HIGH COURT OF AUSTRALIA

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### Details of Filing

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|---|---|
| File Number: | S125/2022 |
| File Title: | Laundy Hotels (Quarry) Pty Limited v. Dyco Hotels Pty Limite |
| Registry: | Sydney |
| Document filed: | Form 27A - Appellant's submissions |
| Filing party: | Appellant |
| Date filed: | 07 Oct 2022 |

### Important Information

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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

# APPELLANT'S SUBMISSIONS

## Part I: Certification

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

## Part II: Issues on appeal

2 The issues on appeal are:

(a) in relation to an executory contract, does supervening illegality (that does not amount to frustration of the contract) result in a suspension of a parties obligation to engage in conduct which has been prohibited; and

(b) in the event of such suspension is the party whose obligation has been suspended prevented, thereby, from enforcing the balance of the obligations and may that party insist on performance of the remaining obligations by requiring completion of that contract.

**Part III: Section 78B of the Judiciary Act 1903 (Cth).**

3 It is unnecessary to give notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth).

**Part IV: Citations**

4

(a) At first instance: *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* [2021] NSWSC 504 (SC) (CAB 5-57).

(b) On appeal: *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* [2021] NSWCA 332 (CA) (CAB 66-128).

**Part V Relevant Facts**

5 The Quarryman's Hotel (the Hotel) is a freehold licensed premises in Pyrmont, just outside central Sydney, which sells mainly craft beer along with gourmet pub food and provides regulated gaming on poker machines.

6 The real estate and business of the Hotel was sold by the Appellant to the First Respondent for a total price of $11,250,000 pursuant to a contract dated 31 January 2020 which required completion of the sale of:

(a) The Business Assets, as defined[1], on the 55th day after the contract date or such other date as the parties agreed in writing; and

(b) Subject to completion of the sale of the Business Assets, the Hotel property, license, and gaming machines entitlements were to be transferred on the 56th day after the contract or such other date as the parties agreed in writing[2].

7 The parties possessed considerable experience of the operation of hotels in Sydney and it was accepted they each had knowledge of the nature of the legal and regulatory environment within which such hotels operate, particularly the regime established by the *Liquor Act 2007* (NSW) and the *Liquor Regulation 2018* (NSW). That operating environment is characterised by extensive and detailed legislative prescription, and regulatory oversight that can involve action to cancel or suspend licences, impose various

[1] CA [167] CAB 126 (Additional Clause 33.1)
[2] SC 2 [1 & 2]] CAB 9 and CA [93] CAB 96 & CA [108] CAB 104 (Additional Clause 65)

penalties, and interfere with hotel operations (e.g. by the making of closure orders under Division 4 of Part 5 of the *Liquor Act 2007* (NSW)) (SC [78] CAB 33).

**8** The relevant terms of the contract are set out in the judgement at first instance (SC [11] to [24] CAB 12 – 20).

**9** The Parties agreed in writing to settle on 30 March 2020 (SC [35] CAB 22).

**10** The Contract provided that:

> "50.1 Dealings Pending Completion
>
> 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." [3] (**emphasis added**).

**11** Clause 50.1 was one of a number of clauses dealing with the condition of the business and obligations and entitlements of the parties between exchange and completion. Clause 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 (CA [128 & 129] CAB 113).

**12** The importance of the regulatory environment in which the business was carried out under a licence was recognised by the parties. The contract contained detailed provisions in relation to the liquor licence and the circumstances surrounding its operation (CA [125] CAB 112). For example, at clause 48.8(r)[4] the vendor expressly warranted:

> "The Licence authorises the sale and supply of liquor as defined in the Liquor Act and as at the date of completion, will not be subject to any conditions restricting the sale or supply of liquor, other than any condition already imposed on the licence or automatically imposed by virtue of the Liquor Act and the Regulations under that [A]ct from time to time."

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[3] SC [15] CAB 14 and CA [6] CAB 73, CA [94] CAB 96 & CA [148] 119
[4] CA [23] CAB 77

**13** The contract also provided:

(a) At clause 38.1(b)[5]:

"The Purchaser relies on its own enquiries in relation to all matters affecting the Assets whether or not disclosed in this contract and that the Purchaser is purchasing the assets as a result of and that the Purchaser has relied exclusively on, its own knowledge, investigation and enquiries of and in relation to the Assets, independently of any statements, inducements or representations made by or on behalf of the Vendor (including by an agent acting on behalf of the Vendor) and, without limiting the generality of the foregoing, the Purchaser acknowledges that prior to entering into this contract the Purchaser, by appropriate independent enquiry and examination, inspection and advice, has satisfied itself as to and accepts the following:

(i).....

(iv) the present and future financial or income return to be derived from the Property or the Business.

(iv)....".

(b) At Clause 55.2 Exclusion of Other Representations[6]:

"Except as expressly stated the Vendor gives no representations or warranties whatever about anything including but without limit:

(a) future matters, including the future financial position or performance of the Business;

(b) the accuracy or completeness of any information, including the material provided to the Purchaser or to the Purchaser's solicitor about the Assets; or

(c) the compliance of or approvals under any planning or local government requirements."

**14** On 20 March 2020, the first of a series of public health orders was made under the *Public Health Act 2010* (NSW) resulting from the impact of the Covid virus. On 23 March 2020 pursuant to the *Public Health (COVID-19 Places of Social Gathering) Order 2020* licensed hotels were limited to selling food or beverages for consumption off the premises (SC [39] CAB 22-23) (the Covid Orders).

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[5] SC [14] CAB 13
[6] SC [17] CAB 16

15 The Respondents' solicitors wrote to the Appellant's solicitors on 23 March 2020 and alleged that the Appellant was in breach of special condition 50.1, 58.1 and 58.2 and was not ready willing and able to complete (SC [44] CAB 24).

16 On 27 March 2020, the Respondents' solicitors wrote again to the Appellant's solicitors and contended the contract was frustrated (SC [48] CAB 25).

17 The Appellant's solicitors disputed the Respondents' solicitors' contentions in writing and indicated that the Appellant was ready willing and able to settle (SC [49] CAB 25).

18 An offer was made by the Appellant through its solicitors to delay settlement to "14 days after the removal of the existing Covid related impediments which prevent the Hotel opening to members of the public". There was no reply by the Respondents to that offer (SC [55] CAB 27).

19 The contract did not settle on 30 March 2020.

20 The contract provided in clause 51.7 for a 10-business day notice to complete. The requirements of giving such a notice included that the party giving the notice be ready, willing and able to complete and not in default (SC [16] CAB 15).

21 On 28 April 2020 the Appellant served a notice to complete (SC [58] CAB 28). The First Respondent commenced proceedings on the same day, inter alia, for declaratory relief alleging frustration of the contract by reason that the hotel business was not able to operate as a going concern, or in the usual and ordinary course as regards its nature, scope and manner as required by additional clause 50.1 and that, as a consequence, the assets the subject of the contract had decreased in value by at least $1 million (SC [7] CAB10).

22 On the expiry of the notice to complete, 21 May 2020, 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 (SC [66] CAB 29 - 30).

23 On receiving notice of the termination, the First Respondent wrote and contended that if, as it alleged in its Statement of Claim, the contract was not frustrated then, nonetheless, the Appellant was not entitled to give a notice to complete by reason of its own breach and the Appellant's termination was itself a repudiation which the First Respondent accepted (SC [68] CAB 30).

24 The Appellant filed a cross claim for damages against the First Respondent and the Second and Third Respondents, as guarantors, as a result of the repudiation and termination of the contract.

**25** The trial judge in the Supreme Court of New South Wales heard the proceedings and held that clause 50.1, on its proper construction, did not require the Appellant to trade in a manner that was illegal, referring to *Langley v Foster* (1906) 4 CLR 167 and other authorities and texts to the same effect (SC [80-85] SCA 33 - 35), and, therefore, the Appellant was not in breach of clause 50.1. The trial judge found that the contract was not frustrated (SC [100 – 110] CAB 41-44] and that Appellant was entitled to issue the notice to complete and terminate (SC [115] CAB 46).

**26** The trial judge dismissed the First Respondent's claim, with costs, and assessed damages on the Appellant's cross claim in the amount of $900,000.00 plus interest (SC [150] CAB 56) which, with pre-judgment interest, was an amount $937,044.11(Judgment CAB 58).

**27** The Respondents appealed to the Supreme Court of New South Wales, Court of Appeal. The Respondents did not appeal the finding with respect to frustration, rather they confined themselves to an argument 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).

**28** By Notice of Contention the Appellant raised three further arguments that the trial judge had, in the circumstances, not been required to consider:

(a) firstly, that there was an implied term that clause 50.1 was limited to trading lawfully (CA [36] CAB 80);

(b) secondly, that the contract contained a severance clause and to the extent that Clause 50.1, or any other clause, required the Appellant to engage in conduct which was by reason of supervening illegality prohibited, then that clause might be severed (CA [37] CAB 80).

Clause 63.7[7] contains the relevant severance clause which provides:

> "63.7 Severability
>
> If it is held by any court of competent jurisdiction that:
>
> (a) any part of this contract is void, voidable, illegal or otherwise unenforceable; or
>
> (b) this contract would be void, voidable, illegal or otherwise unenforceable unless any part of this contract is severed from this contract,

[7] SC [21] CAB 18

then that part will be severed from this contract and will not affect the continued operation of the rest of this contract."; and

(c) thirdly, that the repudiation of the First Respondent was not limited to or dependent upon its failure to comply with the notice to complete but was evinced by its conduct prior to the time for completion in, firstly, claiming the contract was frustrated and, secondly, commencing proceedings (CA [38] CAB 80).

**29** Bathurst CJ found that clause 50.1 focused on the "particular business" of the Appellant, not the usual course of hotel business generally (CA [41] CAB 81). Clause 50.1 required that the business be "seen to be" continued as the same business (CA [43] CAB 82) or to resemble the business carried on prior to the imposition of the Covid Orders (CA [45] CAB 82). Brereton JA gave reasons to the same effect (CA [151] CAB 120).

**30** A distinction was drawn by Bathurst CJ between the purpose of the contract, which he held to be to sell the business as a "going concern", and the delivery of a group of assets (SC [49] CAB 83). Bathurst CJ rejected the construction of the requirement in the contract to carry on business as being confined to conduct that was lawful (CA [45] CAB 82) and found that any such limitation arising by implication was not "reasonable" (SC [51] CAB 83 - 84) also, thereby, rejecting the first ground of contention.

**31** Bathurst CJ rejected the second ground of contention that there was a severance available pursuant to the contract to limit the obligation imposed, as a result of any supervening illegality, because:

(a) the clause was dependent on an application for a declaration by the party seeking to sever the clause (CA [54] CAB 84);

(b) the Covid Orders were temporary, whereas severance was not, and the clause should not be read as giving the Appellant the opportunity to ignore the obligation, once severed, in the event the Covid Orders were revoked (CA [55] CAB 84); and

(c) clause 50.1 should be read down as not applying to an obligation which involved an "indivisible whole", in this case to deliver a business (CA [57] CAB 85).

**32** However, Bathurst CJ, unsurprisingly, did not determine that there was an obligation which was breached given that performance would have required the Appellant to engage

in illegality. Rather, drawing on English authority[8] dealing with fully executed contracts involving banks, his Honour determined the obligations in clause 50.1 were suspended (CA [63-64] CAB 86 - 87).

**33** Bathurst CJ held that the illegality excused non-performance by the Appellant, at least in respect to any claim for damages against it, referring to *Canary Wharf (BP 4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch), *Heydon on Contract* at [23.120]; *Chitty on Contracts* (34th ed, 2021, Sweet & Maxwell), 26-098 and *Trietel on The Law of Contract* (15th ed, 2020, Sweet & Maxwell) 19-053. His Honour referred to various decisions[9] dealing with leases where the obligations of the parties were found to have continued notwithstanding some aspect of the obligations had become illegal. Nonetheless, his Honour found that the Appellant's inability to operate the Hotel disentitled it from serving a notice to complete (CA [72-77] CAB 90).

**34** His Honour rejected the third ground of contention on the basis that the correspondence and commencement of proceedings was not repudiatory (CA [78-84] CAB 93).

**35** Bathurst CJ found that the termination of the contract by the Appellant was a repudiation and, thereby, allowed the appeal.

**36** Brereton JA agreed with Bathurst CJ (CA [143] CAB 118) and came to the same conclusion as to the construction of clause 50.1 (CA 161] CAB 124). However, his Honour gave additional reasons in which he emphasised the risk allocation provisions of clause 57.2 of the contract (CA [158] CAB 122-123). His Honour found that the Hotel's trade would be affected and, as a result, the Appellant would be in breach of clause 50.1, and that risk was allocated to the Appellant (CA [168] CAB 127). As a result, his Honour also found that the Appellant was not entitled to issue a notice to complete. Brereton JA also allowed the appeal.

**37** Basten JA, in dissent, would have dismissed the appeal. The Appellant respectfully adopts his reasoning (CA [86-140] CAB 94 - 116).

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[8] *Arab Bank Ltd v Barclays Bank (Dominion Colonial & Overseas) Ltd* [1954] AC 495 and *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728

[9] *Gerraty v McGavin* (1914) 18 CLR 152; [1914] HCA 23; *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 22; *John Lewis Properties plc v Viscount Chelsea* [1993] 2 EGLR 771

## Part VI Argument

### The contract

**38** If, as the Appellant contended at first instance and in the Court of Appeal, clause 50.1 of the contract is construed to require the business assets in the period between exchange and completion to be used and operated lawfully, or such an obligation is implied, then the issues which the majority in the Court of Appel then sought to resolve as to the rights and obligations of the vendor do not arise.

**39** A requirement to carry on business in the "usual and ordinary course" suggests the antithesis of illegal conduct. Rather, as Rich J found in *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)* (1948) 76 CLR 463 at 477 in construing the similar expression "in the ordinary course of business" in the *Bankruptcy Act 1924* (Cth) (repealed) those words convey :

> "that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation."

**40** Even if the business concerned is more specifically identified by the words "nature, scope and manner" (as found by Bathurst CJ (CA [41] CAB 81), the obligation is still to do that which forms part of the undistinguished common flow. Indeed, any illegal conduct would jeopardise part of the critical assets which were to be purchased, namely the opportunity to run a licensed premises and operate gaming machines. The contract, read as whole, required the Appellant to maintain the assets, which included those assets subject to regulatory requirement, and not put them at risk through illegal performance, even if that affected the value of them at the time of completion.

**41** In construing the provisions in the contract relating to the obligation to trade, a background fact that was known to both contracting parties (each of whom were experienced in regard to the conduct of hotel businesses), was 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 in regard to licensed premises. These changes are frequent and, in many circumstances, hugely detrimental to a hotel's trade (by way of example, prohibition on smoking in licensed premises' outdoor dining areas introduced by s6A of the *Smoke-free Environment Act 2000* (NSW) or "lockout laws" introduced by *Liquor Amendment Act 2014 No 3* (NSW) (repealed)).

**42** The obligation in clause 50.1, read in the context of the whole of the contract, embraced adherence to regulatory requirements, as well as common law ones, which might be taken to include acting in accordance with the law and:

(a) not operating so as to create an environment that was dangerous for customers and staff; and

(b) not putting at risk the licence (and gaming machine entitlements) which provided the basis of the goodwill of the business to be purchased.

**43** The contract entered into by the parties was never rendered inutile by the imposition of the Covid Orders. The finding that the contract was not frustrated demonstrates that the purpose and object of the contract were unaffected. Rather, the effect of the Covid Orders, if any, was on the (temporary and fluctuating) value of the assets to be exchanged in return for the agreed price.

**44** The obligation in clause 50.1 to trade the Hotel business and to maintain and keep in good repair the assets encompassed obligations that might be breached in both substantial and trivial ways. For example, the maintenance and sanitation of beer lines was as much a part of the obligation anticipated by clause 50.1 as keeping the Hotel's doors open.

**45** The obligation in clause 50.1 was not intended to merge on completion because a breach might only be potentially discovered after the transfer of the business. It is unlikely that the parties would have intended for a breach to have delayed settlement. An action for damages after the sale was a reasonable and, in the circumstances, the most obvious remedy for any such breach of clause 50.1.

**46** Any person purchasing the business with the intention of running it would expect to do so in the hope of maintaining or improving the business that person was acquiring. The contract, therefore, called for settlement in a relatively short period of time. Any obligation with respect to the condition of the assets agreed to be conveyed was limited and temporary. The vendor's obligation in clause 50.1 was not the sort of covenant the breach of which was objectively intended to delay settlement.

**47** The contract was to convey certain assets, including: the real estate of the Hotel, a lease of the Hotel, its fixture and fittings and the means of conducting the Hotel business. There was no warranty as to the value of the property or the business. Any representation or warranty as to the performance and future performance of those assets, as a business, were expressly excluded.

**48** The provisions of the contract dealing with risk allocation did not deal with events after completion and, to the extent loss and detriment occurred prior to completion, it was

borne as a trading risk by the vendor. An alteration of the underlying value of the subject matter of the contract is not a risk that the contract addresses. *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments)* (1976) 133 CLR 671, to which Brereton JA referred in his judgement (CA [157] CAB 122]), is authority that loss and detriment not destroying the subject matter is to be determined by reference to the warranties and obligations contained in the contract.

**49** The loss of trade resulting from the Covid Orders was a loss suffered by the Appellant, as vendor, because in that period prior to settlement, by reason of the Covid Orders, the Appellant did not make as much money from sales of liquor and food or the provision of gaming services. Any default by the vendor delaying settlement would have extended those losses in that sense that the Appellant bore the risk. However, this is to be distinguished from the fact that the Appellant did not bear the risk of a diminution of value of the underlying asset. An alteration of the underlying value of the subject matter of the contract is not a risk that the contract addresses. In the absence of a warranty as to the value of the business at the time of completion it was wrong of the majority of the Court of Appeal in construing the contract to treat an event tending to reduce the current value of the business between exchange and settlement as anything other than a risk obviously and inherently allocated to the purchaser.

**50** The diminution of the value of the enterprise and assets sold was, on the Respondents' evidence, nearly 10% of the price. However, any impact on value was not as the result of the Appellant's non-compliance with clause 50.1, but, rather, because of the Covid Orders. This is to say that the diminution of the value did not result from breach, but was due to the changed, but temporary, regulatory environment[10]. Any diminution in value occurred only in the 7 days' prior to the agreed completion date and for what could only be a temporary period when the orders relevantly restrained all Sydney hotel operations.

**51** The conveyance of the assets was integral to the object and purpose of the contract. Indeed, unlike the circumstance where the title of the property to be conveyed is affected by error or misdescription, here the assets remained entirely in good condition and the Respondent had no basis for complaint, such as if there had of been an error or misdescription[11]. All that had changed at the time of the agreed completion date was the (temporary) value of the assets to be transferred.

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[10] Basten JA CA [137-138] CAB 115
[11] *Flight v Booth* (1834) 1 Bing N.C 370 at 377;131 E.R 1160 at 1067

**52** In the event that this Court were to find the obligations in the Contract purportedly required operation of the business by sale of its products in contravention of the Covid Orders, then severance of so much of those obligation as became illegal to perform is the appropriate response of the law.

**Illegality**

**53** A remarkable feature of the present dispute is that whilst illegality was central to the Respondents' argument the Appellant did nothing illegal. Illegality in respect of a specific obligation usually prevents a party who is required to rely on the illegal conduct from seeking specific performance of that obligation or damages for its breach. In *Gollan v Nugent* (1988) 166 CLR 18 at 44 Deane, Dawson, Toohey and Gaudron JJ observed:

> "One principle which is axiomatic is that the law will not lend its processes for criminal, illegal or immoral purposes: see, eg, *Collins v Blantern* (1767) 2 Wils KB 347 at 349-350 [95 ER 850 at 852]. Just how far a court will regard itself as being used for any of these purposes is something to which it will be necessary to turn. For the moment it may be taken as beyond question that the law will not compel an individual to do something which, if done on his own, would constitute him a participant in an offence."

**54** The Appellant was not required, in suing for damages for termination, to rely, in any way, on any illegality. At all material times from and including exchange and termination of the contract, the Appellant obeyed the law.

**55** This case is perhaps akin to the fourth category of contracts affected by illegality in the performance of an otherwise legal contract as identified by Gibbs J in *Yango Pastoral CO Pty Ltd v First Chicago Australia Ltd* (1978)139 CLR 410 at 413. However, as stressed in *Fitzgerald v FJ Leonhardt Pty Ltd*[12], prior to considering the effects of illegality on a contract, the Court has to first conclude that the contract requires a means of performance that is illegal. Otherwise, illegality does not affect the parties' rights under the contract. Further, even if the performance required by the contract is illegal, there remains a question as to the role of the Court as to enforcement[13].

**56** If a Court would not enforce the obligation in clause 50.1 insofar as it purported to require the Appellant to breach the Covid Orders and thus would not give damages against the Appellant for its obedience to the law, then illegality, in effect, operates to sever that illegal element of conduct is purportedly required by that obligation.

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[12] *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 particularly per Dawson &Toohey J at 220 and McHugh and Gummow J at 226 and Kirby J at 245

[13] *Nelson v Nelson* (1995) 184 CLR 538 at 604 -605

**57** Further, even if clause 50.1 is construed as purporting to require performance, whether lawful or not, and it is accepted to that extent the Covid Orders restrained the Appellant's trade, the consequence would be that the obligation was unenforceable, at the suit of the Respondents, but there is no reason why that should affect the parties' other rights and contractual obligations. The whole of the consideration was payable for the assets, the whole of the assets could be conveyed; illegality did not affect the promise to deliver, or the actual delivery of, those assets.

**58** The obligation in clause 50.1 was not to produce a certain result, such as particular earnings. In the finding of breach by the majority of the Court of Appeal, there is a conflation of the inferred purpose or object of the clause, being the protection of goodwill with the performance actually required, which was limited to trading in the usual and ordinary course. There might be a breach if clause 50.1 is read as requiring the Appellant to achieve a particular level of earnings comparable to those previously achieved. However, clause 50.1 says nothing about the objects that are to be achieved other than that business should be "usual and ordinary".

**59** The Covid Orders' limitation on the business conducted by the Appellant did not affect the condition of any of the assets proposed to be transferred. The transactions which were made illegal were all with potential customers, being unrelated third parties, not the First Respondent. There was a temporary change to the regulatory environment, but it operated not only to limit, but also expand the business, by, for example, permitting sale of draft beer for off premises consumption in "growlers" and "squealers" (air-tight bottles of different sizes).

**Frustration**

**60** There are a number of responses of legal principle to circumstances where some part of the performance of a contract is illegal. The determination that a contract has been frustrated is only one of a range of ways in which the law responds. The responses range from the recovery of money, if services have been provided, in the case of unenforceable contracts (for example *Mann v Paterson Constructions Pty Ltd* (2019) 267 CLR 560) to the statutory responses, such as the *Frustrated Contracts Act 1978* (NSW), intended to ameliorate the potentially draconian effects of a finding of frustration at common law.

**61** There are other situations where, rather than finding frustration, the Court concludes that the party is bound to perform, as in *Scanlon's New Neon Ltd. V. Tooheys Ltd.* (1943) 67 CLR 169. The events that occurred in the present situation are analogous in important ways to the situation considered by this Court in *Scanlon's.* Neither contract expressly

anticipated the supervening illegality in performance. In *Scanlon's*, an advantage which the hirer expected to gain with the illumination of the signs did not eventuate. Likewise, in the present circumstances, the value of the assets to be acquired by the Respondents was affected. It is probable that neither the Respondents, nor the hirer in *Scanlon's*, would have contracted to pay the agreed price if they had known what might happen with respect to the subsequent regulation. Nonetheless, the consequence was that absent frustration, the party who experienced a change in what they anticipated from the bargain was still bound to perform.

**62** In *Codelfa Constructions Pty ltd v State Rail Authority* (1982) 149 CLR 337, this Court dealt with a contract to carry out construction work where an unexpected subsequent event (third party injunctions restraining the building work at certain times) materially altered the burden of the contract on the construction company. The alteration occurred in circumstances where both parties mistakenly thought that no injunction would be granted[14]. This Court was presented with the possibility of implying a term to resolve the issue, or determining if, in the circumstances, the events that occurred substantially altered what was called for by the contract. This Court found that it did. Those circumstances can be contrasted with the present ones where:

(a) the Respondents intended to trade the Hotel and the effect of any burden created by the change in value at the time of settlement was a matter of conjecture over the further period that it might own the Hotel;

(b) the period of time between exchange and completion was short and there was no mutual mistake as to the existence of the possibility of new regulations. There is a difference between unanticipated events and mutual mistake as to the ability to perform. The latter is closer to impossibility and is, therefore, more amenable to a finding of frustration; and

(c) there was no impact on the actual assets to be transferred to the Respondents other than as to their potential value. In *Codelefa* the cost of performance increased in a way for which the contract did not provide. It therefore required the Court to consider the actual immediate cost to the party burdened, not a hypothetical impact in the event the Hotel was resold at the time when the subject of the Covid Orders.

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[14] Mason J at 359

**63** *Gerraty v McGavin* (1914) 18 CLR 152 provides another example of supervening illegality. In that instance, the landlord sought to re-enter relying upon, inter alia, breach of the covenant to cause to be carried on and kept alive a baking business. Since the lease had been granted, the premises had become subject to the Factories and Shop Act and it would have been unlawful to operate the rundown bakery on the premises without substantial rebuilding work. The Court found it would have been practically impossible for the lessee to perform the covenant regarding the carrying on of the business lawfully, and that there could have been no obligation on the tenant to perform the covenant. Performance of the covenant had, therefore, become impossible by law, and the breach of covenant could not be relied upon. In the present case, to continue to trade in accordance with the practical effect of Clause 50.1, as at the date of the contract, would have been unlawful. Similarly, 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.

**64** In the present circumstances, the Respondents must accept that nothing substantially different is required by the contract because no claim of frustration was pursued.

**65** Risk, as far as the possibility that there would be supervening illegality, was borne by the purchaser because the contract provided for severance in clause 63.7 in the event that any of the obligations were illegal.

**66** Severance, as an approach to resolving the rights of the parties in respect of any obligation made illegal, would provide a result that is much more closely aligned with the objects of the commercial bargain than the doctrine of suspension that was applied by the majority in the Court of Appeal. Severance was specifically contemplated in the written contract by the parties as a response to illegality. Severance provides a more appropriate response because given the short time frame between exchange and completion, it provides the least uncertainty and disturbance to the commercial bargain.

**Suspension**

**67** Suspension of the obligations as found by the majority of the Court of Appeal arose because they held that the obligation to carry on the business in the usual and ordinary course, as regards its nature, scope and manner, could not lawfully be performed. The majority of the Court of Appel found that there was an intermediate flexible response in the application of the effects of illegality on contracts not amounting to a finding of frustration, but, rather, involving suspension of the prohibited obligations. This effect on contractual rights did not give rise to a right to damages but operated to prevent the party whose obligation was suspended from enforcing the balance of the terms of the contract.

**68** The Appellant contends that:

(a) such a principle is not supported by the authorities relied upon;

(b) that such a principle is too uncertain in effect and application to be applied to executory contracts dealing with tradeable assets; and

(c) suspension of the obligations that were prohibited left unaffected the obligation on the Respondents to complete.

**The authorities relied on by the majority of the Court of Appeal**

**69** The English decisions of *Arab Bank Ltd v Barclays Bank (Dominion Colonial & Overseas) Ltd* [1954] AC 495 and *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] 1 QB 728 each dealt with deposit or current accounts held by banks for other banks in circumstances where there was raised, by way of defence to the claim, a legal impediment to payment.

**70** In the case of the *Arab Bank v Barclays*, the legal impediment was the war that broke out between Israel and the neighbouring Arab states. Property of aliens was not confiscated, but was, thereafter, required by Israeli law to be paid to a custodian. If, as the Arab Bank contended, there was a contract that was frustrated by war, then it was argued moneys in the current account were liable to be repaid to the Arab Bank as money had and received (Lord Moreton at [526]). The House of Lords was therefore required to consider if the contract was frustrated, or if there was some other basis on which the money was held and then paid to the Israeli authorities. Each of their Lordships held that there was property by way of a debt held by Barclays Bank under a contract with the Arab Bank, which was suspended as to the obligation to pay, and therefore there arose no right for Arab Bank to claim its return by reason of the discharge of the contract for frustration.

**71** The decision turned on the application of a principle excluding "debts" as "accrued rights" from abrogation by reason of frustration. It is not a decision applicable to the present circumstances because in this situation, the vendor was prevented by law from selling beverages, food and offering gaming on site at the Hotel which, if that was required, formed part of an ongoing executory obligation to continue to trade.

**72** The *Libyan Bank v Bankers Trust* decision was to similar effect, although strictly obiter. The circumstances did not concern an impediment arising from war, but an alleged impediment on the ability of Bankers Trust to perform a request for payment of a very large sum of money owed to the Libyan Bank, an instrumentality of the Libyan government, which Bankers Trust alleged would have involved Bankers Trust breaching an executive order of the President of the United States blocking the disposition of all

Libyan assets held by a United States person, including overseas branches of such persons[15].

**73** The Libyan Bank succeed in its claim for payment of the money it had demanded as damages for breach of contract (see claims 1 (at 764) and 2 (at 769)). However, Staughton J went on to consider a further claim under the *Law Reform (Frustrated Contracts) Act* 1943 (U.K). In applying *Arab Bank v Barclays* to the circumstances alleged, his Lordship held that war had no different effect "on the obligations of a banker from any other kind of supervening illegality for present purposes". It is notable that the executive order "blocked" not confiscated or abrogated property rights. It was clear from his Honour's earlier reasoning that his Honour had already held that there was an immediate right to payment. Accordingly, there was an accrued right which would be suspended because the right to payment was not abrogated. As his Honour pointed out shortly thereafter "They [referring to Bankers Trust] are still obliged to repay one day, and meanwhile to credit interest to the account"[16].

**74** The *Arab Bank v Barclays* and *Libyan Bank v Bankers Trust* decisions are examples of the consideration of the effect of supervening illegality on a property right, not an executory contract. It is an approach apparently confined to accrued rights where performance of the obligation to transfer the property is affected by supervening illegality so that the existence of the right to transfer is not abrogated but suspended. That approach is not apt for the present circumstances. It is not necessary for the determination of this case to reach a definitive position concerning all of the implications of those decisions. It suffices to note that the ultimate discharge by performance could not happen in those cases by reason of supervening illegality in contrast discharge by performance of the obligations to transfer and pay the price could obviously occur in this case without any disobedience of the supervening regulatory regime.

**Uncertainty of application**

**75** The effect of applying the doctrine of suspension invoked by majority of the Court of Appeal would be that both parties' rights to terminate or compel completion were suspended for an uncertain time. At the end of that time, when the purchaser was required to complete the contract, the effect of the suspension of trading on the Hotel's goodwill would remain unpredictable.

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[15] at 732 C-F.
[16] at 772 E.

**76** If, as the majority of the Court of Appeal held, the obligations under the contract were suspended, the uncertainty as to the state of the goodwill and, consequently, its value, might still be affected at the time of completion, whensoever that may occur. Any market effect on the value of the assets transferred, following suspension of contractual rights, would arise not out of the terms of the contract or the Covid Orders, but as a result of the market perceptions of the contract 'being suspended' – as well as the more general social and commercial setting in which this Hotel's trading was but a detail.

**77** In so far as the risk to either party during the period of suspension is concerned, that is also unpredictable. Issues of government subsidies and the effect on finance for the purchaser may all alter what risk actually impacts on the parties during the suspension of rights.

**78** The application of a principle permitting a Court to conclude that rights or obligations forming only part of an executory contract were suspended would lead to uncertainty and not resolve the problems created by supervening illegality or more equitably resolve the burdens created in such circumstances.

**Suspension of obligations**

**79** If there were a breach of clause 50.1, then the obligation that was suspended was the one that it is alleged was breached. Suspension should apply only to that part of the obligation made illegal, surely the purchaser would desire all other aspects of normal trading to be maintained. However, under the contract there were other obligations which also required performance that were not suspended because no illegality attached to them. The suspended obligation was not interdependent in the contract with any of the essential terms or conditions. The ability to issue a notice to complete did not depend on performance of clause 50.1.

**Part VII Orders**

**80** The Appeal be allowed.

**81** The orders of the Court of Appeal be set aside and in lieu thereof the appeal against the orders and declarations made by the trial judge be dismissed.

**82** An order for restitution of the moneys paid by the Appellant (the deposit and interest thereon) to the Respondents and such further orders as to interest in accordance with the contract or pursuant to the *Supreme Court Act 1970* (NSW) or alternatively, an order remitting those questions to the Court of Appeal.

**83** The Respondents pay the costs of the Appellant in the Court of Appeal and in this Court.

**Part VIII Estimate of Time**

**84** 2 hours for the Appellant

Dated: 7 October 2022

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# ANNEXURE

## LEGISLATION AND INSTRUMENTS REFERRED TO IN APPELLANT'S SUBMISSIONS

### 1 Legislation

*Bankruptcy Act 1924* (Cth) (repealed) as of 8 October 1924.

*Frustrated Contracts Act 1978* (NSW) current from 8 January 2015.

*Liquor Act 2007* (NSW) current from 16 June 2022.

*Liquor Amendment Act 2014 No 3* (NSW) (repealed) as of 5 February 2014.

*Public Health Act 2010* (NSW) as of 20 March 2020.

*Smoke-free Environment Act 2000* (NSW) as of 7 January 2013.

### 2 Statutory Instruments

*Liquor Regulation 2018* (NSW) current from 29 June 2022.

### 3 Public Health Orders

*Public Health (COVID-19 Places of Social Gathering) Order 2020* as of 23 March 2020.

*Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* as of 15 May 2020.

*Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* as of 1 June 2020.