser had no capacity to vary the obligation to permit the Vendor to carry on the Business other than in accordance with law. The Vendor had no choice other than to comply with the law.

40 This does not mean that cl 50.1 was a dead letter. Clause 50.1 extended beyond the relevant obligation in respect of the Vendor carrying on the Business. It included repair and maintenance obligations in respect of the Assets and the items on the Inventory. Further, it may have been in the interests of both the Vendor and the Purchaser for there to have been some change to the usual and ordinary nature, scope or manner of the Business between the contract date and Completion which did not engage any aspect of the lawful authority of the Business to continue to operate. And it was in the interests of the Purchaser and the Vendor for the Vendor to continue to carry on the Business in the usual and ordinary course to the extent the Vendor could lawfully do so. Clause 50.4 would have been useful if the parties had sought to agree that an obligation contained in cl 50.1 did not apply but says nothing about the proper construction of the relevant obligation in cl 50.1.

41 The Vendor did not warrant that the value of the Assets would remain the same between the contract date and Completion. Nor did the Vendor accept the risk that if the value of the Assets was reduced, even substantially, the Purchaser could elect not to complete. Similarly, if the underlying value of the Assets substantially increased between the contract date and Completion, the Vendor could not delay Completion. The deal the parties made was that the price was agreed, the Vendor would comply with cl 50.1, and Completion would occur subject only to the Conditions Precedent in cl 35.1 and the other contractual rights of rescission and termination. Clause 50.1 is not to be redrafted merely because the doctrine of frustration was not engaged on the facts of the case.

42 The exclusion of warranties from the Vendor as to the "present and future financial or income return to be derived from the Property or the Business" under cl 38.1(b)(iv), and as to "future matters, including the future financial position or

35 Contrary to *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 349 [45]-[46].

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performance of the Business" under cl 55.2(a) does not support the contrary conclusion. They reinforce that the subject-matter of the contract was the Business, which was subject to a dynamic regulatory environment not within the Vendor's control. The Vendor warranted what it knew to the best of its knowledge in cl 48.8. It could not warrant the financial returns from the Business, given not only the regulatory environment within which the Business operated, but also the trends in the commercial environment which might substantially affect the Goodwill of the Business outside of the direct control of the Vendor.

43 Far from this reality (embodied in cll 38.1(b)(iv) and 55.2(a)) reflecting that it was necessary for the Purchaser to obtain the benefit of cl 50.1 as an absolute guarantee of the continuing of the Business in the same form as it existed at the contract date, cll 38.1(b)(iv) and 55.2(a) reinforce that cl 50.1 could not operate in that manner. There was nothing the Vendor could do other than carry on the Business as it was doing to the extent permitted by law to safeguard, as far as possible, the Goodwill in the Business for the benefit of the Vendor (for revenue payable to it before Completion) and the Purchaser (for revenue payable to it after Completion)³⁶.

44 Clause 57, which dealt with title and risk, also does not support the contrary conclusion. Under that clause, title to and risk in the Assets were intended to pass on Completion in the sense that, from that moment on, the Purchaser bore the whole of the risk in the Assets (including the Goodwill). This does not mean that between the contract date and Completion, the Vendor could or did guarantee that the value of the Goodwill would remain the same. Goodwill is "intangible and ephemeral rather than tangible and permanent"³⁷, and involves the "attractive force" of the business³⁸ for customers, existing and prospective. For the period from the contract date until Completion, the Vendor had the risk of receiving

36 In accordance with cl 45.1 of the contract.

37 *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585 at 603 [56], quoting Hey, "Goodwill – Investment in the Intangible", in Currie, Peel and Peters (eds), *Microeconomic Analysis: Essays in Microeconomics and Economic Development* (1981) 196 at 197.

38 *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585 at 604 [58], quoting *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at 223-224.

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reduced revenue from any circumstance, whether temporary or ongoing. From Completion, the Purchaser had that risk³⁹.

45 *Fletcher v Manton*⁴⁰ does not assist. The case concerned the equitable principle that title to and risk in property pass on the date of the contract⁴¹. Clauses 57.1 and 57.2 of this contract displace that ordinary equitable principle. They do not otherwise alter the contract. Dixon J's statement, that the purchaser's risk after the exchange of contracts included "whatever loss or detriment may ... fortuitously befall the property or be placed by the law" on the owner⁴², reflected the fact that the purchaser was the "owner" from that date. This provides no support for the conclusion that, in respect of the contract in the present case, the Vendor warranted that the value of the Assets would not decline or that the Business would be able by law to operate at Completion as it had operated at the contract date.

46 *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments) Pty Ltd*⁴³ rightly focused on the content of the relevant contractual promise⁴⁴, rather than the court's own view of an essential expected benefit of the contract⁴⁵. This is significant given that, in the present case, the Purchaser abandoned recourse to the doctrine of frustration by reason of impossibility or irreconcilability with the common contractual purpose of the parties⁴⁶. Having done so, the Purchaser cannot seek to rewrite cl 50.1 into a form of warranty by the Vendor as to the way the Business would operate at Completion.

39 See cl 45.1 of the contract.

40 (1940) 64 CLR 37.

41 (1940) 64 CLR 37 at 48.

42 *Fletcher v Manton* (1940) 64 CLR 37 at 48.

43 (1976) 133 CLR 671.

44 (1976) 133 CLR 671 at 677-678.

45 *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 188.

46 *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* (2019) 183 ConLR 167 at 197-199 [37]-[38].

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47 As Latham CJ explained in *Scanlan's New Neon Ltd v Tooheys Ltd*, to which Brereton JA referred⁴⁷, "a promisor takes the risk of an event happening which prevents [the promisor] from performing [the] promise"⁴⁸. But whether that risk is taken or not depends on the terms of the promise. In that case, the lessor did not promise that the sign would be illuminated. The lessee could not avoid the obligation to pay rent based on the supervening illegality of illumination. By analogy, the Vendor in the present case did not promise that the Business would operate at Completion as it operated at the contract date. The Purchaser was not thereby "excused from performance because the contract did not work out in the manner expected by one or even by both of the parties"⁴⁹.

48 Clause 58.1 is immaterial. It was concerned with a specific subject-matter, GST. The supply of the Assets as a "going concern" for the purposes of the GST Act was precisely that – a requirement to obtain GST benefits under that legislation and an associated ruling⁵⁰. There is no dispute that the Business involved a going concern at the Completion Date. The nature, scope and manner of the Business under cl 50.1 had no connection with that fact. Bathurst CJ's statement that the Vendor could not convey "the hotel as a going concern" at the Completion Date⁵¹ can mean only that the Vendor could not then transfer the Business as it was being carried on at the contract date due to the public health order then in force. The Business remained a "going concern" for the purposes of the GST Act and otherwise⁵².

49 The Vendor's obligations as lessor under the Lease also do not lead to a different view. Clause 65.6 required the Vendor to grant, and the second

47 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 374 [154].

48 (1943) 67 CLR 169 at 200.

49 *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 192.

50 Subdivision 38-J of the GST Act and Australian Taxation Office, *Goods and services tax: when is a "supply of a going concern" GST-free?* (GSTR 2002/5, 16 October 2002).

51 *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 353-354 [72]-[74].

52 eg, *Commissioner of State Revenue (WA) v Placer Dome Inc* (2018) 265 CLR 585 at 615 [97]-[98], 632-633 [171].

respondent to enter into, the Lease. The second respondent was the purchaser of the Goodwill, Plant and Equipment and remaining Business Assets, while the first respondent was the purchaser of the Property, the Licence, and the Gaming Machine Entitlements⁵³. Clauses 65.2 and 65.6 provided for the Lease to be granted on the Completion of the sale of the Business Assets, but one day prior to the Completion of the sale of the Property, the Licence, and the Gaming Machine Entitlements. By this means, on transfer of the Property, the Licence, and the Gaming Machine Entitlements on the following day⁵⁴, the first respondent would become the lessor in place of the Vendor. As Bathurst CJ noted, there was an obligation under the Lease to "keep the Premises open for the Lessee's business during the usual hours of trade of such a business" (cl 9.2(i)). However, the obligation of the lessee to carry on and conduct the business was to do so "strictly in accordance with ... the Liquor Act and all other relevant law" under cl A2.1 of the Lease. Accordingly, the Lease provides contextual support to the contrary of the construction of the majority in the Court of Appeal⁵⁵.

50 For these reasons, the Vendor was complying with cl 50.1 (and cll 58.1 and 58.2) of the contract at the time of Completion. The fact that the then extant public health order prevented the Vendor from carrying on the Business in the same way as it had been carried on at the contract date did not mean that the Vendor was not complying or could not comply with cl 50.1. The Vendor was "ready, willing and able to complete and ... not in default" in accordance with cl 51.7(b). Accordingly, the Vendor was able to serve the notice to complete making time of the essence for Completion as provided for in cl 51.7(b)(ii). By not completing as required, the Purchaser was in breach of the contract in an essential respect, entitling the Vendor to terminate the contract by notice under cl 63.1 (and to keep the Deposit and sue for damages).

51 On this basis, the status of cl 50.1 as an essential or intermediate term is immaterial. So too are the difficulties and uncertainties associated with any supposed doctrine of the suspension of a contractual promise temporarily incapable of being satisfied by reason of supervening illegality.

53 Clause 64 of the contract.

54 As required by cl 65.2 and item 2 of Sch 1 to the contract.

55 cf *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340 at 349 [48].

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Gageler *J*
Gordon *J*
Gleeson *J*
Jagot *J*

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52 The orders which should be made are:

1. The appeal be allowed with costs.
2. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2021 be set aside and, in their place, order that the appeal be dismissed with costs.
3. Within 28 days of the date of these orders, the respondents repay to the appellant the whole of any sum paid by the appellant to the respondents under or in accordance with Order 2(b) of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 21 December 2021 (the deposit and interest thereon).
4. If, within 14 days of the date of these orders, the parties agree upon the amount of further interest to be paid by the respondents to the appellant on the sum referred to in Order 3 of these orders, the parties are to file a minute of consent and the respondents are to pay the appellants that further sum of interest forthwith. Failing agreement, the issue and calculation of interest be remitted to the Supreme Court of New South Wales.

