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Legalwise Contract Law Conference

# Contracts: The Latest and Greatest

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# OVERVIEW

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- **Refresh on principles**
  - Construction of commercial contracts: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104
  - Implied Terms: *BP Refinery* criteria
- **Recent case analysis**
- **Construction**
  - *Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited* [2023] HCA 6
  - *El Zain v Vitrafy Life Sciences Ltd* [2022] VSCA 195
  - *Butler v Kenny* [2022] VSCA 102
- **Informal contract and implied terms**
  - *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39

# Laundy Hotels v Dyco

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- ***Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited [2023]***  
**HCA 6**
- High Court – one joint judgment (Kiefel CJ, Gageler, Gordon, Gleeson and Jagot JJ)
- 8 March 2023

## **Relevant Parties:**

- Appellant (**Laundy Hotels**) – vendor
- Respondents (**Dyco Hotels and ors**) – purchasers

# QUARRYMAN'S HOTEL

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# CONTRACT FOR SALE OF PROPERTY AND BUSINESS

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- contracts dated 31 January 2020
- sale of freehold property Pyrmont, Sydney and hotel Licence under *Liquor Act 2007 (NSW)*
- sale of hotel business
- > \$11M
- completion due end March 2020
- before completion, operation of the Quarryman's Hotel business was restricted by public health orders in response to the COVID-19 pandemic
- purchasers argued contract frustrated, but if not, vendor not ready, willing and able to complete and not entitled to issue notice to complete
- vendor served notice of termination

# CLAUSE FOR INTERPRETATION

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- Clause 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 ..." (emphasis added)

# PRIMARY JUDGE

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- Supreme Court of NSW – Darke J
- *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* (2021) 20 BPR 41; [2021] NSWSC 504
- Vendor to "carry on the Business in the usual and ordinary course" as far as it remained possible to do so in accordance with law
- Vendor not in breach of cl 50.1
- Contract not frustrated
- cl 50.1 - Vendor entitled to serve the notice to complete, which was effective to make the time for completion essential
- Vendor was entitled to terminate and able to seek damages for loss of bargain

# COURT OF APPEAL

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- Court of Appeal Supreme Court of NSW – Bathurst CJ, Basten JA and Brereton JA
- *Dyco Hotels Pty Ltd & Ors v Laundry Hotels (Quarry) Pty Ltd* [2021] NSWCA 332 (21 December 2021)
- majority allowed appeal
- orders of primary judge set aside
- by issuing notice of termination, vendor repudiated contract which was accepted by purchasers
- purchasers entitled to return of deposit
- Basten JA (in dissent), considered cl 50.1 meant that the Vendor had to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" as permitted by law
- no appeal re findings on frustration



# HIGH COURT APPEAL AND FINDING

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- whether, while operating on the restricted basis required by the public health order, the vendor was "ready, willing and able to complete and ... not in default" at the time the vendor served a notice to complete?
- High Court held vendor was "ready, willing and able to complete" and was not in default of its contractual obligations at the time it served notice
- vendor was obliged to carry on the business in the manner it was being conducted at the time of contract to the extent that doing so was lawful. There was no obligation imposed on the vendor to carry on the business unlawfully
- Appeal from NSW Supreme Court was allowed
- purchasers ordered to repay any deposit already paid back by vendor plus any interest

# HIGH COURT ANALYSIS

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- *Proper construction of contract*
- terms of a commercial contract are to be understood objectively, by what a reasonable businessperson would have understood them to mean, rather than by reference to the subjectively stated intentions of the parties to the contract
- it is from that perspective that the court considers the circumstances surrounding the contract and the commercial purpose and objects to be achieved by it
- [27] referring to *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544 at 551 [16]

# HIGH COURT ANALYSIS

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- ***Proper construction of contract [28]***
- construe s 50.1 in its context
- obligation on the vendor to "carry on the Business in the usual and ordinary course as regards its nature, scope and manner" incorporated an inherent requirement to do so in accordance with law
- there was no obligation (and could not have been an obligation) imposed on the vendor to carry on the Business unlawfully
- not necessary to have recourse to either the doctrine of implied contractual terms to impose on the vendor an obligation to carry on the business to the extent that it was lawful, or the possible consequences of supervening illegality resulting in suspension rather than frustration of the contractual obligation imposed by cl 50.1

# HIGH COURT ANALYSIS

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- ***Proper construction of contract [36]***
- requirement for the carrying on of the Business to be lawful
  - did not need to be expressly stated in cl 50.1
  - did not need to be implied
  - inherent within the words "the usual and ordinary course as regards its nature, scope and manner" construed in the context of the whole contract
  - context includes that the subject-matter of the contract is a hotel business that required specific legal authority to continue to operate and which, by the terms of the vendor's warranties in cl 48.8, the parties accepted was and would be subject to ongoing and potentially changing regulatory requirements

# El Zain v Vitrafy

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- *El Zain v Vitrafy Life Sciences Ltd* [2022] VSCA 195
- Victorian Court of appeal – Sifris, Kennedy and Osborn JJA
- 13 September 2022

## Relevant Parties:

- Appellant (**El Zain**) – wanted to licence the technology
- Respondent (**Vitrafy**) – owners of IP wishing to commercialise

# VITRAFY

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**BIOTHAW  
APPARATUS**



**VITRAFY LABORATORY  
PROCEDURES**



**TAILORED RACKING  
& PACKING**



**CRYOPRESERVATION  
APPARATUS**



**VITRAFY  
ALGORITHM**



**VITRAFY  
SMART PACKAGING**

# KEY FACTS

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- 2018 El Zain entered into MOU with Vitrafy with purpose to obtain a licence
- warranty - 'has reasonable grounds for believing that a partner and/or funder is prepared to enter into a sub licence with him to commercialise the Vitrafy Intellectual Property at a meaningful international level'
- termination date 31 December 2019
- El Zain to pay fee of \$100
- El Zain served notice to extend to end of 2020
- El Zain served another notice to extend to end 2021
- Vitrafy argued second notice ineffective
- El Zain sought declaration that second notice valid and specific performance

# CLAUSE FOR INTERPRETATION

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- **Clause 4.1: 'Timing'**

'will use their best endeavours acting reasonably and in good faith to enter into the Licence by 31 December 2019'

- **Clause 4.7: 'Extension to date'**

'parties agree that if El Zain is in discussions with a potential partner and/or funder and/or purchaser to enter into a commercial licence for the use of the Vitrafy Technology, the date of 31 December 2019 wherever it appears in this MOU shall be extended for as much time as nominated by El Zain, acting reasonably and in good faith, to enable those discussions to progress and to be concluded.'



# KEY FINDINGS

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- Court dealt with preliminary question – whether the clause allowed for more than one extension of the MOU
- Court of Appeal agreed with Primary Judge - the clause properly construed permitted only one extension
- the sole ground of appeal was that the judge departed from the ‘ordinary and natural meaning of clause 4.7’

# PRINCIPLES – CONSTRUCTION OF COMMERCIAL CONTRACTS

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- *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 [42]*
  1. rights and liabilities ... determined objectively, by reference to its text, context ... and purpose
  2. ask what a reasonable businessperson would have understood those terms to mean. ... enquiry will require consideration of the language used ..., the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract
  3. ... if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning
  4. unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties ... intended to produce a commercial result'. ... a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience

# PRIMARY JUDGE

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- *El Zain v Vitrafy Life Sciences Ltd* [2022] VSC 79 (M Osborn J)
- constructional choice but extrinsic evidence of no assistance
- the text of the MOU, and considerations of objective context, purpose and commercial rationality, all militate against the construction urged by El Zain
- to permit multiple extensions with the attendant rolling uncertainty as to when MOU would end/Licence executed, at odds with the expectation of reasonable business people and would work commercial inconvenience/give rise to a commercial nonsense

Other matters which reinforced conclusion:

1. consideration was a mere \$100
2. Vitrafy locked out from commercially exploiting the technology in the meantime
3. El Zain warranted he had reasonable grounds to believe a partner and/or funder was prepared to enter into a sub-licence with him to commercialise the IP at a meaningful international level

# COURT OF APPEAL ANALYSIS

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- both interpretations were possible
- having regard to the text, context, and purpose, a reasonable business person would understand that clause 4.7 does not permit the extension of the MOU on some sort of rolling, indefinite basis with no certain end date
- phrase ‘is in discussions with a potential partner and/or funder and/or purchaser’ is clearly intended to have reference to specific discussions
- use of the word ‘nominated’; ordinary meaning of the word ‘nominate’ is to ‘appoint’ or to ‘propose’ - language is not apt to embrace a series of rolling acts with indefinite effect
- words suggest extension was intended to serve the purpose of providing a ‘once-off’ opportunity to finalise discussions already on foot
- words ‘wherever it appears’ were mechanical provision and did not include reference to clause 4.7 itself

# KEY TAKE AWAYS

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- reminder that Court will interpret a commercial contract on the assumption ‘that the parties ... intended to produce a commercial result’ or to avoid it ‘making commercial nonsense or working commercial inconvenience’
- preventing this issue
  - issue that could have been addressed at the contract drafting stage
  - ensure MOU was clear and unambiguous
  - ensure Vitrafy had certainty as to timing of entry into a license to exploit and commercialise the IP
  - perhaps clarifying that only one extension would be permitted
  - alternatively, including clause to provide Vitrafy rights to bring the MOU to an end at any time after the original termination date, after the giving of a period of notice

# Butler v Kenny

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- *Butler v Kenny [2022] VSCA 102 (31 May 2022)*
- Victorian Court of appeal – Kyrou, McLeish and Walker JJA
- 31 May 2022

## Relevant Parties:

- Appellant (**Mr Butler**) – executor of deceased estate
- Respondents (**Mr Kenny and ors**) – children of deceased

# KEY FACTS

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- Dispute between parties as to whether prior 2005 Will or an informal 2016 should be admitted into probate
- Settlement agreement - in 'full satisfaction of any claim against the estate'
- after Registrar did not admit the informal Will into probate, one of the parties argued that the settlement agreement did not apply and that the earlier Will ought to be admitted into probate
- basis of argument was admission of informal Will was a condition precedent

# COURT OF APPEAL ANALYSIS

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- Court applied test in *Mount Bruce Mining*
- Court preferred the construction which best reflects language of the clause and the overarching purpose of the parties, considered objectively and by reference to the language of the Settlement Agreement as a whole
  - a reasonable business person would have understood that the terms of settlement were directed to resolving, once and for all, all the disputes between the parties concerning the deceased's estate
  - reflected in the Recitals which refer to both the informal and formal wills, and the potential Part IV claims, and then conclude, in Recital G, with the proposition that the parties 'desire to resolve the various disputes between them' [61]
  - the purpose of the terms of settlement was to settle all the disputes concerning the estate, regardless of which Will was ultimately admitted to probate [67]



# Realestate.com.au v Hardingham

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- *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA
- High Court - Kiefel CJ and Gageler J; Gordon J; and Edelman and Steward JJ
- 14 December 2022

## Relevant Parties:

- **Mr Hardingham/Real Estate Marketing Australia (REMA)** – professional photographer claiming breach of copyright
- **Realestate.com.au Pty Ltd (REA)** – entered into standard form terms with agencies
- **RP Data Pty Limited** - published Mr Hardingham's works on website

# KEY FACTS

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- Hardingham engaged by real estate agencies (**agencies**)
- he supplied photographs and floor plans made of residential properties (**works**) and agencies used them in marketing campaigns
- REA operated platform realestate.com.au
- REA agencies who entered into REA's standard-form subscription terms uploaded images to realestate.com.au
- RP Data operated website and provided agencies subscription service through corelogic.com.au
- Corelogic.com provided current and historical sales and leasing data
- by licence agreement, REA provided images to RP Data

# KEY ISSUES

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- Mr Hardingham and REMA brought Federal Court proceedings against RP Data for alleged copyright infringement on basis it used works without licence
- RP Data cross-claimed against REA
- central issue was whether agencies' licence and right to grant sub-licence was limited to period of marketing campaign for sale or lease of a property
- did the contracts between REMA and the agencies contain a licence which authorised the agencies to provide the works to REA on the limited terms submitted by Mr Hardingham and REMA
- did the licence to the agencies extend to sub-licensing the use of those works to REA on REA's standard terms and conditions, which included perpetual use by REA and the power for REA to sub-license the perpetual use of those photographs and floor plans to RP Data

# PRINCIPLES – IMPLIED TERMS

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- ***BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266***
  1. term must be reasonable and equitable
  2. capable of clear expression
  3. non contradictory of the express terms of the contract
  4. give business efficacy to the contract and
  5. must be so obvious that "it goes without saying"

# PRIMARY JUDGE AND APPEAL

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- Primary Judge
  - Thawley J
  - implied term that the agencies were authorised to sub-licence the works to REA on REA's usual terms and conditions
  - included an authorisation for REA to grant a sub-licence to RP Data
  - no finding of any copyright infringement
- Majority of Full Court (Greenwood J, Rares J agreeing)
  - Allowed appeal
  - Contracts contained an express term that a licence to use the works and to sub-licence, was limited to use for the purposes of the marketing campaign for the sale or lease of the relevant property
- Jackson J (dissenting) agreed contracts contained implied term as per primary Judge

# HIGH COURT FINDINGS

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- Set aside orders of Full Court of Federal Court of Australia
- Appeal and cross-appeal dismissed
- licence was not limited to use for the purposes of the marketing campaign for the sale or lease of the relevant property
- RP Data/REA did not infringe copyright in the works

# HIGH COURT ANALYSIS

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Chief Justice Kiefel and Justice Gageler:

- *“what reasonable people with knowledge of the background circumstances then known to both parties would be taken by their words and conduct to have agreed”*
- no question as to whether a term needed to be implied
- an agreement and its terms may be inferred from the acts and conduct of the parties, including silence
- dealt with each other in an industry where the marketing for sale or lease of residential properties were done in a particular way.
- industry practices were relevant to the question of the parties' mutual understanding
- tacit understanding may be understood to have been evident to the agencies in light of what was taken to be part of the mutual understanding on which the parties conducted their contractual relationships

# HIGH COURT ANALYSIS

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Justice Gordon:

- what would the words and conduct of the parties (Hardingham/REMA and each agency), when judged in light of what the parties knew, have led a reasonable person to conclude were the terms of the contract between them?
- terms of contract determined objectively
- reasonable observer would conclude, from the parties' words and conduct in the context of that knowledge, that there was a common understanding that the licence granted to the agency to use and sub-license the use of the works extended beyond the campaign



# HIGH COURT ANALYSIS

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Justice Edelman and Justice Steward:

- The proper approach to recognising implied terms
- **The first task:** identifying the express terms of a contract
- **The second task:** identifying implied terms
  - BP Refinery criteria is flexible
  - assessed as at the time the contract was made
  - not applied in an "over-rigid" way in informal contracts
- in this case, there was no express term, it was an implied term
- a reasonable person in the position of the parties would have known that one of the very purposes of REMA providing the works to the agencies was so that the agencies could provide them to REA, and that the agencies had no real choice other than to accept a term requiring them to provide a licence to REA to use the photographs and floor plans indefinitely and to provide them to RP Data

# KEY TAKE AWAYS

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- guidance as to the ascertainment of terms including implied terms in an informal contract
- objective analysis in identifying what a reasonable person would conclude were the terms of the bargain
- relevant considerations may include industry practice, a party's silence over the course of dealings and the parties' commercial aims and expectations
- importance of applying 'proper' inquiry when recognising implied terms
- identify the express terms before considering implied terms
- terms of a copyright licence should be clearly articulated
- copyright owners must have regard to commercial realities

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- **Informal contracts and Implied terms**
  - *Realestate.com.au Pty Ltd v Hardingham* [2022] HCA 39

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# Questions/Discussion

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