Before the High Court

Kept in Suspense: Supervening Illegality in Contract Law and the High Court Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*

Harrison Simons*

Abstract

In *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, the High Court of Australia must consider the nature and effect of supervening illegality on an executory contract for the sale of land and a business. The appeal is an opportunity for the High Court to provide clear guidance as to how government regulation affects executory contracts entered into before the regulation comes into force. This column explores whether supervening illegality can suspend or sterilise particular obligations in the executory contract, while leaving other obligations unaffected.

Please cite as:

Harrison Simons, 'Kept in Suspense: Supervening Illegality in Contract Law and the High Court Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*' (2022) 44(4) *Sydney Law Review* 605.

 ISSN: 1444–9528

* Solicitor; Sessional Lecturer, The University of Sydney Law School, Sydney, New South Wales, Australia. Email: harrison.simons@sydney.edu.au.
My thanks to Professor the Hon William Gummow AC and Emeritus Professor John Carter for their helpful feedback on an earlier draft. All errors remain my own.

I Introduction

The appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*[1] raises a difficult question concerning the effect of supervening illegality on an executory contract for the sale of a hotel business and the land on which the business operates. The illegality in question arose from the terms of an order made by the New South Wales ('NSW') Minister for Health in response to the COVID-19 pandemic. The Minister's Order prohibited licensed premises from opening to members of the public except to sell food and beverages to persons to consume off-premises. It came into conflict with the appellant vendor's obligation under the sale contract — entered into before the Order came into effect — to carry on the hotel business in the usual and ordinary course as regards its nature, scope and manner. The issue of supervening illegality assumed importance when the vendor served on the respondent purchasers a notice to complete the contract. The purchasers, in turn, contended that the contract had been discharged by frustration due to the Minister's Order or that the Order prevented the vendor from being ready, willing and able to complete the contract.

The vendor succeeded before the primary judge who held that the contract had not been frustrated, nor was the vendor in breach of the contract in a way that precluded service of the notice to complete. In their successful appeal to the NSW Court of Appeal, the purchasers did not challenge the primary judge's conclusion that the contract was not discharged by frustration. However, the majority considered that the supervening illegality merely 'suspended' the vendor's obligation to carry on the business in the usual and ordinary course in such a way that the obligation was inoperative for some purposes, but operative for other purposes. The Court concluded that the vendor could rely on the illegality brought about by the Minister's Order as a defence to any claim for damages by the purchasers, but not to the extent that the obligation was relevant to the vendor's duty to be ready, willing and able to complete when it served the notice to complete. The central issue on the vendor's appeal to the High Court is whether this application of supervening illegality was correct in the circumstances of the case.

II Background Facts

The Quarryman's Hotel, a pub in Sydney, was owned and operated by Laundy Hotels (Quarry) Pty Ltd ('the vendor').[2] It served food and alcohol to customers on premises under a liquor licence and operated several gaming machines. On 31 January 2020, the vendor entered into a bespoke contract for the sale of land and hotel business with Dyco Hotels Pty Ltd and Quarryman Hotel Operations Pty Ltd ('the purchasers').[3] The contract contained the Law Society/Real Estate Institute standard form contract terms, together with 35 'Additional Clauses'.[4] The purchase

---

1 *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* (High Court of Australia, Case No S125/2022).

2 *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41,403, 41,412 [26] ('*Laundy Trial*').

3 Ibid 41,412 [33]. The purchasers' obligations were secured by two guarantors who were also parties to the contract: ibid 41,405 [1].

4 *Laundy Trial* (n 2) 41,407 [11].

price for the land and the hotel business was $11,250,000, with $9 million of that sum apportioned to the land and associated licences and the rest to the business assets.[5] A deposit of $562,500 was paid by the purchasers on execution of the contract.[6]

Additional Clause 50.1 is central to the dispute. Entitled 'Dealings Pending Completion', it relevantly provides that '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'.[7]

Additional Clause 63.7 is also important. It provides:

> 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,
>
> then that part will be severed from this contract and will not affect the continued operation of the rest of this contract.[8]

The contract was to be completed on 30 and 31 March 2020.[9] However, just before completion, the COVID-19 virus became widespread in the Sydney metropolitan area. In response, on 23 March 2020, the *Public Health (COVID-19 Places of Social Gathering) Order 2020* (NSW) ('the Order') was made by the NSW Minister for Health under s 7 of the *Public Health Act 2010* (NSW).[10] Clause 5 of the Order relevantly prohibited pubs and registered clubs from opening to members of the public, except to sell food and beverages to consume off-premises.[11] Under s 10 of the *Public Health Act 2010* (NSW), a person committed an offence if they were subject to, and had notice of, a direction made by the Minister under s 7 and failed to comply with that direction without reasonable cause. Following the issuance of the Order, the vendor operated the hotel business on a scaled-down basis, offering food and beverage to customers to consume on a takeaway basis.[12]

On 28 April 2020, the vendor served on the purchasers a Notice to Complete, calling for the completion of the contract on 12 and 13 May.[13] The purchasers did not attend either day to complete the contract.[14] On 21 May 2020, the vendor served a Notice of Termination on the purchasers.[15] On 23 May 2020, the purchasers' solicitors sent a letter stating, in terms, that it considered the vendor's Notice of

---

5 Ibid 41,411 [24(c)].
6 Ibid 41,412 [33].
7 Ibid 41,408 [15].
8 Ibid 41,410 [21].
9 Ibid 41,406 [3], 41,411 [23].
10 Ibid 41,406 [5], 41,413 [39].
11 Ibid 41,413 [39].
12 Ibid 41,413 [40].
13 Ibid 41,416 [58].
14 Ibid 41,416–17 [62].
15 Ibid 41,417 [66].

Termination to be a repudiation of the contract, which it accepted and that all parties were discharged from further performance.[16]

III Procedural History

In proceedings commenced in the NSW Supreme Court, the purchasers contended that the contract had been discharged by frustration around the time the Order was made as it was impossible for the vendor to perform its obligations under cl 50.1.[17] The result was that the purchasers would be entitled to their deposit back. Alternatively, the purchasers contended that the vendor was in breach of cl 50.1 and was therefore not 'ready, willing and able to complete' the contract when it served the Notice to Complete on 28 April 2020.[18] It followed that the vendor repudiated the contract by its Notice of Termination on 23 May 2020, with such repudiation being accepted by the purchasers.[19]

By its cross-claim, the vendor contended that it was entitled to serve the Notice to Complete and, when the purchasers failed to attend the dates for settlement, serve the Notice of Termination.[20] It claimed declarations to the effect that the contract was terminated and that it was entitled to the deposit, in addition to loss-of-bargain damages.[21]

Before the primary judge (Darke J), it was common ground that the vendor's operation of the business at the time of entry into the contract would have been contrary to the Order.[22] The primary judge held that the vendor did not breach cl 50.1 when it scaled down the hotel business after the Order came into effect. His Honour construed the reference in cl 50.1 to 'carry[ing] on the Business in the usual and ordinary course' as meaning that the hotel business would operate in a lawful manner. His Honour said:

> [the vendor's] obligation to carry on the Business would not extend to carrying on the Business in any manner contrary to law… [T]he obligation would be to carry on the Business in the usual and ordinary course (as regards its nature, scope and manner) as far as it remained possible to do so in accordance with the law.[23]

Accordingly, as it was not in breach of cl 50.1, the vendor proved it was ready, willing and able to complete the contract at the time of serving the Notice to Complete.[24]

---

16 Ibid 41,417–18 [68].
17 Ibid 41,406 [7].
18 Ibid 41,406 [9].
19 Ibid. The purchasers pleaded further alternative claims for an order under s 55(2A) of the *Conveyancing Act 1919* (NSW) for the return of the deposit (see 41,406 [7], 41,431 [140]), and claims based on estoppel by convention and equitable estoppel (see 41,431–2 [141]–[147]). As the appeal to the High Court does not turn on these claims, it is not necessary to discuss them in any detail.
20 *Laundy Trial* (n 2) 41,406 [8].
21 Ibid.
22 Ibid 41,418 [73].
23 Ibid 41,420 [84].
24 Ibid 41,426 [113].

Turning to the issue of frustration, the primary judge held that the contract was not frustrated.[25] Central to this conclusion was that the contract was for the sale of land and a business which, at its core, involved the transfer of title to the parcel of land and business assets from vendor to purchasers.[26] The vendor's obligation under cl 50.1 (which the primary judge held was not breached) was only incidental to the sale of both.[27] Thus, the primary judge concluded that the terms in the contract were wide enough to contemplate the change in circumstances brought about by the Order, having regard to the construction of that clause and the absence of any warranties in the contract that governed future profits that the vendor would receive after entry into the contract.[28]

As the Notice to Complete was otherwise valid, the primary judge concluded that the vendor was entitled to terminate the contract by its Notice of Termination.[29] A declaration was made that the contract was terminated, the purchasers' deposit was forfeited to the vendor, and loss of bargain damages payable to the vendor were assessed in the amount of $900,000.[30]

In their appeal to the NSW Court of Appeal, the purchasers did not challenge the primary judge's conclusion on frustration.[31] The focus was on the primary judge's construction of cl 50.1. The purchasers contended that the primary judge erred in construing that clause as subject to a limitation that the vendor operate the business in the usual and ordinary course 'according to law'.[32] They submitted that no such lawful limitation could be read into that clause.[33] If that was correct, the vendor was in breach at the time of serving the Notice to Complete and was not entitled to serve the Notice of Termination.

The majority of the NSW Court of Appeal accepted these contentions and allowed the purchasers' appeal. Chief Justice Bathurst and Brereton JA (the latter, while agreeing with the former's reasons, also wrote separately) held that the primary judge's construction of cl 50.1 was erroneous. Neither judge accepted that cl 50.1 was subject to a limitation that the business operate only in a lawful manner.[34] It followed that when the Order came into force, the vendor's scaled-down business operation was in breach of cl 50.1, as it was not operating in the 'usual and ordinary course' based on how the hotel business was understood to operate at the time of entry into the contract. The departure from the primary judge on this point gave rise to the issue of importance before the High Court: if the hotel business was not limited to operating lawfully, what was the impact of the Order on the vendor's breach of cl 50.1 and the vendor's ability to serve a Notice to Complete?

---

25 Ibid 41,425–6 [110], [112].
26 Ibid 41,424–5 [104]–[105].
27 Ibid.
28 Ibid 41,425–6 [110].
29 Ibid 41,426–7 [115].
30 Ibid 41,432 [148]–[150]. The primary judge also dismissed the purchasers' alternative claim for the return of the deposit under s 55(2A) (see 41,431 [140]) of the *Conveyancing Act* and the estoppel claims (see 41,432 [147]).
31 *Dyco Hotels Pty Ltd v Laundy Hotels (Quarry) Pty Ltd* (2021) 396 ALR 340, 351 [60] ('*Laundy Appeal*').
32 Ibid 347 [34].
33 Ibid.
34 Ibid 349–50 [45]–[52] (Bathurst CJ), 373–6 [153]–[161] (Brereton JA).

Chief Justice Bathurst relied on several authorities, discussed further below, which held that supervening illegality did not always result in the discharge of a contract by frustration.[35] His Honour referred to *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*, where Marcus Smith J observed that supervening illegality in a contract might invite a range of responses.[36] For instance, one such response was that the illegality 'renders the contract unenforceable by one party or the other but leaves the rest of the contract standing and enforceable'.[37] Applying these principles, the Chief Justice held that the vendor may have been able to rely on the Order to be excused from any liability in damages for breach of cl 50.1.[38] But the Order did not excuse the vendor from complying with cl 50.1 for the purposes of proving that it was ready, willing and able to complete when it called for completion.[39] The Notice to Complete was therefore ineffective, and the purchasers could successfully rely on the Notice of Termination as the vendor's repudiation of the contract.[40] The Chief Justice also held that cl 63.7 did not assist the vendor because it required a court to declare a clause to be void or unenforceable, where no such relief was sought by either party; the clause did not apply to illegality that might temporarily affect a particular clause; and that, in any event, cl 50.1 could not be severed from the contract as a whole.[41]

The separate reasons of Brereton JA are consistent with the reasons of the Chief Justice. In addition, his Honour held that the breach of cl 50.1 disentitled the vendor from serving the Notice to Complete based on the wording of cl 51.7, which relevantly provided that if completion did not occur by the dates stipulated by the parties, then a party could serve a notice to complete on the other if they were ready, willing and able to perform and not in default.[42] Brereton JA construed the words 'not in default' to mean *any* default under the contract and not necessarily one connected with the completion of the contract.[43] His Honour also held that cl 63.7 did not apply because that clause was directed to illegality at the time of contract formation, not supervening illegality, and the contract had provided for the consequences of supervening illegality by allocating the risk of such occurrence to the vendor, who could not then rely on it to escape its consequences.[44]

In his dissenting reasons, Basten JA upheld the primary judge's construction of cl 50.1.[45] Given that there was no challenge to the primary judge's conclusions on

---

35 See *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)* [1954] AC 495 ('*Arab Bank*'); *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] QB 728 ('*Libyan Arab Foreign Bank*').

36 *Laundy Appeal* (n 31) 352 [65], quoting *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), [41]. See also *Laundy* Appeal (n 31) 376–7 [163] (Brereton JA).

37 Ibid.

38 *Laundy Appeal* (n 31) 352 [66], 353–4 [73]. See also *Laundy Appeal* (n 31) 352–3 [67], [69], quoting *Gerraty v McGavin* (1914) 18 CLR 152, 162 (Griffith CJ) ('*Gerraty*'); *Cricklewood Property & Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, 233 (Lord Russell of Killowen).

39 *Laundy Appeal* (n 31) 353–4 [73].

40 Ibid.

41 Ibid 350 [53]–[57].

42 Ibid 371–2 [145]–[146].

43 Ibid 372 [146].

44 Ibid 376–7 [162]–[165].

45 Ibid 368 [126].

the frustration issue, this was sufficient for Basten JA to dismiss the appeal.[46] His Honour alternatively held that if the majority was correct in their construction of cl 50.1, any breach of that clause was not a condition precedent to the completion of the contract or an essential term such that a breach of that clause would prevent the vendor from being ready, willing and able at the time it served the Notice to Complete.[47]

IV Overview of the Issues

The principal ground relied on by the vendor in their Notice of Appeal to the High Court is that the majority of the NSW Court of Appeal erred in holding that the vendor's obligation to complete was suspended during the period in which the supervening illegality brought about by the Order remained in force.[48]

The application of this so-called 'suspensive nature' of supervening illegality is said to be illustrated by *Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas)*,[49] a decision on which Bathurst CJ relied.[50] In that case, the Arab Bank Ltd, which had a branch located in Jerusalem, entered into a contract of current account payable on demand with Barclays Bank's Jerusalem branch in 1939. At that time, Jerusalem was governed under a British mandate. When the mandate ended in 1948, the Arab–Israeli War broke out, resulting in the Arab Bank's Jerusalem branch residing in an area occupied by enemy forces. The Arab Bank sued to recover the balance in the current account with Barclays Bank's Jerusalem branch, which was situated in friendly territory. In the House of Lords, it was not disputed that as a matter of general principle, the outbreak of the war made the further performance of the contract illegal as the contract between the two banks involved intercourse with a person or entity resident in enemy territory.[51]

In the *Laundy Appeal*, Chief Justice Bathurst summarised the decision as holding that 'the liability to pay the monies held on the current account had been suspended [by the outbreak of the war], not terminated'.[52] Bathurst CJ also referred to *Libyan Arab Foreign Bank v Bankers Trust Co*,[53] a case concerned with the recovery of a large sum of money in circumstances where the recovery would have been contrary to an executive order from the President of the United States. In that case, Staughton J held that the 'suspension' principle in *Arab Bank* was of general application to contract law and not limited to contracts affected by the outbreak of war.[54]

In its appeal to the High Court, the vendor denies that supervening illegality has the effect of suspending rights and obligations in the contract such that the rights

---

46 Ibid 368 [127].
47 Ibid 368–370 [128]–[139].
48 Laundy Hotels (Quarry) Pty Ltd, Notice of Appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, S125/2022, 31 August 2022, [2].
49 *Arab Bank* (n 35).
50 *Laundy Appeal* (n 31) 351 [62].
51 *Arab Bank* (n 35) 522 (Lord Morton of Henryton); 530 (Lord Reid); 537 (Lord Cohen).
52 *Laundy Appeal* (n 31) 351 [62].
53 Ibid 351 [63], citing *Libyan Arab Foreign Bank* (n 35).
54 *Libyan Arab Foreign Bank* (n 35) 772.

and obligations affected by illegality are ineffective for some purposes, but not others.[55] The vendor accepts that supervening illegality might have a range of applications to a contract,[56] but argues that any illegality is limited to the vendor's performance of cl 50.1 and does not affect the primary obligations of conveying the land and the business assets.[57] If the illegality results in cl 50.1 becoming void or unenforceable, then cl 50.1 could be severed from the contract as contemplated by cl 63.7.[58] If it is severed, it follows that the vendor was ready, willing and able to complete the contract at the time of serving the Notice to Complete and could rely on the subsequent Notice of Termination.

V The Dimensions of Supervening Illegality

A frustrating event may include a change in the law or the imposition of a court order that affects the manner in which the parties are to perform their obligations under a contract that was entered into before the intervening event. Where the change in the law or the imposition of the court order renders the performance of the contract illegal, the contract may be discharged by frustration.[59] These cases are treated in the same way as other cases where the performance of the contract is rendered impossible or significantly more difficult (but not illegal) by some supervening event.[60]

But *Gerraty v McGavin*, a decision relied on by Bathurst CJ,[61] shows that supervening illegality may have a wider application outside of the frustration context.[62] In that case, a tenant occupied certain premises under a lease that required him to operate a bakery on the land. Legislation was then passed prohibiting the tenant from operating the bakery. When the landlord sought to re-enter for the tenant's breach of the covenant to run the bakery business (which covenant the tenant had not observed for some time), the High Court held that the change in the law made compliance with the covenant impossible and that the landlord was not entitled to rely on it to establish his right to re-enter.[63] Supervening illegality framed in this way may have answered Brereton JA's conclusion that the vendor was in default for the purposes of cl 51.7 and therefore not entitled to serve the Notice to Complete

---

55 Laundy Hotels (Quarry) Pty Ltd, 'Appellant's Submissions', Submissions in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd*, Case No S125/2022, 7 October 2022, [2], [67]–[68] ('Appellant's Submissions').

56 Ibid [60].

57 Ibid [59], [63]–[64].

58 Ibid [52], [66].

59 See, eg, *Arab Bank* (n 35) (discharge of a banking contract due to the outbreak of war where the contract involved intercourse with a person residing in enemy territory); *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (discharge of construction contract where an injunction obtained against contractor made it unlawful to complete the construction works in the manner contemplated and within the time required by the construction contract).

60 See, eg, *Taylor v Caldwell* (1863) 3 B & S 826; 22 ER 309 (discharge of contract to use a garden and music hall where the music hall was destroyed by fire); *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 (discharge of time charter where ship requisitioned by the United Kingdom Government for war purposes).

61 *Gerraty* (n 38), quoted in *Laundy Appeal* (n 31) 352–3 [67].

62 See JW Carter, *Contract Law in Australia* (LexisNexis Butterworths, 7th ed, 2018) 1058 [33-22], citing *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 163 (Lord Simon LC).

63 *Gerraty* (n 38) 162.

pursuant to that clause. But Bathurst CJ held that the Order did not excuse the vendor from proving it could comply with cl 50.1 so that it was ready, willing and able to complete at the time of serving the Notice to Complete.

VI The Statutory Consequences of Supervening Illegality

In the NSW Court of Appeal, the Chief Justice assumed that the Order would have legal consequences for the vendor's performance of cl 50.1.[64] But was this assumption correct? For the most part, the decisions relied on by Bathurst CJ all preceded significant recent developments in the role of statutory illegality in contract law. As the High Court of Australia has said in more recent times (in the context of illegality subsisting at the time of contract formation), the consequences of statutory illegality are always determined as a matter of statutory construction.[65] Those consequences, however, depend on the interaction between the statute and the particular contract in question.

In its written submissions, the vendor seeks to restore the primary judge's construction of cl 50.1, requiring the vendor to carry on the business in the usual and ordinary course 'in a lawful manner'.[66] Put another way, the vendor contends that the clause should be read as requiring activity by the vendor that was not illegal, not as obliging the vendor to breach the law. If the vendor succeeds in this contention, there is no statutory illegality and the appeal should be allowed. There is some force in this contention. The primary judge's construction focused on the 'manner' in which the vendor was obliged to operate the business. The contract itself did not prescribe the 'manner' of business operation, although cl 48.8 contemplated that the vendor would observe legal requirements imposed on it as the holder of a licence under the *Liquor Act 2007* (NSW).[67]

The Chief Justice noted that the word 'manner' in cl 50.1 referred to 'how the [hotel business] is carried on'[68] and acknowledged that cl 50.1 did not require the hotel business to 'be carried on between the date of contract and the date of completion in an identical manner to the way it was carried on pre-contract'.[69] His Honour also acknowledged that cl 50.1 contemplated variations brought about by changes to the regulatory environment in which the hotel was operating.[70] It is difficult to see how the imposition of the Order was not such a relevant regulatory change. Indeed, the terms of the Order were not of general application, but specifically directed to premises licensed under the *Liquor Act 2007* (NSW). But the Chief Justice said, notwithstanding these considerations, the scaled-down operations brought about by the Order did not resemble the 'Business' as that term was understood to refer to the business operated by the 'Quarryman's Hotel'. With respect, it is somewhat difficult to reconcile the conclusion that cl 50.1 contemplates

---

64 *Laundy Appeal* (n 31) 353 [72]–[73].
65 *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 425 [36] (French CJ, Kiefel, Keane and Nettle JJ) ('*Gnych*').
66 Appellant's Submissions (n 55) [38]–[51].
67 *Laundy Appeal* (n 31) 345 [23].
68 Ibid 348 [42].
69 Ibid 348 [43].
70 Ibid.

changes in the 'manner' in which the hotel business can operate with the view that there are *a priori* assumptions about the operation of the Quarryman's Hotel business. There is no doubt that the Order required the hotel business to make significant operational changes to comply with the terms of the Order, but the vendor was still running a hotel business wherein it sold food and beverages to customers for consumption. The vendor was not carrying out some completely different trade or business undertaking.

If the vendor is unsuccessful in restoring the primary judge's construction of cl 50.1, the supervening statutory illegality becomes relevant. As a matter of principle, there is no reason why Bathurst CJ's conclusion concerning the effect of statutory illegality on cl 50.1 is not an available statutory consequence of the illegality. As Gageler J said in *Gnych v Polish Club Ltd*:

> An implied statutory consequence determined in accordance with the ordinary principles of statutory construction — if a statutory consequence is implied at all — need not always go so far as to render an agreement made in breach of an express or implied statutory prohibition 'void' or 'vitiated' or 'nullified' or 'invalid', in the sense of being 'devoid of legal consequences'. There is no reason why an implied statutory consequence cannot stop short of rendering an agreement made in breach of a particular statutory prohibition wholly unenforceable by all parties in all circumstances. *An implied statutory consequence might be limited, for example, to rendering an agreement unenforceable by a contravening party in the occurrence or non-occurrence of particular events*.[71]

But the threshold question remains: are *any* statutory consequences intended to apply to private contracts or particular contractual obligations made or performed in breach of the Order? In the present case, it is certainly arguable that no statutory consequences should apply. The most important consideration that informs this argument is that the Order was intended to be temporary in nature. It was introduced to provide a provisional charter of conduct to navigate an immediate crisis. It would be contrary to legislative intention for an order or regulation not designed to endure for an indefinite period to interfere with ongoing and executory contractual obligations between individuals in the absence of express words or by necessary intendment.

However, if the High Court concludes that no statutory consequences apply to cl 50.1, this does not necessarily assist the vendor. In fact, it significantly weakens their case on appeal. This is because the vendor is relying on the consequences of illegality to sterilise the operation of cl 50.1 so that it may escape the finding that it was in breach of that clause such that it was disentitled from serving the Notice to Complete.

VII A 'Suspensory' Doctrine?

If the High Court concludes that statutory illegality has some effect on cl 50.1 it becomes necessary to consider Bathurst CJ's conclusions on supervening illegality more closely.

---

[71] *Gnych* (n 65) 432 [65] (emphasis added; citations omitted).

The Chief Justice relied on the *Arab Bank* decision to justify the conclusion that particular contractual rights can be 'suspended' because of supervening illegality without affecting the balance of the obligations under the contract.[72] At a superficial level, various passages from the speeches of the Law Lords certainly support Bathurst CJ's summary of that decision. For instance, Lord Reid said:

> Many kinds of contractual rights are totally abrogated by the outbreak of war and do not revive on its termination. *On the other hand, there are other kinds of contractual rights which are not abrogated; they cannot be enforced during the war, but war merely suspends the right to enforce them and they remain and can be enforced after the war*.[73]

Several observations may be made about this passage. First, Lord Reid is discussing the enforcement of contracts involving trade or intercourse with the enemy. Second, his Lordship accepts that some contractual obligations affected by the outbreak of war are 'totally abrogated', meaning that the parties are discharged from further performance of those obligations. Third, his Lordship states that 'other kinds of contractual rights' survive the outbreak of war, but the war 'suspends the right to enforce them'. At first blush, the level of generality with which this passage is written may give rise to some tension between the second and third propositions. How is it that 'many kinds of contractual rights' are abrogated by the outbreak of war but 'other kinds of contractual rights' survive, but are merely suspended? For the following reasons, however, Lord Reid's meaning is clear in its proper context. That context shows Lord Reid is not propounding any general doctrine of 'suspension' of contractual rights that can be applied to contracts outside of contracts affected by an outbreak of war.

Arab Bank is an example of illegality in the frustration context. As noted above, contracts with persons residing in enemy territory are discharged from further performance on the declaration of war.[74] One exception to this rule is that the discharge does not affect rights accrued to the parties before the declaration of war.[75] In context, this is what Lord Reid means when he refers to 'other kinds of contractual rights which are not abrogated'.[76] The precise issue in *Arab Bank* was whether monies held in a current account payable on demand could be characterised as an 'accrued right' in circumstances where demand for payment had not been made before the territory became occupied by enemy forces. The House of Lords characterised the right as an accrued debt — a property right that survived and was enforceable post-discharge.[77] So far, none of this reasoning is controversial; it is consistent with the doctrine of frustration applied in other contexts.

But why is it that these accrued rights 'cannot be enforced' and are 'suspended' during the war? The answer is not found expressly in any of the

---

72 *Laundy Appeal* (n 31) 351–4 [62], [64], [72]–[73].

73 *Arab Bank* (n 35) 530 (emphasis added). See also 528–9 (Lord Morton of Henryton); 535 (Lord Tucker); 540–1 (Lord Cohen).

74 See *Esposito v Bowden* (1857) 7 E & B 763; 119 ER 1430; *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd* [1918] AC 260 ('*Rio Tinto*').

75 *Rio Tinto* (n 74) 269 (Lord Dunedin).

76 See above n 73 and accompanying text.

77 *Arab Bank* (n 35) 529 (Lord Morton of Henryton); 534 (Lord Reid); 537 (Lord Asquith of Bishopstone); 540 (Lord Cohen).

speeches in *Arab Bank*. But Lord Reid clearly distinguishes between the discharged contract and the *enforcement* of rights accrued under it. There is a good reason for this distinction. English courts have long recognised that an alien enemy of England could not seek the assistance of English courts to *enforce* rights against an English subject without permission given by royal licence. This rule was approved by a specially constituted panel of the English Court of Appeal in *Porter v Freudenberg*[78] and the House of Lords in *Sovfracht (V/O) v Van Udens Scheepvaart En Agentuur Maatschappij (NV Gebr)*,[79] two important decisions that predate *Arab Bank*. Under this rule, the enemy alien suffers from a legal disability affecting their capacity to sue, not the underlying legal right.[80] In *Dynamit Actien-Gesellschaft v Rio Tinto Co Ltd*, another war case, Lord Sumner explained the relationship between the discharged contract and the legal disability as follows:

> …the suspension of the right of suit in the case of enemy nationals, for causes of action already accrued, until the conclusion of peace is not an argument in favour of substituting suspension by agreement for discharge by operation of law. … *Suspension of the remedy implies no continuance of the contract during the war, but only a recognition of its existence before the war as the basis or origin of a right, which, when it has accrued, is a chose in action, a form of property*.[81]

This line of reasoning is consistent with the Australian decision in *Hirsch v Zinc Corporation Ltd*.[82] In that case, the High Court accepted that an English company could recover payments accrued to it under an ongoing contract to supply zinc concentrates to metal merchants based in Germany following the outbreak of the First World War. The Court held that although the outbreak of war discharged executory obligations under the contract of supply, it did not affect the right of the English company to recover outstanding payments accrued before the war.[83] In contrast to the *Arab Bank* decision, it was the English company seeking to vindicate its accrued rights, not the German metal merchants who, after the declaration of war, were considered enemy aliens. As such, the High Court held that the English company's right to recover the payments was not 'suspended' until the end of hostilities.[84] It follows that the *Arab Bank* decision does not propound any general doctrine of 'suspension' of contractual rights as a result of supervening illegality.

VIII A Proper Place for Supervening Illegality?

The question remains whether there is a principled basis to support Bathurst CJ's conclusion that cl 50.1 was suspended (or inoperative) for some purposes, but not others. Two lines of reasoning underpin this conclusion. The first is that the supervening illegality may operate to excuse the vendor from liability in damages for breach of the obligation. The second is that the obligation is not otherwise

---

78 *Porter v Freudenberg* [1915] 1 KB 857.
79 *Sovfracht (V/O) v Van Udens Scheepvaart En Agentuur Maatschappij (NV Gebr)* [1943] AC 203.
80 Ibid 212 (Viscount Simon LC).
81 *Rio Tinto* (n 74) 289 (emphasis added).
82 *Hirsch v Zinc Corporation Ltd* (1917) 24 CLR 34.
83 Ibid 48 (Barton J); 65–6 (Isaacs J); 79–80 (Higgins J); 82–3 (Gavan Duffy J); 84 (Powers J).
84 Ibid 48 (Barton J); 64–5, 68–72 (Isaacs J); 79–80 (Higgins J); 83–4 (Gavan Duffy J); 84 (Powers J).

discharged, but is suspended during the illegality.[85] As discussed above, the second line of this reasoning is difficult to justify based on the decision in *Arab Bank*. But is it justified on some other basis? And what does it mean for the vendor to be 'excused from liability' because of the Order?

The answer to both questions might be found in *Gerraty*, where it was accepted that the tenant could rely on an intervening statute as a defence to a re-entry attempt by the landlord. Chief Justice Griffith held that as '[p]erformance of the covenant had become impossible by law … the '[lessor] cannot take advantage of the failure of the [lessee] to resume the business of baking as a breach of the covenant.'[86] While no authority was cited for this conclusion, his Honour might have had in mind *Brewster v Kitchell*,[87] a decision of Holt CJ in the Court of King's Bench, which was discussed at length in another decision of the Court of Queen's Bench, *Baily v De Crespigny*.[88] *Baily* was relied on by Isaacs J in his separate concurring judgment in *Gerraty*.[89]

In *Brewster*, Chief Justice Holt said:

> where H covenants not to do an act or thing which was lawful to do, and an Act of Parliament comes after and compels him to do it, the statute repeals the covenant: so if H covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.[90]

It is unclear what Holt CJ meant when referring to the 'repealing' of covenants. Does it mean the complete or temporary discharge of a promise? And is any discharge limited to particular promises, or does it apply to the entire contract? The factual context in which *Brewster* was decided — concerning the nature, scope and enforceability of a freehold covenant affecting certain land — suggests that Holt CJ had in mind whole obligations, not *particular* obligations. If so, the passage in *Brewster* is simply an earlier, more rudimentary formulation of the law regarding the discharge of contracts by frustration. In *Baily*, however, the Court applied the passage above in *Brewster* in concluding that a lessor was not bound to continue observing a singular covenant in a lease.[91]

If *Gerraty* is an application of Holt CJ's passage as understood in *Baily*, the application in those cases suggests that supervening illegality is more than an excuse (or a defence) to liability for damages in a particular instance. Rather, the obligation is discharged. If this is correct, then in the present case, the vendor could not be required to prove it was ready, willing and able to perform an obligation that the vendor is disabled from performing at the time of serving the Notice to Complete, at least while the Order remained in force.[92]

---

85 *Laundy Appeal* (n 31) 353–4 [72]–[73].

86 *Gerraty* (n 38) 162.

87 *Brewster v Kitchell* (1697) 1 Salk 198; 91 ER 177 ('*Brewster*'). The decision is more satisfactorily reported as *Brewster v Kidgil* (1702) 5 Mod 368; 87 ER 711.

88 *Baily v De Crespigny* (1869) LR 4 QB 180 ('*Baily*').

89 *Gerraty* (n 38) 165.

90 *Brewster* (n 87) 178. The 'H' in this passage appears to be a reference to 'heirs'.

91 See *Baily* (n 88) 187, 189. In *Matthey v Curling*, Lord Buckmaster was of the view that the outcome in *Baily* turned only on the construction of the terms of the lease: [1922] 2 AC 180, 227–8.

92 See also Sir Guenter Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 2nd ed, 2004) 389 [8–048].

But this conclusion also gives rise to difficult questions of degree. If the principle is that the discharge of the obligation is only temporary, at what point in time does the contract become frustrated? If, like the present case, the obligation affected by the illegality is important to the performance of an executory contract, the inherent uncertainty caused by the intervening legislative regime in the performance of the contract may operate to discharge it.[93] A similar difficulty arises if the discharge is permanent, for it may be that the purchasers are receiving something radically different from what for which they contracted.

It is likely for these reasons that the vendor relies on the severance clause in cl 63.7 (which by its terms appears to be directed to the consequences of both illegality and frustration) to sever cl 50.1 from the contract to avoid these difficult issues. But the vendor's written submissions do not fully develop how the severance clause would assist in this regard.[94] Those submissions also do not address the reasons Bathurst CJ and Brereton JA gave as to why the clause is inapplicable.

In the result, while a pathway exists for the vendor to succeed on appeal, there are considerable obstacles in its way. For one, there is a real possibility that if the High Court determines that cl 50.1 is discharged or inoperative, the contract may be discharged by frustration.

IX Conclusion

The appeal in *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* is an opportunity for the High Court of Australia to provide authoritative guidance on the proper role of supervening illegality in contract law. The above analysis shows that the *Arab Bank* decision does not support a general doctrine in contract law to the effect that obligations are suspended due to illegality. The decided cases also indicate that supervening illegality affecting the performance of particular obligations in an executory contract discharges or disables those obligations. To that extent, the vendor may be able to successfully argue that it was relieved from having to prove it was ready, willing and able to perform under cl 50.1 at the time of serving its Notice to Complete. However, if that is the case, the High Court will need to consider whether this kind of discharge in an executory contract (whether permanent or temporary) is coherent with the principles governing the discharge of a contract by frustration.

---

93 See *Metropolitan Water Board v Dick, Kerr and Co Ltd* [1918] AC 119.

94 Appellant's Submissions (n 55) [52], [66].