HIGH COURT OF AUSTRALIA

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Details of Filing

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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

RESPONDENTS' OUTLINE OF ORAL SUBMISSIONS

PART I: INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

PART II: PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Clause 50.1 is not subject to an implication of lawful conduct

2. The first limb of clause 50.1 should not be construed in the manner adopted by Darke J at [84] **(CAB 35)** and Basten JA at [126] (**CAB 112**) and explained in the Appellant's Reply (**AR [7]**). A number of arguments are made by the Appellant but each suffers from the fundamental problem that cl. 50.1 is not expressed in any terms consistent with the advanced construction.

Relevance of Clause 58.2

3. The Appellant relies on cl. 58.2 in support of its construction of cl. 50.1 (**AR [5]**). However this clause sets out a lesser standard of conduct than cl. 50.1.

4. Clause 58.2 is irrelevant to the case at hand other than to accentuate the centrality of the first limb of cl. 50.1. No-one contended that the Vendor was not "carrying on" the Business to the level required by cl. 58.2 at the relevant time. It was carrying on the enterprise, albeit from a takeaway window. The question is whether the Vendor met the higher threshold imposed by cl. 50.1 of "carry[ing] on the Business in the usual and ordinary course *as regards its nature, scope and manner*".

Proper Construction of Clause 50.1

5. The parties differ as to whether the first limb of cl. 50.1 is an essential term of the Contract. The Appellant also relies on Basten JA's reasons at [102], [128]-[139] (**CAB 100, 113-116**) for finding at [140] (**CAB 116**) that the first limb of cl. 50.1 did not impose a condition precedent for completion (**AR [5]**).

6. A focus on whether the first limb of cl. 50.1 is a condition precedent distorts the issue. It is not necessary to show that it is a condition precedent. It is sufficient to show that it is an essential term.

7. Whether a particular clause is a condition, a warranty, or an intermediate term is a question of construction. The test for whether a clause should be characterised as a condition was explained by this Court in *Koompahtoo Local Aboriginal Land*

Council v Sanpine Pty Ltd (2007) 233 CLR 115 at 138 [48] (Gleeson CJ, Gummow, Heydon and Crennan JJ) (**JBA Tab 19, 816**).

8. On the application of these principles, the first limb of cl. 50.1 is an essential term. It is precisely worded; it was included in the contract by the parties despite the presence of cl. 58.2, indicating an intention to ensure that the Business be carried on to a higher standard of performance than that clause required from the date of the Contract until completion; and the Contract itself had the clear commercial purpose of selling an operating business.

The Appellant was not ready, willing and able to perform the Contract

9. If cl. 50.1 is an essential term, then the Vendor was not ready, willing and able to perform the Contract when it issued its Notice to Complete. If Grounds 1 and 2 of the Respondents' proposed Notice of Contention are upheld, then the same result follows.

10. Barwick CJ, in the context of specific performance, noted in *Mehmet v Benson* that the question of whether or not a party is ready and willing to perform "is one of substance …[i]t is important to bear in mind what is the substantial thing for which the parties contract and what … are his essential obligations": (1965) 113 CLR 295 at 307 (**JBA, Tab 21, 869**); cited in part in *Green v Sommerville* (1979) 141 CLR 594 at 610 (Mason J) (**JBA, Tab 17, 751**) and in *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 620 (Mason CJ and Dawson J) (**JBA, Tab 12, 493-494**).

11. Similarly, Mason J considered in *Green v Sommerville* that it was enough that a plaintiff in a suit for specific performance be "ready and willing to perform the substance of the contract": *Green v Sommerville* (1979) 141 CLR 594 at 610 (Mason J) (**JBA, Tab 17, 751**), citing *Fullers' Theatres Limited and another v Musgrove* (1923) 31 CLR 524 at 550 (Isaacs and Rich JJ) (**JBA, Tab 15, 717**).

12. These principles have a similar application in the case of a party issuing a notice to complete, who must likewise be ready, willing and able: *McNally v Waitzer* [1981] 1 NSWLR 294, 296 (Reynolds JA) and 303 (Hutley JA) (**JBA, Tab 39, 1540; 1547**); see also *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) (**JBA, Tab 29, 1229**).

13. A purpose of the contract, on its proper construction, was to convey an operating business in a state meeting cl. 50.1. The Appellant was not ready, willing and able,

at the time of issuing its Notice to Complete, to perform the substance of the Contract. As a result, it was not entitled to issue a Notice to Complete, and the Respondents were entitled to treat the Appellant's purported termination of the Contract as a repudiation and to terminate the Contract.

14. This results regardless of whether:

    a. the Appellant's obligation under, or any remedy for breach of, cl. 50.1 was suspended as a result of temporary illegality, since this would suspend the Respondents' entitlement to sue for breach but would also preclude the Appellant from issuing a notice to complete; or

    b. the Appellant was simply in breach of cl. 50.1.

15. As Marcus Smith J noted in *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency* [2019] EWHC 335 (Ch) at [41] (citing Lord Simon LC in *Joseph Constantine Steamship Line Ltd v. Imperial Smelting Corporation Ltd* [1942] AC 154 at 163), "[i]n cases of supervening illegality, it is quite clear that the law has a range of responses" (**JBA, Tab 30, 1260**).

16. As to the proposed Notice of Contention, if the first limb of cl. 50.1 is not a condition then it is an intermediate term and the same analysis follows. A sufficiently serious breach or default of an intermediate term can give rise to an entitlement of the purchasers to terminate the Contract: *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 147 (**JBA, Tab 19, 825**). As this Court recognised in *Koompahtoo*, "there are cases in which damages are not an adequate remedy, and it would be irrational and unjust to bind one party to an ongoing contractual relationship notwithstanding the other's default" (at 136 [46] (Gleeson CJ, Gummow, Heydon and Crennan JJ)) (**JBA, Tab 19, 814**). The Respondent also relies on Spry (9th edn) at 227 (**JBA, Tab 56, 1787**).

17. In this case, the effect of the Covid Order (**JBA, Tab 9, 436**) was to reduce a three-storey hotel to a takeaway window (see Bathurst CJ, [46] (**CAB 82**)). This is not substantially different from the position that would maintain if the appellant had chosen to shut the Business which would have been a breach at fundamental odds with the substance of the Contract.

Dated: 9 December 2022

Name: Noel Hutley