PUBS, CONTRACTS, AND COVID-19: THE HIGH COURT'S DECISION IN *LAUNDY V DYCO*

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Australia Corporate Alert

A SIGNIFICANT DECISION

On 8 March 2023, the High Court of Australia (High Court) delivered a single joint judgment published by Kiefel CJ, Gageler, Gordon, Gleeson and, Jagot JJ. The case is *Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited* [2023] HCA 6 (Laundy v Dyco), which deals with important principles of contract law in a business context, with COVID-19 in the shadows.

THE CONTRACT OF SALE

Laundy Hotels (vendor) entered into a contract of sale with Dyco Hotels (purchaser) for the freehold sale of a pub called the Quarryman Hotel (Quarryman) in Pyrmont (Sydney) on 31 January 2020. With the hotel licence, the purchase price of the Quarryman was AU$11.25 million.

The contract was due for completion at the end of March 2020. On 23 March 2020, a COVID-19 public health order in NSW came into effect (Regulation). Under the Regulation, hotels like Quarryman could sell food and drinks to people, who could then consume the purchased items 'off-premises.' After a day's closure to prepare for a business restructure, Quarryman reimagined its business as a venue for supplying takeaway craft beer and food.

An escalating sequence of correspondence followed between the purchaser and the vendor. On 22 April 2020, the purchaser obtained a valuation of Quarryman which estimated the hotel to be AUD1 million less than the purchase price. In late April 2020, the vendor served a notice to complete on the purchaser. The purchaser sought declaratory relief in the Supreme Court of NSW (NSWSC) claiming that contract had been frustrated, or that the vendor was not entitled to issue the notice to complete.

'CARRYING ON A BUSINESS IN THE USUAL AND ORDINARY COURSE…'

One clause in the parties' contract of sale became central to the proceedings in the NSWSC, the Court of Appeal of the Supreme Court of NSW (NSWCA), and in the High Court. The relevant clause (50.1) stated "*… 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 …*"

Rejecting the argument that the contract had been frustrated, Darke J in the NSWSC, held that clause 50.1 required the vendor to carry on the business insofar as it was possible to do so in accordance with the law. The

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primary judge reasoned that, due to the purchaser's failure to complete, the vendor was entitled to terminate the contract and to sue the purchaser for damages.

On appeal to the NSWCA (which set aside the orders of Darke J), there was no challenge to the primary judge's conclusion that the contract had not been frustrated. Bathurst CJ, however, held that the vendor could not comply with clause 50.1 at the time the vendor served the notice to complete. His Honour reasoned that the vendor's obligation to complete the contract was suspended while an illegality brought about by the Regulation remained in force. His Honour considered that that the vendor's purported termination of the contract amounted to repudiation.

Brereton JA agreed with Bathurst CJ, but Brereton JA also held that the vendor was in breach of clause 50.1 when the vendor served the notice to complete. Critically, neither Bathurst CJ nor Brereton JA considered that clause 50.1 was subject to any contractual limitation that the business be conducted in a lawful manner. Basten JA, dissenting, held that the obligation in clause 50.1 required the vendor to 'carry on the Business in the usual and ordinary course as regards its nature, scope and manner' *as permitted by law* (emphasis added). His Honour would not have allowed the appeal.

THE HIGH COURT'S DECISION

Upholding the appeal, in their solitary judgment, the five High Court judges held that clause 50.1 incorporated an obligation on the vendor 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." The High Court held that this is what a reasonable businessperson in the position of the parties would understand clause 50.1 to mean. The High Court noted that it reached this conclusion without resorting to the doctrine of implied contractual terms.

Tellingly, the High Court observed that in the contract, the vendor did not accept any risk that the purchaser could elect not to complete the contract if there was a substantial reduction in the value of the pub. Nor, the five judges remarked, did the vendor warrant that the value of the pub would remain the same between sale and completion. The High Court stated that 'clause 50.1 is not to be redrafted merely because the doctrine of frustration was not engaged on the facts of the case.'

WHAT ARE THE IMPLICATIONS?

Laundy v Dyco is intriguing for what it says and for what it leaves unsaid. It is one thing to find (as the High Court held) that clause 50.1 required the pub to carry on its business lawfully. It is another thing to say that the parties agreed at contract formation that they would complete the sale even if value of the purchased asset diminished between sale and completion. It is worth recalling that, even though licenced hotels are regulated businesses, clause 50.1 did not refer to laws or compliance. Even with the benefit of the High Court's guidance, it is difficult to discern how a reasonable businessperson in the position of the parties at contract formation would interpret clause 50.1 in light of COVID-19 restrictions.

There are, however, some lessons from the High Court's judgment. First, contracting parties probably should not rely upon clauses of generality to cater for specific concerns. Secondly, and related to the first point, if contracting parties cannot reach agreement about what they agreed, then the Courts (as the ostensible reasonable businessperson in the position of the buyer and seller) may interpret the parties' contractual commitments. Thirdly, any development of the doctrine of supervening illegality by the High Court will have to wait. This wait

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could be for a long time. In the meantime, specific events of supervening illegality may make a mini-resurgence in contracts as may contract terms relating to frustration.

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