SUPREME COURT OF QUEENSLAND

CITATION:	*Sentinel Property Group Pty Ltd v ABH Hotel Pty Ltd* [2024] QCA 14
PARTIES:	**SENTINEL PROPERTY GROUP PTY LTD** ACN 149 805 489 (appellant) **v** **ABH HOTEL PTY LTD** **ACN 622 296 011 AS TRUSTEE FOR THE ABH HOTEL TRUST** (respondent)
FILE NO/S:	Appeal No 11504 of 2022 SC No 12953 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 165 (Bradley J)
DELIVERED ON:	13 February 2024
DELIVERED AT:	Brisbane
HEARING DATE:	19 April 2023; 20 April 2023
JUDGES:	Morrison, Bond and Boddice JJA
ORDERS:	**1. The appeal is dismissed.** **2. The appellant must pay the respondent's costs of the appeal.** **3. The appellant must pay the respondent's costs of the application for interlocutory injunction the subject of the order made by Dalton JA on 11 October 2022.** **4. Order 1 of the order made by Dalton JA on 11 October 2022 is discharged.** **5. The respondent's application for orders pursuant to r 264 is remitted to the trial division for determination.**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the respondent granted the appellant a call option in respect of land – where the call option was subject to the respondent obtaining the consent of its mortgagees to the transaction within a specified time – where the respondent failed to obtain consent within time and

purported to terminate the call option – where the appellant rejected the respondent's purported termination and sought to enforce the call option – where the appellant contended that the respondent had breached its implied obligation to take reasonable steps to obtain the mortgagees' consent – whether the primary judge erred in finding that the appellant had the onus of proving causally significant breaches of the implied obligation by the respondent

CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the respondent granted the appellant a call option in respect of land – where the call option was subject to the respondent obtaining the consent of its mortgagees to the transaction within a specified time – where the respondent failed to obtain consent within time and purported to terminate the call option – where the appellant rejected the respondent's purported termination and sought to enforce the call option – where the appellant contended that the respondent had breached its implied obligation to take reasonable steps to obtain the mortgagees' consent – whether the primary judge erred in finding that the appellant had failed to prove the respondent breached its implied obligation as alleged – whether the primary judge erred in finding that the appellant had failed to prove that the alleged breaches would have been causally significant even if they had been proved

Al Achrafi v Topic [2016] NSWSC 1807, followed
Doerr v Gardiner [2023] QCA 160, followed
GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore (2023) 97 ALJR 857; [2023] HCA 32, followed
Joseph Street Pty Ltd v Tan (2012) 38 VR 241; [2012] VSCA 113, considered

COUNSEL: M M Stewart KC, with C Johnstone, for the appellant
D A Savage KC, with C H Matthews, for the respondent

SOLICITORS: Russells for the appellant
Morgan Conley Solicitors for the respondent

Table of Contents

MORRISON JA:

[1] I agree with Bond JA.

BOND JA:

Introduction

[2] By a written agreement dated 7 October 2020 entitled "Heads of Agreement" (**the HOA**) ABH Hotel Pty Ltd (**the Grantor**) granted Sentinel Property Group Pty Ltd (**the Grantee**) a call option to purchase the land on which the Airlie Beach Hotel was built, including all buildings, improvements and licences attached to it (**the Hotel**) for $41,500,000.

[3] The call option was subject to the Grantor obtaining the consent of its mortgagees to the transaction within a specified time period. The Grantor did not obtain consent within time and on 13 November 2020 purported to terminate the HOA in reliance on what it said was its contractual right to do so.

[4] The Grantee contended that it was an implied term of the HOA that the Grantor would take reasonable steps to obtain the consent of its mortgagees to the transfer of the Hotel to the Grantee free of their mortgages. It contended that the Grantor breached that implied term in various ways with the result that the Grantor was precluded from terminating the HOA on the basis that consent of its mortgagees had not been obtained within time.

[5] Accordingly, the Grantee contended that the purported termination by the Grantor was ineffective. On 11 December 2020 it purported to exercise the call option, contending that the Grantor thereby became obliged to settle a sale of the Hotel to the Grantee on 25 January 2021. No such settlement took place.

[6] The Grantee commenced a proceeding in the Supreme Court seeking a declaration that it had an equitable interest in the Hotel and also specific performance of the HOA, including by obtaining orders that the Grantor execute and complete a contract for the sale of the Hotel to the Grantee.

[7] The primary judge rejected the Grantee's case, concluding that the Grantor had validly terminated the HOA and that the Grantee had no interest in the Hotel.

[8] By the present appeal, the Grantee seeks to overturn its loss below. It seeks declaratory relief and orders by way of specific performance equivalent to the relief sought below. It also seeks orders that the trial division assess the Grantor's liability for damages for breach of contract and interest.

[9] For reasons which follow, the appeal should be dismissed, with costs. A number of ancillary orders must also be made, as I will explain under a separate heading at the end of this judgment.

Relevant events before the HOA[1]

[10] Between 1982 and 2018, the Hotel was owned by Oncore (1982) Pty Ltd (**Oncore**).[2] Mr O'Neill was a director of Oncore, and its guiding mind and will.[3]

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1 The identification of relevant events both before and after the HOA derives from the findings made by the primary judge, together with some elaboration and expansion on those findings based on conclusions which I would make from the documents contained in the appeal record, and the evidence of Mr O'Neill on behalf of Oncore who was a witness called by the Grantee at trial and whose evidence the primary judge accepted, and I would also accept.

2 Reasons of the primary judge at [2] and evidence of Mr O'Neill on behalf of Oncore at ARB6 at 2153.

[11] Raging Bull Holdings Pty Ltd (**RBH**) was the parent company of the Grantor, ABH Operations Qld Pty Ltd (**ABHO**), and RGH Hotel Pty Ltd **(RGH).**[4] Mrs McFie was a director of the Grantor, ABHO and RGH.[5] RGH owned the land about 5 km from the Hotel on which the Reef Gateway Hotel and its warehouse were built. RGH had leased the Reef Gateway Hotel to RGH Operations Pty Ltd.[6]

[12] Mr O'Neill gave evidence that he had had a very lengthy period of involvement with Mr McFie.[7] He knew that Mr McFie was Mrs McFie's husband.[8] Although Mr McFie was not a director of the Grantor, or of the entities associated with the Reef Gateway Hotel, Mr O'Neill regarded Mr McFie as the directing mind of those entities.[9] In argument before this Court, the Grantee argued that Mr O'Neill was right in forming that judgment.[10] The Grantee did not, however, identify a sufficient evidentiary basis to form a view one way or the other on that question.

[13] In September 2018, Oncore sold the hotel business (but not the Hotel) to ABHO.[11] Oncore had provided vendor finance in relation to that sale which had been documented in a facility agreement and guarantee dated 22 October 2018, the parties to which included Oncore and the Grantor.[12] At the same time, Oncore granted to ABHO a lease of most of the land on which the Hotel was built, and of the Hotel building erected on it. This lease (**the operating lease**) was for a term of 40 months from 24 September 2018.[13] Under the operating lease, ABHO carried on the hotel business, including providing hotel and motel accommodation, food and beverage services, retail takeaway liquor and tobacco operations, function and conference room facilities, and gaming operations including gaming machines, TAB and Keno facilities. ABHO held commercial hotel licences and gaming machine licences issued by the Commissioner for Liquor and Gaming under the *Queensland Liquor Act 1992* and the *Gaming Machine Act 1991*. The Grantor was a company related to ABHO.[14]

[14] In about August 2019, Oncore sold the Hotel to the Grantor. The Grantor held that estate as trustee of the ABH Hotel Trust. It continued to hold the land in that capacity at the time of the trial before the primary judge.[15]

[15] In connection with that purchase, the Grantor had obtained finance from Commonwealth Bank of Australia (**CBA**) and vendor finance from Oncore. Thus, on 9 August 2019, the Grantor granted mortgages of the freehold to CBA and to

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3 Reasons of the primary judge at [153].
4 ARB1 at 82.
5 ARB1 at 82.
6 Reasons of the primary judge at [8].
7 ARB6 at 2155.
8 ARB6 at 2153.
9 ARB6 at 2153.
10 Transcript 1-12 at lines 42 to 45.
11 Reasons of the primary judge at [3].
12 Recital A to the loan agreement with guarantee entered into between Oncore and ABH Hotel at ARB3 at 718. See also evidence of O'Neill at ARB6 at 2145.
13 ARB3 at 1047.
14 Reasons of the primary judge at [3].
15 Reasons of the primary judge at [4].

Oncore. Both mortgages were registered over the title on 21 August 2019, with the CBA mortgage being first in time.[16]

[16] The CBA mortgage was part of the security for several loan facilities provided by CBA pursuant to facility agreements. The original CBA facility agreement was dated 21 August 2019. It was subsequently amended as set out at [19] below.[17] Under the mortgage:

(a) The Grantor mortgaged to CBA its estate and/or interest in the Hotel, as security for the debt or liability described in the terms and conditions in the mortgage and covenanted with CBA to comply with those terms and conditions.[18]

(b) The terms and conditions provided that the Grantor mortgaged the land to CBA to secure the due and punctual payment of the "Secured Money", a term defined to mean:[19]

> "… all money which the Mortgagor or any other Obligor (whether alone or not) is or at any time may become actually or contingently liable to pay to or for the account of the Mortgagee (whether alone or not) for any reason whatever, whether or not contemplated as at the date of this Mortgage.
>
> It includes money by way of principal, interest, fees, costs, Guarantee, indemnity, charges, duties or expenses or payment of liquidated or unliquidated damages under or in connection with a document or agreement, or as a result of a breach of or default under or in connection with, a document or agreement.
>
> It also includes money that the Mortgagor or any other Obligor would have been liable to pay but for its Liquidation or a set off claimed by it, or some other reason."

[17] The Oncore mortgage was part of the security for a loan pursuant to a loan agreement dated 12 August 2019 between the Grantor and Oncore. The principal sum was $4.5 million. It was for a term of two years with interest at 5.5% pa in the first year and 8.5% pa in the second year. Interest was to be capitalised and no repayment was required until the end of the two-year term.[20] The following further observations may be made about the terms of that loan agreement:

(a) The parties to the agreement were Oncore (as financier), the Grantor (as borrower) and RBH, its subsidiaries ABHO and RGH, and Mrs McFie personally (as guarantors).[21]

(b) The Hotel freehold was the only real property over which Oncore held a mortgage to secure the debt it was owed. It held no security over the Reef Gateway Hotel.[22]

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16 Reasons of the primary judge at [5].
17 Reasons of the primary judge at [6].
18 ARB2 at 463.
19 ARB2 at 466.
20 Reasons of the primary judge at [7].
21 ARB3 at 718.
22 Reasons of the primary judge at [8].

(c) The loan agreement recited the existence of the initial facility agreement of 22 October 2018; that the initial facility agreement had included a formula for determining the amount of finance which Oncore would provide; and that Oncore and the Grantor had agreed to vary the terms of the initial facility agreement by replacing it with the loan agreement.[23]

(d) The loan agreement recorded that the purpose of the loan was to assist the Grantor to purchase the land from Oncore.[24]

(e) Clause 1.13 of the loan agreement provided that the loan would (amongst other things) be secured by:[25]

> "A **Priority Deed** in a form acceptable to [Oncore] between [CBA] and [Oncore] granting [CBA] a priority of not more than the principal amount of the Bank Loan, plus interest fees and expenses (including reasonable enforcement expenses under its securities) relating to the Bank Loan principal amount only, with [Oncore] taking second priority for the Loan Amount plus interest fees and expenses (including reasonable enforcement expenses under its securities)."

(f) Clause 1.15 of the loan agreement specified condition precedents to the advance being made under the loan agreement, including that:[26]

(i) Oncore be provided with a copy of the loan contract and any side agreements as between CBA and the Grantor; and

(ii) the other parties agree that the loan agreement was in substitution for, and not in addition to, the initial facility agreement.

[18] The loan of $4,500,000 to the Grantor was not the only loan which Oncore made in relation to the Grantor's purchase of the Hotel. The primary judge found that Oncore had also lent $1,500,000 to Mr McFie that was associated with the purchase of the Hotel.[27] The primary judge accepted the evidence of Mr O'Neill and on this issue:

(a) Mr O'Neill confirmed that Oncore made a personal loan of $1,500,000 to Mr McFie at about the same time as Oncore having lent $4,500,000 to the Grantor.[28] The loan was made for the acquisition of the Hotel.[29] It was on an unsecured basis. It was based on the clear understanding between Oncore and Mr McFie that Oncore had advanced the money for the purpose of the acquisition and expected to be paid out in full if Oncore was to reduce the mortgage security (given by the Grantor).[30] It was always the understanding that the personal loan would be paid out at the same time as the $4,500,000.[31]

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23 ARB3 at 718.
24 ARB3 at 718.
25 ARB3 at 720.
26 ARB3 at 720 to 721.
27 Reasons of the primary judge at [153].
28 ARB6 at 2145.
29 ARB6 at 2152, transcript 3-38.
30 ARB6 at 2153, transcript 3-39 at lines 1 to 5.
31 ARB6 at 2156, transcript 3-42. His evidence in this regard must be taken as secondary evidence of the contents of the documentation as between Oncore and Mr McFie concerning the loan of $1.5 million.

(b) Support for Mr O'Neill's evidence as to the clear understanding between Oncore and the Grantor was also to be found in tab 152 of the trial bundle which was a document presented to him on 10 November 2020 by Mr McFie which, amongst other things, acknowledged that in order to pay out Oncore for its mortgage the personal loan by Oncore to Mr McFie of $1,500,00 would have to be paid out at the same time as the $4,500,000.[32]

(c) Support was also to be found in Exhibit 6. It was a document which had been prepared by Mr O'Neill as a written explanation of Oncore's response to non-party disclosure requests. It referred to Oncore having given vendor finance by loans of $4.5 million and $1.5 million. It referred to there having been an unsecured facility between Oncore and Mr McFie signed on 12 August 2019 with the loan provided on 15 August 2019.[33]

[19] On 14 May 2020, the Grantor and RGH agreed with CBA to amend the 12 August 2019 facility agreement. It is convenient to refer to this second amended agreement as the **CBA Facility Agreement**. The lender was CBA. The jointly liable borrowers were the Grantor, ABHO and RGH. The corporate guarantors were the Grantor, ABHO, RGH, RBH, RGH CTC Pty Ltd, Invado Investments Pty Ltd, Invado Hospitality Pty Ltd and O.L.F. No 2 Pty Ltd.[34] Each of the borrowers and corporate guarantors was regarded as an "obligor" under the agreement.[35]

[20] Some matters concerning the nature of the Grantor's contractual obligation to CBA should be specifically pointed out:

(a) Six facilities were listed in schedule 3 to the CBA Facility Agreement:[36]

Borrower	**Facility type**	**Purpose**	**Facility limit**
RGH	Market rate loan facility – variable rate	Refinancing and any other approved purpose	$10,514,000
RGH	Market rate loan facility – variable rate	Refinancing, renovation of Reef Gateway Hotel roof; any other approved purpose	$1,000,000
The Grantor	Market rate loan facility – variable rate	Financing acquisition of and renovation and improvements to the Hotel and any other approved purpose	$20,375,000
The Grantor	Market rate loan facility – variable rate	Financing refurbishment and fit out of part of the Hotel and any other approved purpose	$2,500,000

32 The document referred to as Tab 152 was an exhibit at the trial. It had not initially been made part of the appeal record, but it was handed to the Court to supplement the appeal record during the course of oral argument.

33 Exhibit 6 had not initially been made part of the appeal record, but it was handed to the Court to supplement the appeal record during the course of oral argument.

34 Reasons of the primary judge at [9] and schedule 1 Facility Agreement at ARB3 at 684.

35 Facility Agreement cl 1.1 definition of "Obligor" at ARB3 at 626.

36 Reasons of the primary judge at [10] and schedule 3 Facility Agreement at ARB3 at 689 et seq.

The Grantor	Trade Finance Facility	Financing purchase of bulk liquor and tobacco products	$3,000,000
The Grantor	Equipment Finance Facility	Financing equipment purchase	$1,000,000
	Total		**$38,389,000.00**

(b) Under the CBA Facility Agreement CBA agreed to make available to the borrowers each Facility during its Availability Period, up to its Facility Limit.[37] The first four were facilities with five-year terms, each subject to annual review. The facility limit for each of these was the amount noted above "or such greater amount as may be agreed in writing by the Lender". The other two were facilities with a term until at least the next annual review.[38]

(c) Importantly, the Grantor was both a borrower and a corporate guarantor. As a corporate guarantor the Grantor guaranteed the due and punctual payment of the "Secured Money" which necessarily included any amount which any of the other borrowers or corporate guarantors were or at any time might become actually or contingently liable to pay CBA for any reason whatever.[39] The Grantor also accepted independent liability to pay the Secured Money on demand, effectively as a principal debtor.[40]

(d) The result is that the Grantor was liable not merely for the amounts owing under the six specified facilities from time to time but was liable also for any monies otherwise owed to CBA by any of the other corporate guarantors. Moreover its mortgage to CBA stood as security for that debt, not merely as security for whatever might have been owing under the six specified facilities from time to time.

(e) Under the CBA Facility Agreement, the Grantor and each other obligor undertook to CBA, except to the extent that CBA consented, and amongst other things:[41]

(i) Not to sell or otherwise dispose of or create an interest in all or a substantial part of its assets; and

(ii) Not to sell or otherwise dispose of any of its real property assets where under the terms of that sale or disposal, or under a related transaction, that real property asset was or might be leased to an obligor.

(f) The CBA Facility Agreement obliged each borrower to ensure that for various periods Group EBITDA would not fall below $3,125,000.[42] "Group" was defined as RBH and each of its wholly owned subsidiaries and "Group EBITDA" was defined as:[43]

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37 CBA Facility Agreement (see cl 3.1) at ARB3 at 612.

38 Reasons of the primary judge at [11].

39 CBA Facility Agreement (see cl 1.1 definitions of Guarantor; Obligor; Secured Money; cl 9 Repayment; cl 11 Payments; cl 19 Guarantee and Schedule 3) at ARB3 at 612.

40 CBA Facility Agreement (see cl 19) at ARB3 at 612.

41 CBA Facility Agreement (cl 17.1(g) and (l)) at ARB 3 at 655.

42 CBA Facility Agreement (cl 19.5 and 19.6) at ARB3 at 667 to 668.

43 CBA Facility Agreement (cl 1.1) at ARB3 at 623.

> "… in respect of a period, the consolidated profit of the Group for that period, plus the amount of any Tax and Interest Expense, depreciation and amortisation for that period (other than in respect of a lease or hire purchase contract which would, in accordance with Current Accounting Practice prior to 1 January 2019, have been treated as an operating lease) to the extent deducted in arriving at that profit, after deducting (to the extent included):
>
> (a) all realised and unrealised gains and losses;
>
> (b) any fair value adjustments; and
>
> (c) all other non-cash items,
>
> all as shown in the Financial Reports for the Group for that period and forecast for any relevant future period."

(g) If a borrower paid out a facility earlier than the facility contemplated, the CBA Facility Agreement also contained provisions imposing on the borrower the obligation to pay an "Early Repayment Adjustment", or a "Break Cost", calculated by reference to CBA's lost interest earnings consequent upon there having been an early repayment.[44]

[21] On 19 June 2020, CBA, Oncore, the Grantor, ABHO, RBH and RGH executed a subordination and priority deed (**the Priority Deed**). By the Priority Deed, the parties to it agreed that any money which the Grantor was liable to pay to Oncore or for Oncore's account was subordinated to all money which the Grantor was actually or contingently liable to pay to CBA or for CBA's account. They also agreed that Oncore would not require or accept payment or otherwise allow satisfaction or discharge of the subordinated debt, without the written consent or written approval of CBA, until after a date stated in a notice by CBA as the date CBA was satisfied that its debt had been fully and finally paid.[45]

[22] At some time prior to September 2020, the Grantor must have determined to investigate the possibility of selling the Hotel. The Grantor's Agent, CBRE (C) Pty Ltd (**CBRE**), prepared an information memorandum for the purpose of soliciting from selected invitees an expression of interest in purchasing the Hotel from the Grantor.[46] Amongst other things, the information memorandum recorded that the Hotel had undergone a refurbishment program and that a renovation of the Hotel's accommodation was underway.

[23] On 8 September 2020, CBRE sent the information memorandum to the Grantee.[47] There followed over the weeks leading up to the execution of the HOA a number of communications between representatives of the Grantor and representatives of the Grantee, the details of which are not necessary to examine.

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44 CBA Facility Agreement (sch 4 and cl 22) at ARB3 at 672.
45 Reasons of the primary judge at [12].
46 Reasons of the primary judge at [25].
47 Reasons of the primary judge at [23].

[24] At around the time of entering into the HOA there had been negotiations for the sale of the Reef Gateway Hotel which had at least progressed to the stage of a non-binding heads of agreement.[48]

[25] It remains to note that as at the end of June 2020 the Grantor's draft financial accounts showed a negative net asset position of $6,232,182.51 and a loss of over the preceding financial year of $711,333.33.[49] The evidence did not directly address the balance sheet or profit and loss position of either ABHO or RGH, but the matters next identified do not support forming a rosy view of either.

[26] On 9 October 2020, the Grantee sought information from CBRE concerning trading figures and a representative of ABHO responded by advising, amongst other things:[50]

> "…
>
> 6. The Pub Bar, Restaurant & Gaming Closed due to COVID-19 on 23rd March 2020,
>
> 7. The Pub Bar, Restaurant & Gaming Re-Opened on 10th July 2020,
>
> 8. From November 2019 the Accommodation has been severely affected with cancellations due to COVID-19."

[27] On 15 October 2020, CBA notified the directors of the Grantor, ABHO, and RGH in these terms:[51]

> "We refer to our Facility Agreement dated 14th May, 2020.
>
> It has been noted that, under the terms and conditions applying to your Bank facilities, the following Financial Covenant for half year ending 30th June, 2020 has been breached.
>
> - Minimum EBITDA for the period on and from 1 January 2020 to and including 30 June 2020, is not less than $3,125,000 [outcome $1,237,403 based on the Banks calculation inclusive of allowable addbacks].
>
> We recognize the extraordinary nature of the current situation and the impact the coronavirus may have had on your business. I want to assure you that we're committed to working with you.
>
> Therefore the Bank has decided not to exercise its rights relating to that breach, but the Bank will be checking your compliance of the Financial Covenants documented with [the CBA Facility Agreement] for the next and future Reporting Periods.
>
> If you would like to discuss this matter further in any way, please don't' hesitate to contact Warrick Bignell or the writer …"

The HOA

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48 ARB5 at 1572.
49 ARB3 at 778 to 781.
50 ARB5 at 1771.
51 Reasons of the primary judge at [13]; ARB5 at 1701.

[28] The HOA was a paginated document under the letterhead of the Grantee's solicitor. It comprised three parts:[52]

(a) a single page coversheet entitled "Heads of Agreement" and paginated as page 1 which recorded that the agreement was made on 7 October 2020 between the Grantor and the Grantee. It also recorded the full name and address of the Grantor and the Grantee and the contact details of the Grantor's Solicitor, the Grantee's Solicitor and the Grantor's Agent;

(b) a printed and executed document paginated as pages 2, 3 and 4 which contained some handwritten amendments and which recorded the terms and conditions pursuant to which the Grantor granted the call option to the Grantee; and

(c) a single page printed document paginated as page 5 and entitled "Schedule 1 Terms and Conditions" which was a document cross-referenced in the previous part.

[29] The chapeau of page 2 of the HOA recorded:[53]

> "The [Grantor] grants to the [Grantee] a call option to purchase the Property (including all buildings, improvements and licences attached to the Property) upon the following terms and conditions".

[30] The terms and conditions there mentioned were then itemized in pages 2, 3 and 4 of the HOA. The table below records those terms and conditions as they appear in the HOA. For ease of subsequent reference, I have inserted item numbers although such numbers do not appear in the HOA.

HOA printed terms and conditions

1	Property	Address:	Airlie Beach Hotel, 12 Airlie Esplanade, Airlie Beach, Qld 4802
2		RPD:	Lot 18 on RP900236
3	Purchase Price	$41,500,000	
4	GST	Going Concern (subject to structuring of the leaseback arrangement).	
5	Deposit	Initial deposit	$10.00 payable to the [Grantor's] Agent within 2 business days of the date of this Agreement.
6		Deposit	$1.5 million payable to the [Grantor's] solicitor's Trust Account on exercise of the Call Option. The Deposit is to be invested in an interest bearing account, with interest to be shared equally between the [Grantor] and the [Grantee].
7	Documents:	Call Option Agreement:	Grantee is permitted to nominate alternate Purchaser

52 ARB3 at 873 to 877.
53 ARB3 at 874.

HOA printed terms and conditions

8		Contract:	A Call Option Agreement with a standard form of Contract for the state in which the Property is located drafted on an "as is where is basis", unconditional unless otherwise stated below, containing the following warranties from the [Grantor]:
9			The [Grantor] warrants that, to the best of the [Grantor]'s knowledge and belief, at the date of this Agreement and the Contract Date
10			(a) the particulars of the lessees in leases schedule are in all material respects true and correct;
11			(b) no circumstances exist that would render any lease liable to forfeiture;
12			(c) the [Grantor] is not in material breach of any of its obligations under a lease;
13			(d) all documents disclosed to the [Grantee] are true and correct copies of the original documents;
14			(e) the responses given by or on behalf of the [Grantor] to requests for information issued by or on behalf of the [Grantee] are true, accurate and not misleading;
15			(f) the [Grantor] has not deliberately withheld any material information concerning the Property from the [Grantee];
16			(g) no tenant under a Lease is in material breach of obligations under its Lease; and
17			(h) there are no subsisting under leases or licences affecting the Property.
18	Conditions	Due Diligence	30 days from the later of the date of this Heads of Agreement and the date of receipt of all due diligence information reasonably required by the [Grantee] ("Due Diligence Period")
19		Finance:	30 days from expiry of the Due Diligence Period ("Finance Period")
20		Call Option:	To be exercised by 5pm on the last day of Finance Period.
21		Subject to	The parties agree to enter into a leaseback arrangement with the [Grantee] as landlord and the

HOA printed terms and conditions

		Leaseback:		[Grantor] as tenant, on the following terms:
22			(a)	Premises: the whole of the Property (subject to the tenant becoming landlord under the lease to Subway Realty Pty ltd ACN 009 277 374)
23			(b)	Term: 20 years
24			(c)	Options: 3 x 10 years
25			(d)	Initial Rent: $2.69 million plus GST
26			(e)	Rent Reviews: 2.5% on each anniversary of the commencement date, with market reviews (ratcheted) on the commencement of each option term
27			(f)	Outgoings: Triple net – the tenant will be responsible for all outgoings, including land tax and the costs of any capital or structural works.
28			(g)	Bank Guarantee: an amount equivalent to 6 months Rent and Outgoings, plus GST.
29			(h)	Triple net – the lease is to be prepared on a triple net basis.
30		Other:	(a)	For the purposes of calculating any dates under this Agreement, the Call Option Agreement or the Contract, the period from and including 19 December 2020 to 17 January 2021 is to be excluded.
31			(b)	The parties will discuss an acquisition structure whereby the [Grantor] can contribute to equity to the [Grantee], in order to benefit from any asset growth whilst the [Grantee] owns the Property.
32			(c)	See terms and conditions detailed in Schedule 1 (attached).
33	Settlement Date:	14 days after the date the Call Option is exercised		
34	Binding Agreement:	The [Grantor] and the [Grantee] acknowledge that this Agreement is a valid, enforceable and legally binding agreement effective from the date hereof in respect of its subject matter.		

[31] Page 4 of the HOA contained provision for execution of the document by the parties and also a deleted handwritten clause which had been replaced with a further handwritten clause to the following effect:[54]

> "The Call Option Agreement is subject to the [Grantor] obtaining the consent of its mortgagee to this transaction within the Due Diligence Period. If the Call Option Agreement is terminated by the [Grantor] due to it being unable to obtain the consent of its Mortgagee to this transaction, the [Grantor] agrees to compensate the [Grantee] for its reasonably incurred due diligence costs, capped at $50,000 and to be verifiable costs incurred by the [Grantee]."

[32] Page 5 of the HOA set out the Schedule 1 terms and conditions which had been earlier referenced (see [30] item 32 above) as follows:[55]

> "1. As soon as reasonably practicable after the date of this Agreement but within no more than 5 business days, the [Grantee] must cause its solicitor to issue to the [Grantor] a draft of the Call Option Agreement and Contract.
>
> 2. The [Grantor] and [Grantee] must act reasonably and in good faith in negotiating the Call Option Agreement end Contract and must act expeditiously in agreeing and executing those documents.
>
> 3. The parties agree to use reasonable endeavours to finalise the documents and enter into the Call Option Agreement within 10 business days of the date of this Agreement.
>
> 4. The [Grantor] may, until such time as the Call Option has been exercised, may advertise or market the Property for sale, but may not enter into new negotiations or continue with any existing negotiations with any party in respect of the sale of the Property. Upon exercise of the Call Option, the [Grantor] must not enter into new negotiations or continue with any existing negotiations with any party (other than the [Grantee]) in respect of the sale of the Property and must not advertise or market the Property for sale.
>
> 5. In consideration of the [Grantor] granting the [Grantee] the Due Diligence Period the [Grantee] must pay to the [Grantor] the Initial Deposit. The Initial Deposit will form the Call Option Fee under the Call Option Agreement. If the Contract is not entered into the Initial Deposit will be forfeited to the [Grantor]. If the Contract is entered into, the Initial Deposit will form part of the Deposit.
>
> 6. During the Due Diligence Period the [Grantee] is entitled to conduct such due diligence enquiries in respect of the Property as the [Grantee] deems suitable. The [Grantor] must provide

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54 ARB3 at 876; the primary judge explained that handwritten alterations had been finalised by communications between the parties between 3 and 7 October 2020: see reasons for the primary judge at [41] to [49].

55 ARB3 at 877.

all reasonable assistance to the [Grantee] so as to allow the [Grantee] to undertake such due diligence enquiries. The [Grantee] may terminate this Agreement if the results of its due diligence enquiries are not satisfactory (in its absolute discretion), in which event the Initial Deposit will be forfeited to the [Grantor].

7. The parties acknowledge and agree that the existence of this Agreement and all details referred to in it is/are valuable and confidential information and neither party shall disclose it to any person other than to its lawyer, accountant, consultant, adviser, financier or investor.

8. Within 5 business days of the date of this Agreement the [Grantor] must procure that the Agent enter into an enforceable agreement with the [Grantor] (and for the benefit of the [Grantee]) whereby it agrees not to disclose any information relating to the property, the sale, or completion of the contract without the consent of the [Grantee].

9. This Agreement may be executed in one or more counterparts and all counterparts taken together constitute one agreement

10. Communication of execution of this Agreement by a party may, as an alternative to any other lawful method, be completed by successfully transmitting a facsimile of this Agreement or an email attaching a pdf copy of this Agreement bearing execution by that party to the ether party or the other party's agent or solicitor."

Relevant events after the HOA

[33] Examination of the events after the HOA was signed reveals five relevant aspects of communications between the parties:

(a) First, communication between the Grantee's Solicitor and the Grantor's Solicitor aimed at reaching agreement on the Call Option Agreement, the standard form of Contract and the leaseback arrangement contemplated by the HOA;

(b) Second, communication between the Grantor and Oncore by which the Grantor sought and failed to obtain Oncore's consent to the transaction;

(c) Third, communication between the Grantor and CBA by which the Grantor sought and failed to obtain CBA's consent to the transaction;

(d) Fourth, communication between the Grantor's Solicitor and the Grantee's Solicitor by which the Grantor initially sought to establish a mutual agreement to terminate the HOA and, when that failed, terminated the HOA; and

(e) Finally, communication between the Grantee and the Grantor after the termination by which the Grantee rejected the validity of the termination and then purported to exercise the call option and to insist on completion.

Communication between the Grantee's Solicitor and the Grantor's Solicitor aimed at reaching agreement on documents contemplated by the HOA

[34] On Wednesday 14 October 2020, at about 1:08pm, the Grantee's Solicitor, sent an email to the Grantor's Solicitor. The subject line of the email referred to the proposed purchase of the ABH Hotel and to the "Call Option and Contract". The email attached three draft documents, which the author described and qualified in this way:[56]

> "I **attach** the following draft documents for your review and comments:
>
> 1. Call Option Agreement;
> 2. REIQ Contract; and
> 3. Special Conditions to the REIQ Contract.
>
> Please note the draft documents are issued to you subject to our client's review and instructions. As such, we reserve our client's right to request further changes and there are no binding contracts between the parties until the documents are signed and exchanged in the normal way.
>
> **Leaseback and going concern**
>
> We note the heads of agreement (HoA) provides that the Seller will be the tenant under the leaseback but the HoA also provides that the sale will be of a going concern. Based on the "pro forma lease" you provided to us a few weeks ago, it appears though there is a different operating entity ([ABHO]) to the Seller's entity. Please clarify the Seller's intention.
>
> Please also let us know how you propose to deal with the other leases that are already in place (e.g. Subway) after settlement."

[35] It will be recalled that the HOA contemplated that the parties would enter into a formal Call Option Agreement which would be accompanied by a standard form sale contract (see [30] items 8 and 30) and that the sale contract would contain certain warranties by the Grantor (see [30] items 9 to 17) and would also contain a leaseback arrangement between the Grantee as landlord and the Grantor as tenant on certain terms (see [30] items 21 to 29).

[36] The Call Option Agreement attached to the email of 14 October 2020 was a formal form of a Call Option Agreement between the Grantor as grantor and the Grantee as grantee.[57] The attached REIQ contract was a formal standard form sale contract which named the Grantor as the seller and the Grantee as the buyer.[58] The Special Conditions to the REIQ contract provided,[59] by clause 13, an agreement that before Settlement "the Leaseback must be granted by [the Grantor] (as lessor) to [ABHO] (as lessee)"; "the Property is sold to [the Grantee] subject to the Leaseback"; and "as soon as possible after settlement [the Grantee] must lodge the Leaseback for

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56 Reasons of the primary judge at [89] and [92] and ARB3 at 878.
57 ARB3 at 880 to 891.
58 ARB3 at 892 to 926.
59 ARB3 at 913 to 923.

registration in priority to the instrument of transfer of Land and any incoming mortgagee".[60] In the Special Conditions, the "Leaseback" was defined as:[61]

> "the lease to be granted by [the Grantor] (as lessor) and [ABHO] (as lessee) for the whole of the Land, which is set out in Annexure D and completed in accordance with special condition Error! Reference source not found."

[37] The Annexure D to the draft Special Conditions referred to in that definition was not completed in the draft document. A note by the Grantee's Solicitors conveyed the same sentiment that had been expressed in the covering email:[62]

> "As it's intended that the supply of the Property will be of a going concern, the acquisition needs to be structured in a way so that the Property needs to be leased at settlement (commencing the day before settlement). We note the HoA says [the Grantor's] entity will be the tenant but the "proforma lease" previously provided to us seems to indicate that there is a different operating entity ([ABHO]) as the tenant under the Leaseback. Please clarify [the Grantor's] intention. Please also advise how [the Grantor] proposes to deal with the other leases (e.g. to Subway) that are already in place."

[38] At 4.46 pm on the same day, the Grantor's Solicitor replied to the Grantee's Solicitor's email. The author confirmed she acted for the Grantor. She had prepared a draft Call Option Deed and some special conditions for the land sale contract and attached them to her email. She advised she would review the documents the Grantee's Solicitor had attached to his email and "mark up any required changes." As to the leaseback, she advised:[63]

> "It appears there was a typographical error in the HOA and the tenant under the lease will be [ABHO] (being a related party of the Seller)."

[39] The Grantee's Solicitor replied at 5.46 pm, thanking the Grantor's Solicitor for her email and comments.[64]

[40] On Thursday 15 October 2020, the Grantee's Solicitor and the Grantor's Solicitor again exchanged emails clarifying a further typographical error in the HOA about the name of the trust on which the Grantor held the land.[65]

[41] On Monday 19 October 2020, at about 3.30 pm, the Grantor's Solicitor sent the Grantee's Solicitor an email. She attached a draft lease. In her email, she explained:[66]

> "I am not sure if you have reviewed the initial draft Lease (that I understand was uploaded in PDF to the data-room). This Lease is the same, with the exception of the additional clause 33 (and

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60 ARB3 at 921 to 922.

61 Reasons of the primary judge at [90], ARB3 at 913. The "error" message is that recorded in the document.

62 Reasons of the primary judge at [91].

63 Reasons of the primary judge at [93].

64 Reasons of the primary judge at [94].

65 Reasons of the primary judge at [95].

66 Reasons of the primary judge at [96] and ARB3 at 987.

> corresponding definitions and notices). Let me know if you want me to send a marked-up version.
>
> The Lease is in draft only and has yet to be approved by my client. Accordingly, I must reserve my clients right to require further amendments."

[42] On Tuesday 20 October 2020, at about 5.47 pm, the Grantor's Solicitor sent the Grantee's Solicitor another email. In it, she advised that she expected to respond to the Grantee's Solicitor about "the contract" the following day. She attached a copy of the draft Call Option Agreement "with marked up amendments for your client's consideration." She again advised:[67]

> "Please note the Call Option Agreement and proposed amendments have not been finally approved by our client and we reserve our client's right to require additional amendments."

[43] On Wednesday 21 October 2020, at about 4.06 pm, the Grantee's Solicitor sent an email to the Grantor's Solicitor. He conveyed that he had started reviewing the attached draft leaseback and had identified that the draft lease "does not quite align with what the parties agreed in the [HOA]". He identified five examples. He also asked for a copy of the operating lease between the Grantor's land and operating entities.[68]

[44] On Monday 26 October 2020, at about 9.04 am, the Grantor's Solicitor sent the Grantee's Solicitor an email attaching "the existing operating lease" between the Grantor and ABHO. The Grantee's Solicitor acknowledged receipt at 9.06 am.[69]

[45] On Wednesday 28 October 2020, at about 8.59 am, the Grantee's Solicitor asked the Grantor's Solicitor, by email, "when we can expect to receive your comments on the Contract/Special Conditions for our review."[70]

[46] On Thursday 29 October 2020, at about 1.15 pm, the Grantor's Solicitor sent the Grantee's Solicitor an email attaching "contract with special conditions, incorporating our client's proposed amendments in mark-up for your client's consideration". The email invited the Grantee's Solicitor to call if there were any questions. The Grantee's Solicitor acknowledged receipt at 1.55 pm.[71]

[47] That day, Mr Kent (on behalf of the Grantee) had a telephone conference with Mr Bunz (on behalf of the Grantor's Agent), and Mr McFie (on behalf of ABHO). In the conference, Mr McFie said the building works underway at the Hotel would take about six months to finish.[72]

[48] At about 9.10 pm that day, the Grantee's Solicitor sent the Grantor's Solicitor a "further marked-up Call Option" and a "marked-up Leaseback". He advised:[73]

> "As previously discussed, the draft leaseback you provided to us does not reflect the terms of the heads of agreement and quite a

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67 Reasons of the primary judge at [97].
68 Reasons of the primary judge at [98] and ARB3 at 986 et seq.
69 Reasons of the primary judge at [99].
70 Reasons of the primary judge at [100].
71 Reasons of the primary judge at [101].
72 Reasons of the primary judge at [102].
73 Reasons of the primary judge at [103].

> number of changes have been made to reflect the heads of agreement (in particular reflecting a true triple net lease) and otherwise the information memorandum. We have also incorporated our comments within the document.
>
> As our client has not had an opportunity to review the documents in full we expressly reserve our client's right to request further changes".

[49] On Thursday 5 November 2020, Mr Ebert (on behalf of the Grantee) and Mr Kent met with Mr Bunz and Mr McFie. They discussed the terms of the proposed leaseback to ABHO. The discussion was wide-ranging, dealing with specific terms in the draft lease, but also including discussion of a right for ABHO to "buy-back" the freehold interest in the land and a sharing of any "super profit" from a subsequent sale of the freehold and leasehold interests.[74]

[50] At about 4.53 pm, after the meeting with Mr Bunz and Mr McFie, Mr Kent sent an email to them, copied to Mr Ebert. In it, Mr Kent set out in dot points "a suitable mechanism" to include in a "separate instrument to deal with any future sale of the freehold going concern with both parties to benefit". The "mechanism" involved the valuation of the freehold and leasehold interests. Then, if a buyer of the combined freehold and leasehold interests ("Freehold Going Concern") paid a price that exceeded the sum of the separate valuation of the freehold and valuation of the leasehold, the excess ("super profit") would be shared equally between the Grantee as the owner of the freehold and, it seems, ABHO as the owner of the leasehold.[75]

[51] At about 7.21 pm that day, the Grantee's Solicitor sent the Grantor's Solicitor a "further marked-up [REIQ] Contract and Special Conditions." He advised her that "we hold instructions to request a number of amendments" to the call option and leaseback, but would "await your comments on those documents" and "include those amendments in the second round of negotiation." He copied the email to Mr Kent, Ms Liu (also an officer of the Grantee), Mr Bunz and others.[76]

[52] On Friday 6 November 2020, at about 10.58 am, the Grantee's Solicitor asked the Grantor's Solicitor for "an update on the status of the Call Option and Leaseback." He copied this email to Mr Kent, Ms Liu and Mr Bunz.[77]

Communication by which the Grantor sought and failed to obtain Oncore's consent

[53] On Tuesday 10 November 2020, Mr McFie met with Mr O'Neill (on behalf of Oncore). At the meeting, Mr McFie gave Mr O'Neill a letter from the Grantor dated 9 November 2020 about the proposed sale of the land to the Grantee. [78] The letter was in these terms:[79]

> "**Mortgagee consent to sale of Airlie Beach Hotel Freehold**
>
> As you know, we have entered into a heads of agreement (**'HOA'**) for the sale of the above freehold for the sale price of $41.5m. The

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74 Reasons of the primary judge at [104].
75 Reasons of the primary judge at [105].
76 Reasons of the primary judge at [106].
77 Reasons of the primary judge at [107].
78 Reasons of the primary judge at [109].
79 ARB5 at 1572.

> HOA is subject to mortgagee consent to be given to the sale under the HOA.
>
> At the time of entering into the HOA we also were in negotiations for the sale of the Reef Gateway Hotel freehold, and had also entered into a heads of agreement that was not binding but had progressed to a point ready for execution. However, it has since been determined to be an uncommercial proposition that we no longer wish to pursue given the market conditions and are therefore withdrawing from sale and will imminently terminate that heads of agreement.
>
> Accordingly, it was always the resolution of the board of the Airlie Beach Hotel, that in light of the Commonwealth Bank of Australia (**'CBA'**) being the first mortgagee and holding a cross collateralised security over both the Airlie Beach Hotel and Reef Gateway Hotel, that we intend to repay in full the CBA debt owing in the amount of $38,521,238.82, which after selling costs associated with the sale of the ABH freehold, there would [be] insufficient funds to pay out any of your loan.
>
> We therefore request your consent whether despite the above you would be willing to release your mortgage in the event that there would be a shortfall to fully discharge our debt to you. If we do not receive your consent, then we will thereafter terminate the HOA."

[54] Mr McFie also gave Mr O'Neill a quite extensive group of documents. Mr O'Neill prepared a list of the document, which ran into a third page. The documents included: ABHO Queensland Profit & Loss EBITDA draft July – September 2020; ABHO Queensland Sales by month July – October 2020; the tab 152 document Proposed Refinance Airlie Beach Hotel Freehold discussed at [18] above; and a Knight Frank Valuation Airlie Beach Hotel 23 October 2020 (**Knight Frank Valuation**) which had been prepared for the Grantor.[80]

[55] The primary judge found that the Knight Frank Valuation valued the Hotel as a "Freehold Going Concern (As if Complete)" at $76.5 million, and as a "Freehold Going Concern (As Is)" at $76.2 million. These values were expressed to be the combined value of the freehold and leasehold estates and interests. The valuation calculated a "Lessors Freehold Interest value" between $48 to $52 million, based on a rental of $3 million per annum, and so adopted an "As If Complete" and a "Lessor's Freehold Interest" at the mid-point of $50 million.[81]

[56] The primary judge also found that the information provided to Mr O'Neill was plainly intended to induce Oncore to release its mortgage over the land and be a creditor of (or even become an investor in) ABHO to the extent of the Grantor's liability to Oncore.[82]

[57] On Wednesday 11 November 2020, at 4.47 am, Mr O'Neill sent an email to Mr McFie:[83]

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80 Reasons of the primary judge at [109].
81 Reasons of the primary judge at [151].
82 Reasons of the primary judge at [152].
83 Reasons of the primary judge at [110].

> "Thank you for the opportunity to meet in Brisbane yesterday when you outlined developments regarding your freehold interests in both Reef Gateway Hotel and Airlie Beach Hotel. I also acknowledge receipt of your letter of 9 November regarding the proposed sale of the ABH freehold and the requested application of the sale proceeds. While I have given it further thought overnight, I confirm my initial reaction that we would not be prepared to release our second mortgage unless our loan is paid out in full, together with interest. This is consistent with both the relevant security documentation as well as the spirit of the transaction, as I am sure you will appreciate."

[58] Mr O'Neill had elaborated on his approach to the subject matter of the loan being paid out in full in evidence before the primary judge. The primary judge found:[84]

> "… As the controlling mind of Oncore, Mr O'Neill did not consent to the transaction. He said Oncore would not consent to the transaction between [the Grantor] and [the Grantee] unless he was assured Oncore would be paid "in full" all amounts owed to it. By "in full" Mr O'Neill explained the payment would have to discharge the $4.833 million secured by the Oncore mortgage and a further $1.5 million advanced by Oncore to Mr McFie that was associated with the purchase of the hotel business and the land. The total sum Mr O'Neill said Oncore would require to release the mortgage was about $6.3 million.
>
> Mr O'Neill was asked whether a request to consent made on 7 October 2020 would have yielded a different answer. He said "No, you wouldn't have got a different answer."
>
> Mr O'Neill agreed that in October, November and December 2020, the only prospect of Oncore agreeing to release the mortgage over the land was if Oncore was paid in full. He said if [the Grantor] asked Oncore to consent to a transaction for the sale of the land without Oncore being paid in full, he, as the principal of Oncore, would have refused. Mr O'Neill told the court Oncore was "not at all" interested in refinancing [the Grantor's] debt with the provision of other security for the sum owed to Oncore as vendor finance.
>
> Mr O'Neill also told the court that he would not accept repayment in full while CBA was not repaid, because of Oncore's obligations to CBA under the Subordination Deed.
>
> Mr O'Neill said he thought further about [the Grantor's] request that Oncore consent to the transaction, after his meeting on 10 November 2020 and overnight. He explained:
>
> > "I have fairly extensive experience in dealing with mergers and acquisitions and other sorts of commercial arrangements … I came to a very clear view that there was nothing there that was worth discussing further, that we weren't prepared to release our second mortgage security."

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84 Reasons of the primary judge at [153] to [158].

> Mr O'Neill was a careful and experienced person. He was clear in his evidence. I accept it as truthful and reasonable. He was familiar with the secured property, Oncore having owned it for many years before the sale to [the Grantor]."

Communication by which the Grantor sought and failed to obtain CBA's consent

[59] The Grantor did not seek the consent of CBA until 12 November 2020. On that date, the Grantor sent an email to Mr Bignell of CBA at 4.11 pm in the following terms:[85]

> "I advise that we have entered into the attached heads of agreement ('HOA').
>
> We advise that to date we have been involved in protracted negotiations to finalise documentation to proceed formally.
>
> It is noted that the special conditions require that we obtain mortgagee's consent prior to the due diligence date which is tomorrow 13 December 2020.
>
> The deed of subordination with you and my client requires that the total debt owing to the bank be repaid before we repay the second mortgagee debtor [Oncore].
>
> The total debts owing to the CBA and [Oncore] exceed the purchase price in the HOA. At the time our client entered into the HOA we had another heads of agreement with the Reef Gateway Hotel which, if it was sold, would have clearly discharged all debts to the CBA.
>
> However, the sale of the Reef Gateway Hotel is no longer proceeding and as such we note that we therefore cannot satisfy our obligations under the deed of subordination such that [Oncore] will not release its mortgage and will not provide its consent to the transaction accordingly.
>
> We also advise that we have received notice from [Oncore] to the effect that if the entirety of its debt is not discharged by the sale proceeds, it will refuse to consent to the transaction. Our client has informed the [Grantee] that [Oncore] has refused to consent to the transaction (on those terms) such that our client is unable to proceed with the transaction. The [Grantee] in response has among other things lodged a caveat over the land, of which we are obliged to inform you of under our client's covenants.
>
> Please advise on an urgent basis whether you will consent to the above transaction, noting that it will not discharge all registered liabilities such that Oncore would be [amenable] to release its mortgage, in which case the CBA would have to concede to its position considerably under its deed of subordination to allow Oncore to be discharged fully."

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85 ARB5 at 1702.

[60] It will be recalled that Mr Bignell of CBA was one of the two CBA staff members identified in the CBA's letter of 15 October 2020 as points of contact in relation to CBA's notice of the breach of the minimum EBITDA amount under the CBA Facility Agreement and the fact that CBA intended to be checking compliance.

[61] CBA (by Mr Bignell) responded by email 11 minutes later at 4.22 pm on 12 November 2020 in these terms:[86]

> "Thank you for the detailed request.
>
> Considering the facts presented and the banks position CBA will not be consenting to the above transaction."

[62] The primary judge found that "Neither party called Mr Bignell (or any other CBA staff member) as a witness. No case was put that CBA's refusal was not genuine."[87]

Communication by which the Grantor sought to establish a mutual agreement to terminate the HOA and, when that failed, terminated the HOA

[63] On Wednesday 11 November 2020, and prior to the approach to CBA, the Grantor's Solicitor sent a letter to the Grantee's Solicitor by email, referring to the HOA and relevantly stating:[88]

> "We note from your most recent correspondence that further amendments are being sought to the lease and contract that are, in our client's view, uncommercial and not consistent with what the parties had agreed to under the HOA.
>
> Our client is of the view that in light of these changes, there has been a significant departure from the HOA and the negotiations have become frustrated by your client abandoning what had been agreed to at the outset. In good faith, our client has endeavoured to accommodate certain requests but the most recent requests for amendments (particularly to the contract and lease) are such a significant departure from the original terms agreed that continuing the process is untenable.
>
> Further, under the terms of the HOA, the parties had until 22 October 2020 by which to agree on the terms of the transaction documents and enter into the call option. This has not happened which again only highlights that the negotiations are now frustrated.
>
> We also advise that yesterday, 10 November 2020 our client's representative Michael McFie met with the second mortgagee to seek his consent to the transaction. In light of the fact that the facility agreement our client has with the Commonwealth Bank of Australia ('CBA') requires all funds be repaid across the group assets prior to discharging the second mortgagee (leaving the second mortgagee a shortfall on completion) the second mortgagee has advised that his consent to the transaction will be withheld.

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86 ARB5 at 1709.
87 Reasons of the primary judge at [160].
88 Reasons of the primary judge at [111].

> Accordingly, as it is clear that our client is unlikely to procure mortgagee consent pursuant to the terms of the HOA (and call option), it would be pointless to continue progressing the matter and we have been instructed to propose that the parties agree to mutually terminate the HOA.
>
> Please provide us with your client's urgent instructions by not later than 12pm tomorrow."

[64] The next day and before the requested deadline, the Grantee emailed the Grantor's Solicitor, copied to the Grantee's Solicitor, contesting the matters asserted in the Grantor's Solicitors letter and advising that the Grantee:[89]

> "… will not agree to mutually terminate the HOA as your client has requested and it will take all steps necessary to enforce the HOA, including putting your client to proof in relation to the satisfaction (or otherwise) of the mortgagees' consent condition. To this end, our client has lodged a caveat this morning, protecting its equitable interest in the property."

[65] On Friday 13 November 2020, at about 11.07 am, the Grantor's Solicitor wrote to the Grantee and the Grantee's Solicitor. The letter rejected any criticism of the Grantor's conduct advising:[90]

> "Our client's intention was merely to highlight the fact that to proceed with formal documentation may be futile given the fact that the parties had not reached agreement on a number of fundamental matters and that our client's second mortgagee was not willing to grant its consent. Accordingly, to avoid the parties incurring further unnecessary costs, we therefore sought requested whether your client would agree to mutually terminate the HOA.
>
> As previously advised, our client's second mortgagee has advised that it will not consent to the transaction contemplated by the HOA. A copy of the request for consent and the second mortgagee's response is attached. …
>
> Given the position outlined in your email, our client has now also sought, on an urgent basis, its first mortgagee's ('CBA') consent to the transaction. CBA has also refused to consent to the transaction. A copy of the request to CBA and CBA's response is attached.
>
> Accordingly, we hereby [give] notice that mortgagee's consent has not been obtained pursuant to the HOA and our client hereby elects to terminate the HOA."

[66] It was common ground that the Due Diligence Period referred to in the HOA (see [30] item 18 above) ended on 13 November 2020 and the Finance Period referred to in the HOA (see [30] item 19 above) ended on 13 December 2020. Accordingly, the termination, if otherwise valid, was within time.

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89 Reasons of the primary judge at [113].

90 Reasons of the primary judge at [116].

Communication by which the Grantee rejected the validity of the termination and purported to exercise the call option and insist on completion

[67] On Friday 13 November 2020, at about 4.40 pm, the Grantee's Solicitors replied to the Grantor's Solicitors advising that the Grantee "rejects the contention that the Vendor was entitled to terminate the agreement and, consequently, that it has terminated the agreement".[91] The Grantee's Solicitors set out the "grounds" on which the Grantee did so:[92]

> "[The Grantee] does so on the ground that [the Grantor] did not use all reasonable endeavours to obtain the consent of the mortgagee either at all or within the due diligence period; and on the ground that the [the Grantor] was not unable to obtain the consent of the mortgagee either at all or within the due diligence period. [The Grantee] also relies on all and any other grounds entitling it so to elect."

[68] The Grantee's Solicitors further advised that the Grantee regarded the Grantor's conduct "in purporting to terminate the agreement" as a repudiation of the agreement; that the Grantee "waives that repudiation and elects to hold [the Grantor] to the agreement"; and that the Grantee "is satisfied with the due diligence information and elects to proceed with the agreement in that respect".[93] The Grantee's Solicitors then wrote that the Grantee calculated the finance period would end on 13 December 2020 and asked the Grantor's Solicitors whether they agreed with the calculation.[94]

[69] On Monday 16 November 2020, at about 10.26 am, the Grantor's Solicitors replied to the Grantee's Solicitors and maintained "that the subject heads of agreement has been validly terminated by [our] client".[95]

[70] On 11 December 2020, the Grantee's Solicitors wrote a letter to the Grantor's Solicitors informing the Grantor that the Grantee had waived the benefit of the finance condition in the HOA, gave notice of exercise of the call option, and nominated Sentinel Multi-Sector Income Pty Ltd as trustee for the Sentinel Multi-Sector Income Trust as the buyer to purchase the land. The letter enclosed a Notice of Exercise of Call Option and Notice of Nomination, a Form of contract for the sale of the land including special conditions and a form of lease between ABH and ABHO, and a bank cheque for the balance deposit of $1,499,990.[96] The letter stated:[97]

> "[The Grantee] asks [the Grantor] to execute the form of contract and return same to us.
>
> We note that the terms of the contract have been subject of negotiations between [the Grantee] and [the Grantor].

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91 Reasons of the primary judge at [117].
92 Reasons of the primary judge at [117].
93 Reasons of the primary judge at [118].
94 Reasons of the primary judge at [118].
95 Reasons of the primary judge at [120].
96 Reasons of the primary judge at [122].
97 Reasons of the primary judge at [123].

> [The Grantee] believes that the form of contract tendered herewith conforms with the requirements of the HOA and also meets the preferences most recently expressed by [the Grantor] that also conform with (or at least do not conflict with) the requirements of the HOA. However, we are instructed to make it clear that [the Grantee] is not wedded to this form of contract and that if [the Grantor] believes that some amendments are required, it will be happy to discuss any reasonable suggestions that [the Grantor] may wish to make in that regard. We do note that time is of the essence in that respect.
>
> Similarly, the Lease has been prepared in accordance with the clause "subject to lease back" contained in the HOA. The Lease is, as you will understand, based on the form in the data room on which [the Grantor] invited offers and also meets the preferences most recently expressed by [the Grantor] that also conform with (or at least do not conflict with) the requirements of the HOA. We have inserted [ABHO] as lessee, in conformity with [the Grantee's] understanding of [the Grantor's] intentions in that respect – derived, we note, also from the parties' negotiations under the HOA. Again, [the Grantee] is not wedded to the terms of the Lease herewith and will likewise entertain any reasonable suggestions that [the Grantor] may wish to make in this respect. It is intended that the commencement date of the Lease will be the day prior to settlement of the contract.
>
> We calculate that the date for settlement of the contract will be Monday, 25 January 2021."

[71] The Grantor did not take any steps towards settling the contract as requested.

The reasons of the primary judge

[72] The Grantee rejected the proposition that the Grantor had validly terminated the HOA and sought –

(a) a declaration that it had an equitable interest as purchaser in the land the subject of the HOA;

(b) an order for specific performance of the agreement in the HOA including orders that the Grantor execute a contract of sale in a particular form and that it complete the transaction; and

(c) alternatively damages for breach of contract.

[73] It was common ground before the primary judge that the parties had entered into an agreement on 7 October 2020. They were, however, in dispute about the content and nature of the agreement. Their dispute raised a number of *Masters v Cameron* issues.[98]

The resolution of the Masters v Cameron issues

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98 *Masters v Cameron* (1954) 91 CLR 353.

[74] The Grantee had contended that by the HOA the Grantor had granted the Grantee an option to call on the Grantor to sell the land to it on terms and conditions, including that there would be a lease of the whole of the land to ABHO.[99] The Grantee contended that nothing further was required for the HOA to be legally enforceable. By its terms the parties proposed to have the terms of their agreement restated in a form of three instruments (a call-option agreement, a contract of sale, and a leaseback), which would be fuller or more precise than the agreement made on 7 October 2020, but not different in effect.[100]

[75] The Grantor had contended that the HOA could only be regarded as a binding agreement to negotiate the terms of the three other instruments and some associated obligations. It contended that the HOA did not grant a call option to the Grantee. Nor could it be regarded as an agreement for the Grantee to buy and sell the land if the option was exercised, or by which they agreed to a lease of the land if the sale was completed. The terms and conditions of the three instruments contemplated by the HOA were yet to be agreed.[101]

[76] The primary judge resolved that dispute in favour of the Grantee. He found that the parties had agreed to be bound immediately by signing and exchanging the HOA. Although they did so on the express basis that certain formal documents would follow, the detail in the HOA was sufficiently comprehensive to give effect to the call option, and, if exercised, a contract of sale in a "standard form" for Queensland with the agreed warranties. He rejected the Grantor's contention that the HOA was merely an agreement to negotiate the three foreshadowed instruments. In the summary form they used, the parties left no essential or critical term of the bargain to be settled by the foreshadowed agreements, save for the proposed leaseback. The HOA was itself an agreement as to the substance of the transaction, which had been the subject of the parties' preceding negotiations.[102]

[77] Thereafter the primary judge framed the determinative issues in this way:[103]

(a) what was the proper construction of the mortgagees' consent provision in the HOA;

(b) whether the Grantor was unable to obtain the mortgagees' consent;

(c) whether the HOA included an implied term that the Grantor take all reasonable steps to obtain the consent of CBA and Oncore to the transfer of the land to the Grantee (or its nominee) free of their mortgages within the Due Diligence Period;

(d) whether the Grantor was in breach of that implied term on 13 November 2020, when it sent the communication giving notice terminating the HOA (or the call option within it); and

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99 The Grantee's case at trial had also advanced some alternative arguments which contended that the binding agreement with the Grantor was expressed in the HOA and also in two other, or alternatively one other, documents. The primary judge rejected both arguments. The Grantee did not press either argument on appeal.

100 Reasons of the primary judge at [18].

101 Reasons of the primary judge at [21].

102 Reasons of the primary judge at [87].

103 Reasons of the primary judge at [131].

(e) whether, absent any such breach by the Grantor, there was a chance Oncore and CBA would have given their consent to the transaction.

[78] I turn to identify the primary judge's approach to each of those issues.

The proper construction of the mortgagees' consent provision

[79] Having identified and applied orthodox principles of contractual construction the primary judge accepted the Grantee's description of the clause and construed it in this way (emphasis added):[104]

> "In its written submissions, [the Grantee] described the provision as a "contingency for which the parties have bargained". **The provision might also be described as a condition subsequent or a resolutive condition**. It did not prevent the parties entering a binding contract in the terms of the HOA. **It had the effect that [the Grantee] could not exercise the call option and [the Grantor] was under no obligation that might otherwise arise from an exercise of the call option, unless the condition was fulfilled or waived by [the Grantor]. Put another way, the call option, or the obligation of the parties to perform it, depended on the fulfilment of the condition, and non-fulfilment entitled [the Grantor] to terminate.** The mortgagees' consent was a contingency. It was not within the power of either of the parties to the HOA. In the ordinary language used by the parties in the provision, they expressed their intention that [the Grantor] was to seek the mortgagees' consent and, if [the Grantor] was unable to obtain that consent, [the Grantor] could terminate the call option.
>
> While it remained possible that the mortgagees might consent to the call option before the end of the Due Diligence Period, neither party could terminate for that reason. If the mortgagees did consent, then neither party would be able to terminate for that reason.
>
> If the contingency, to which the call option was subject, did not occur within the time specified, then [the Grantee] could not exercise the call option, unless [the Grantor] waived the condition. If it became clear that the contingency could not occur within the stipulated time, then [the Grantor] could terminate the call option, even before the final date for its fulfilment."

Whether the Grantor was unable to obtain the mortgagees' consent

[80] Consistent with the construction which he had reached, the primary judge reasoned from the evidence that consent had been sought from each of CBA and Oncore, that each of them had declined to give consent, and that:[105]

> "… it might fairly be concluded that the mortgagees' consent could not be obtained. In the absence of the mortgagees' consent to the transaction, [the Grantee] was not entitled to exercise the call option in the HOA. On the face of the HOA, [the Grantor] was entitled to terminate the call option."

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104 Reasons of the primary judge at [135] to [137].

105 Reasons of the primary judge at [141].

[81] The primary judge noted that the Grantee sought to avoid that conclusion in two ways.

[82] The first was that the Grantee argued that the proper construction of the clause was that the Grantor's right to terminate was subject to a condition precedent that the Grantor comply with its obligation to take reasonable steps to obtain the consent, the effect of which was that the Grantor bore the onus of proving that it was unable to obtain the mortgagees consent despite taking such steps. The Grantee's argument relied upon the reasoning of Robb J in *Al Achrafi v Topic* [2016] NSWSC 1807 and Bryson J in *Hardy v Wardy* [2001] NSWSC 1141. It adopted Robb J's reasoning both in this Court and below. The primary judge pointed out that the contracts considered in those cases were framed specifically to impose a condition precedent on the vendor's ability to terminate. The primary judge distinguished them on that basis, concluding (footnotes omitted):[106]

> "In the HOA, the parties included no condition precedent to the [Grantor] exercising the right to terminate the call option, like that in cl 28.3.2. In the absence of such a provision, Robb J expressed the broadly accepted view in these terms:
>
> > "The burden of proof falls on the party who denies the right of the party who has rescinded to do so, to prove both the breach of the implied or express obligation by the rescinding party, and that the breach caused the event that had given rise to the right to rescind."
>
> Here, [the Grantee] bears the onus of proving a breach by [the Grantor] and showing its relationship to the mortgagees' consent not being obtained.
>
> [The Grantee] will discharge its onus if it establishes: a breach by [the Grantor]; and that the mortgagees' consent would probably have been obtained, had [the Grantor] not breached its obligation. The first requires consideration of whether [the Grantor's] conduct discharged its implied obligation. The second requires an assessment of whether [the Grantor] could have obtained the consent if it had discharged its obligation. Or, put another way, whether [the Grantor's] breach brought about, materially contributed to, or was a major cause of [the Grantor] being unable to obtain consent."

[83] The last paragraph of the quote explained the way in which the primary judge framed the next three dispositive issues as identified at [77] above.

[84] The second way in which the Grantee had sought to avoid the Grantor's apparent entitlement to terminate was to submit that the Grantor was "not unable" to obtain the mortgagees' consents. The primary judge rejected that submission, criticising it as inappropriately pedantic in light of the construction of the HOA on which it was based. He regarded it as sufficient to conclude that:[107]

> "On the proper interpretation of the handwritten clause, in the context of the whole HOA, the grant of the call option was subject to

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106 Reasons of the primary judge at [145] to [147].

107 Reasons of the primary judge at [149].

> [the Grantor's] mortgagees consenting to the transaction. Although each was asked to consent, neither did so."

[85] He then found (on the evidence to which I have referred at [53] to [62] above) that he was satisfied that the Grantor was unable to obtain the mortgagees' consent within the meaning of the HOA.[108]

The nature of the implied term

[86] The primary judge rejected various ambit propositions advanced by the parties and concluded that the HOA included an implied term that each party was to take such steps as were objectively required and reasonable in the circumstances to achieve the end specified by the HOA. The correctness of that conclusion is not challenged on this appeal.[109]

Whether the Grantor was in breach of that implied term on 13 November 2020

[87] The primary judge introduced his analysis of the ways in which the Grantee alleged that the Grantor was in breach of the implied term with these findings:[110]

> "[The Grantor] asked each mortgagee to consent. In doing so, [the Grantor] gave each of them the HOA, which was the instrument recording the transaction to which their consent was sought, and some information about the proposed sale of the land to [the Grantee]. [The Grantor] gave Oncore updated financial information about ABHO's trading of the hotel business. Under the facility agreement, CBA was entitled to regular financial information and there is no reason to assume it did not have access to it."

[88] In my view, the fact and terms of the CBA letter of 15 October 2020 (by which CBA had informed the Grantor that there had been a breach of the terms of the facility agreement regarding maintenance of Group EBITDA levels: see [25] above) supports the assumption made by the primary judge. Obviously CBA had the capacity to do the calculations to which it referred in its letter. And the fact that it referred to its intention to check on compliance with financial covenants supports the inference that it had the means to do so.

[89] Based on his earlier analysis that the Grantee had the onus of proof in relation to breach the primary judge found that the Grantee must show the Grantor breached the implied term and that, in a practical sense, that meant that the Grantee must identify something that the Grantor had failed to do which was necessary and reasonable in the circumstances to obtain the mortgagees' consent. He then proceeded to identify and analyse the various ways in which the Grantee had in its pleadings and written and oral submissions contended that the Grantor had breached the implied term.

[90] The means by which the primary judge considered and rejected all of the ways in which the Grantee had suggested the Grantor had breached the implied term may be considered under the headings which he adopted.

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108 Reasons of the primary judge at [159] to [161].
109 Transcript 1-6 lines 43 and 44.
110 Reasons of the primary judge at [170].

Delay

[91] The Grantee had contended that the Grantor had breached the implied term by delaying seeking Oncore and CBA's consent until 10 and 12 November 2020 respectively, and not allowing CBA sufficient time or information to consider its position.

[92] His Honour concluded that there were sound reasons to approach Oncore before approaching CBA, because if Oncore could be persuaded then CBA's consent would be easier to obtain. He was not persuaded that the Grantor acted otherwise than was honest, reasonable and with proper consideration of the steps most likely to obtain CBA's consent.[111]

[93] The primary judge found, correctly having regard to the facts identified at [34] *et seq.* above, that between 7 October and 10 November 2020, the Grantor and the Grantee were negotiating the terms of the Call Option Agreement, the Contract of Sale and the leaseback as required by the HOA.[112]

[94] His Honour concluded that it was reasonable for the Grantor to allow some time for those negotiations before seeking consent because he thought that if either mortgagee had any interest in consenting to the transaction, it would likely want to see the progress of the instruments to document it.[113]

[95] A further reason why the primary judge thought that it was reasonable for the Grantor to delay approaching Oncore for consent concerned the impact of the Coronavirus on trade. He found:[114]

> "Reliable information about the trading of the ABHO business was relevant to any decision Oncore might make about consent. In March 2020, Australia closed its international border to non-citizens. The closure of the Queensland State border to interstate residents was announced on 24 March 2020. On 10 July 2020, the Queensland border was opened to interstate residents, except those from Victoria.
>
> On 15 October 2020, CBA had advised [the Grantor] that [the Grantor], RGH and ABHO had breached the minimum EBITDA covenant in clause 17.3(a)(ii) of the CBA Facility Agreement for the 1 January to 30 June 2020 period. …
>
> Given the disruption to its trade, it was reasonable for [the Grantor] to wait until it had a period of post-lockdown trading information, before putting a proposition to Oncore that it should consent to the transaction on the basis it might remain a creditor without the security of its mortgage.
>
> In the circumstances, I am not satisfied that [the Grantor] breached the implied term by making its request for Oncore's consent on 10 November 2020. I am not satisfied that [the Grantor] committed

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111 Reasons of the primary judge at [177].
112 Reasons of the primary judge at [174].
113 Reasons of the primary judge at [175].
114 Reasons of the primary judge at [178] to [181].

such a breach by failing to seek CBA's consent before 12 November 2020."

[96] The primary judge also inferred from the fact of the existing contractual obligations to provide financial information to CBA and from the fact and terms of CBA's letter dated 15 October 2020 that CBA was aware the financial position of the Grantor and the other borrowers and was checking their compliance with their obligations.[115] He rejected the Grantee's suggestion that the Grantor had allowed CBA insufficient time and information to properly consider the basis upon which it might release the land from its mortgage while adequately protecting CBA's position and meeting the needs of the Grantor and ABHO.[116]

Proceeds of sale would be sufficient to pay CBA and Oncore

[97] The Grantee had contended that the Grantor breached the implied term by –

(a) failing to seek CBA's consent on the basis that the proceeds of sale would be sufficient (after paying the principal and interest to Oncore) to repay the amount owing to CBA at that time for principal and interest; and

(b) failing to seek Oncore's consent on the basis that the principal and interest owning to Oncore would be paid out of the proceeds of sale at settlement.

[98] The findings of the primary judge in this regard are important because they are the subject of particular criticisms on this appeal. Accordingly, I will address the detail of the findings in the course of discussing the appeal grounds at [145] *et seq*. below.

[99] It suffices presently to record the relevant ultimate finding, namely that his Honour was satisfied that it was likely that the sale proceeds, due under a contract that might arise from an exercise of the call option, would be insufficient to pay CBA, Oncore and the transaction costs. In the circumstances, he was not satisfied that the Grantor breached the implied term by failing to seek the mortgagees' consent on the basis that they would be paid out in full out of the proceeds of sale at settlement.

Additional things should have been mentioned in request for consent

[100] The primary judge considered the Grantee's argument that the Grantor had breached the implied term by not conveying the following matters to CBA in support of the request to consent to the transaction:

(a) after paying the debt to Oncore the balance of the sale proceeds was likely to be available to reduce the debt owing by the Grantor to CBA to no more than about $5 million;

(b) if the transaction proceeded, after the sale of the land to the Grantee, CBA would continue to hold security over the Reef Gateway Hotel, with a market value of "perhaps" $27.5 million;

(c) CBA would continue to hold security over ABHO's business, albeit under a lease arrangement yet to be agreed between the Grantee and ABHO;

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115 Reasons of the primary judge at [183].

116 Reasons of the primary judge at [184].

(d) CBA's securities over the Reef Gateway Hotel and the ABHO business would be more than sufficient security for the residual debt likely to be owed by the Grantor to CBA;

(e) the loan to value ratio of the residual loan would be below the 50% condition specified in the CBA Facility Agreement;

(f) more recent trading information from ABHO indicated that it would have annual EBITDA of about $8.1 million, and after the sale of the land, ABHO's net income would be sufficient to service any remaining debt owed by the Grantor to CBA; and

(g) the sale of the land to the Grantee would not place the Grantor and ABHO collectively in breach of financial undertakings in the CBA Facility Agreement.

[101] His Honour found that: (a) and (c) were factual matters that CBA would have been aware of prior to its decision to refuse consent; CBA's acceptance of (b), (d) and (e) may have depended on obtaining market valuations of the Reef Gateway Hotel and ABHO; (f) may not have been accepted by CBA or affected its decision on consent; and CBA's acceptance of (g) was dependent on the establishing of (b), (d), (e), and (f).[117]

[102] His Honour concluded that while a borrower may be prepared to put "doubtful or unsubstantiated propositions" to their bank, "[i]n so far as the propositions advanced by [the Grantee] were of that nature, it would not be reasonable to require [the Grantor] to put them to CBA".[118] His Honour was not satisfied that the Grantor breached the implied term in failing to do so.

Restructuring CBA lending arrangements

[103] The Grantee contended that the Grantor breached the implied term by failing to seek CBA's consent on the basis of restructuring its lending arrangements by proposing –

(a) the proceeds of sale would be sufficient (after paying the principal and interest owing to Oncore) to repay the amount owing on the CBA facilities in the name of the Grantor and ABHO;

(b) in return for repayment of the amount owing on the CBA facilities in the name of Grantor and ABHO, CBA would release its mortgage over the land;

(c) ABHO would continue its hotel and gaming business at the Hotel after settlement, pursuant to a 30-year lease (with options for a further 20 years) to ABHO; and

(d) CBA would retain its other existing securities, and CBA's commercial security over all present and after acquired property of ABHO would attach to the leaseback to ABHO.

[104] The Grantor denied there was an obligation under the implied term which required it to seek the restructuring of its lending arrangements with CBA, which involved other entities, in the manner alleged and submitted by the Grantee. The primary

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117 Reasons of the primary judge at [194] to [196].

118 Reasons of the primary judge at [197].

judge accepted this submission, noting that the Grantor was both a borrower in respect of its own facilities and a guarantor in respect of sums which ABHO and RGH had borrowed from CBA under other facilities, and CBA's mortgage secured both aspects of the Grantor's liability to CBA.[119] In this regard, see also [19] and [20] above.

[105] His Honour further held that it was reasonable for the Grantor to offer the net proceeds of sale, after the payment of transaction costs, to repay the debts owed to CBA and Oncore even though those net proceeds would not be sufficient to discharge the whole of the debts to CBA for which the Grantor was liable. His Honour found:[120]

> "It was for CBA to consider whether it would consent on that basis. Had CBA proposed terms on which it would consent to the transaction, such as obtaining updated valuations of the other securities or restructuring the lending, then it would have been reasonable for [the Grantor] to seek to meet those conditions. When CBA was not prepared to consent and did not propose any basis on which it would be prepared to do so, the implied term did not oblige [the Grantor] to formulate a restructuring proposal and put it to CBA."

Further inquiry, request and negotiation with CBA

[106] The Grantee contended that the Grantor breached the implied term by failing to inquire of CBA as to the terms on which its mortgage over the land could be released to allow the sale to the Grantee to be completed.

[107] The Grantee also submitted that the Grantor breached the implied term by failing to ask CBA "not to stand on its strict legal right of being paid before the second mortgagee, but rather to [take] a commercial decision to enable the transaction to go ahead". It said the Grantor should have asked CBA to give "much more careful consideration to the matter and at a higher level within the bank".[121]

[108] His Honour rejected both contentions, finding that the implied term "did not oblige [the Grantor] to act beyond the bounds of reason". His Honour held that once Oncore and CBA had "categorically refused consent" the Grantor was not required to take further steps to persuade the mortgagee to change its mind, or indeed, to make any further inquiry.[122]

CBA conceding its position under the Deed of Subordination

[109] The Grantee pleaded that the Grantor breached the implied term by not putting to CBA that CBA would have to concede its position under its Deed of Subordination to allow Oncore to be discharged fully. At trial, the Grantee did not dispute that the Grantor would have had to pay Oncore in full from the sales proceeds to obtain its consent to the transaction, and that the Grantor would not have been able to do this

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119 Reasons of the primary judge at [201] and [202].
120 Reasons of the primary judge at [204].
121 Reasons of the primary judge at [206].
122 Reasons of the primary judge at [207] and [208].

unless CBA agreed to release its security over the land without being paid its debt in full.

[110] The primary judge found that neither mortgagee was obliged to consent to the transaction when the resulting proceeds would not be sufficient to discharge its security interest. His Honour held that the obligation under the implied term did not require the Grantor to put such a proposition to CBA.[123]

Whether, absent breach by ABH, the mortgagees would have consented

[111] Although the primary judge found that because he had concluded that the Grantor was not in breach of the implied term it was not necessary to consider whether, if the position were otherwise, there was a chance the Grantor could have obtained the consent of Oncore and CBA, he went on to express some conclusions on that question.

[112] The primary judge found that the causal issue was whether a breach by the Grantor resulted in their failing to consent to the transaction "in the sense that it materially contributed to that outcome, or that it was more likely than not they would have consented had the failure not occurred".[124]

[113] He considered an expert report tendered by the Grantee. The report had addressed what major Australian banks might have done with respect to the Grantor's loan in the final quarter of 2020. It had not addressed Oncore's position. The primary judge concluded that the opinions there expressed as to what a major Australian bank might have done were without substantial foundation and of no probative value.[125] There is no challenge to that finding on appeal.

[114] As to Oncore, the primary judge found:[126]

> "I am not satisfied, had [the Grantor] done all of the things [the Grantee] alleged it was obliged to do, that the mortgagees' consent would have been obtained. On the evidence of Mr O'Neill, which I accept, I have no doubt Oncore would have maintained its refusal to consent."

[115] As to CBA, the primary judge found:[127]

> "CBA's decision not to consent was reasonable and unsurprising. CBA had priority by registration of its mortgage and under the Deed of Subordination. CBA was being asked to stand by and allow the second ranked Oncore to recover its debt in full. There were other obvious risks. The hotel buildings had been undergoing some extensive renovation, broadly described in the IM and in correspondence passing between the parties. CBA had advanced funds for these works. They were yet to be completed. The World, including Australia, was in the midst of a global pandemic affecting much economic activity, including tourism and air travel.

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123 Reasons of the primary judge at [211] to [212].
124 Reasons of the primary judge at [217].
125 Reasons of the primary judge at [226].
126 Reasons of the primary judge at [233].
127 Reasons of the primary judge at [234].

> As a matter of probability, I think CBA would not have given its consent. On the evidence, the chance CBA would have consented is so slight it may be disregarded as fanciful."

Conclusion

[116] The primary judge rejected the Grantee's case and relevantly declared –

(a) that the Grantor had terminated the call option to purchase the land in the HOA by notice in writing on 13 November 2020; and

(b) that the Grantee had no interest in the land.

The issues on appeal

[117] The issues on appeal may conveniently be dealt with by grouping them in the following way:

(a) Alleged errors of law in construing the HOA; in formulating the issues for determination; and in determining who bore the onus: appeal grounds 1, 2, 4 and 5.

(b) Alleged errors of fact concerning the findings as to non-fulfilment of the condition subsequent concerning mortgagees' consent: appeal ground 6.

(c) Alleged errors of fact leading to alleged erroneous conclusions concerning alleged breaches of the implied term: appeal grounds 7, 8, 9 and 10.

(d) Alleged error in failing to find that breaches of the implied term materially contributed to the non-fulfilment of the condition subsequent concerning mortgagees' consent: appeal ground 9A.

[118] Appeal grounds 3, 9(a)(ii), 11 and 12 were not pressed.

[119] By a notice of contention, the Grantor sought to support the orders made by the primary judge on the following bases:

(a) the HOA was not binding absent the obtaining of the mortgagee's consent (the *Masters v Cameron* contention); and

(b) further, or alternatively, the Grantee repudiated its obligations under the HOA by tendering and seeking specific performance of a form of contract not provided by the HOA (until judgement below).

[120] It will only be necessary to consider the notice of contention issues if any of the appeal grounds succeed. Accordingly, I will turn first to consider whether any of the appeal grounds should succeed.

[121] Before doing so, it is necessary to make some observations as to the applicable standard of appellate review in a case like the present.

The approach to appellate review

[122] Recently in *Doerr v Gardiner*, the Court summarised relevant principle in these terms (footnotes in original):[128]

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128 *Doerr v Gardiner* [2023] QCA 160 at [65] to [70].

"This Court is not authorised to intervene on an appeal by way of rehearing under s 61 of the *Supreme Court of Queensland Act 1991* (Qld) and r 766 of the *Uniform Civil Procedure Rules 1999* (Qld) merely so as to substitute its own view as if it were hearing the matter afresh.[129] Rather, the appeal court must consider whether the impugned factual findings were affected by material error.[130] The demonstration of error is essential.[131] The appeal court must conduct its review on appeal having regard to the way in which the parties chose to conduct their litigation for they are generally bound by their conduct of the trial and confined to the issues they litigated in it.[132]

The requirement to conduct a real review of the trial record and an evaluation of the trial judge's reasons may nonetheless warrant this Court drawing its own inferences and conclusions:[133]

> "Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of 'weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect'."

Whilst the appeal court may draw its own inferences or conclusions from primary findings of fact which are not disputed or which are not affected by error,[134] it is necessary to recognise the "natural limitations" in a review which proceeds "wholly or substantially on the record".[135]

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129 *Coulton v Holcombe* (1986) 162 CLR 1, 7 (Gibbs CJ, Wilson, Brennan and Dawson JJ): "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish."

130 *Norbis v Norbis* (1986) 161 CLR 513, 518-519 (Mason and Deane JJ): "According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."

131 *Allesch v Maunz* (2000) 203 CLR 172, [23] (Gaudron, McHugh, Gummow and Hayne JJ), that is, whether the order that is the subject of appeal is the result of some legal, factual or discretionary error. See also *Sutton v Hunter* [2022] QCA 208, [46], *McEntee v SJ Berry* [2022] SASCA 133, [36].

132 *Coulton v Holcombe* (1986) 162 CLR 1; University of Wollongong v Metwally (No 2) (1985) 60 ALR 68, 71 (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ): "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

133 *Fox v Percy* (2003) 214 CLR 118, [25] (Gleeson CJ, Gummow and Kirby JJ). See also Abalos v *Australian Postal Commission* (1990) 171 CLR 167; Devries v Australian National Railways Commission (1993) 177 CLR 472.

134 State Rail Authority (NSW) v Earthline Constructions Pty Limited (In Liq) (1999) 73 ALJR 306; *Warren v Coombes* (1979) 142 CLR 531.

135 *Fox v Percy* (2003) 214 CLR 118, [23] (Gleeson CJ, Gummow and Kirby JJ).

For that reason, there is a recognised reluctance to revisit factual findings which depend on credibility findings.[136] The appeal court proceeds with restraint when addressing those findings because its review is conducted without the benefit of the opportunities available to the trial judge to evaluate the credibility of each witness and to experience the "feeling" of the conduct of a trial which cannot always be "fully shared" from a reading of the evidence on the page:[137]

> "Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole." (footnotes omitted)

Nonetheless, in "some, quite rare, cases" though the facts fall short of being "incontrovertible" the appeal court may decide that the conclusion of the primary judge was "glaringly improbable" or "contrary to compelling inferences".[138] As the High Court explained in *Lee v Lee*:[139]

> "A court of appeal is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law. Appellate restraint with respect to interference with a trial judge's findings unless they are 'glaringly improbable' or 'contrary to compelling inferences' is as to factual findings which are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence. It includes findings of secondary facts which are based on a combination of these impressions and other inferences from primary facts. Thereafter, 'in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge'."

In that kind of case the appeal court must conduct its own review, making all due allowance for the advantages available to the primary judge and, if material error is disclosed, the appeal court cannot "shrink from giving effect" to its own conclusion.[140]"

[123] In the present case, it is necessary to make some preliminary observations.

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136 Devries v Australian National Railways Commission (1993) 177 CLR 472, 479 (Brennan, Gaudron and McHugh JJ), referred to in *Fox v Percy* (2003) 214 CLR 118, [26]-[27] (Gleeson CJ, Gummow and Kirby JJ).

137 *Fox v Percy* (2003) 214 CLR 118, [23] (Gleeson CJ, Gummow and Kirby JJ).

138 *Fox v Percy* (2003) 214 CLR 118, [28]-[29] (Gleeson CJ, Gummow and Kirby JJ).

139 (2019) 266 CLR 129, [55] (Bell, Gageler, Nettle and Edelman JJ).

140 *Fox v Percy* (2003) 214 CLR 118 at [28] to [29] (Gleeson CJ, Gummow and Kirby JJ); *Robinson Helicopter Company Inc v McDermott* (2016) 331 ALR 550 at [43] (French CJ, Bell, Keane, Nettle and Gordon JJ).

[124] First, insofar as the primary judge was required to conclude whether, based on the facts he found, a contractual standard to act reasonably in all the circumstances had been complied with, that conclusion required an evaluative judgment, but it was one to which there could be only one right answer. Such an evaluative judgment attracts the *Warren v Coombes* correctness standard of appellate review, rather than the deferential *House v the King* standard which is applicable to appellate review an exercise of judicial discretion.[141]

[125] Second, this Court's task is to conduct a review of the nature explained in *Doerr v Gardiner* to determine whether it is persuaded that the primary judge erred in the ways alleged in the Grantee's notice of appeal, or, if necessary, by the Grantor's notice of contention. Insofar as any impugned findings have been made solely by reference to inferences from documentary evidence, they must be regarded as findings where this Court is in as good a position as the primary judge to decide on the proper inference to be drawn. Hence the above identification of relevant events before and after the HOA is not identical to that carried out by the primary judge.

[126] Third, not all of the issues arising in this case can be regarded as issues on which this Court is in just as good a position to determine as was the primary judge. There are issues which arise on this appeal which are affected by necessary appellate restraint to one degree or another. In particular, insofar as findings were made by the primary judge which are likely to have been affected by his Honour's acceptance of and giving weight to Mr O'Neill's evidence and his Honour's evaluation of its significance, this Court would not interfere unless persuaded that they were "glaringly improbable" or "contrary to compelling inferences".[142]

[127] Fourth, whether it is carried out at appellate or trial level, the process of weighing evidence is informed by relevant legal principle. In *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore*, the High Court recently reminded us (footnotes in original):[143]

> "The common law incorporates other principles in recognition of the fact that, in the adversarial system, cases are always decided within the evidentiary framework the parties have chosen and are often decided on incomplete evidence. The legal maxim that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted"[144] acknowledges "the problem that in deciding issues of fact on the civil standard of proof, the court is concerned not just with the question 'what are the probabilities on the limited material which the court has, but also whether that limited material is an appropriate basis on which to reach a reasonable decision'"[145].

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141 See *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [16] per Kiefel CJ, Gageler and Jagot JJ, Steward and Gleeson JJ separately agreeing generally with the majority's view on the appellate standard of review, and in particular their Honour's citing with approval *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 562 to 563 [46]-[49] per Gageler J.

142 *Robinson Helicopter Company Incorporated v McDermott* (2016) 90 ALJR 679 at [43].

143 *GLJ v The Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 97 ALJR 857 at [58] and [60] per Kiefel CJ, Gageler and Jagot JJ.

144 *Blatch v Archer* (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

145 *Cross on Evidence*, 13th ed (2021) at 47 [1215], quoting *Ho v Powell* (2001) 51 NSWLR 572 at 576 [14]-[16].

…

A court is not bound to accept uncontradicted evidence. Uncontradicted evidence may not be accepted for any number of reasons including its inherent implausibility, its objective unlikelihood given other evidence, or the trier of fact simply not reaching the state of "actual persuasion" which is required before a fact may be found[146]. "To satisfy an onus of proof on the balance of probabilities is not simply a matter of asking whether the evidence supporting that conclusion has greater weight than any opposing evidence ... It is perfectly possible for there to be a scrap of evidence that favours one contention, and no countervailing evidence, but for the judge to not regard the scrap of evidence as enough to persuade him or her that the contention is correct."[147] The evidence must "give rise to a reasonable and definite inference" to enable a factual finding to be made; mere conjecture based on "conflicting inferences of equal degrees of probability" is insufficient[148]. As Dixon CJ said in *Jones v Dunkel*[149], the law:

> "does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.""

Alleged errors in construing the HOA; in formulating the issues for determination and in determining who bore the onus: appeal grounds 1, 2, 4 and 5

The appeal grounds

[128] Appeal grounds 1, 2, 4 and 5 were as follows:

> "1. The learned trial judge should have found that:
>
> (a) the respondent's entitlement to terminate the agreement was dependent upon the existence of a state of affairs, namely that the respondent was unable to obtain the consent of its two mortgagees to the agreement represented by the Heads of Agreement; and
>
> (b) the evidence did not establish that that state of affairs existed up to or on 13 November 2020.
>
> 2. The learned trial judge erred in assessing the respondent's ability to obtain the consent of its mortgagees to the transaction by approaching that matter on the basis that:

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146 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.
147 *Brown v New South Wales Trustee and Guardian* (2012) 10 ASTLR 164 at 176 [51].
148 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5.
149 (1959) 101 CLR 298 at 305.

(a) the only question was whether the net proceeds of sale (after unquantified 'transaction costs') exceeded the debts secured by the mortgages; and

(b) the only money that would be available to pay the mortgagees would be the net proceeds of sale from this transaction.

4. The learned trial judge should have held that:

(a) the respondent bore the onus of establishing that it was unable to obtain the consent of its mortgagees;

(b) the relevant facts as to the ability of the respondent to obtain their consent were matters peculiarly within the knowledge of the respondent; and

(c) a *Jones v Dunkel* inference should be drawn against the respondent by reason of the unexplained failure of the respondent to call as witnesses the directors of the respondent, its agent Michael McFie, and the person who had authority within the CBA to give consent to the transaction.

5. The learned trial judge erred in deciding the case on the basis that it turned on:

(a) whether the respondent was in breach of an implied term to take such steps as were objectively required and reasonable in the circumstances to obtain the mortgagees consent, rather than whether the respondent, was unable to obtain the mortgagees' consent; and

(b) whether, but for breach of that implied term, the consent of the mortgagees would probably have been given, rather than whether the respondent was unable to obtain the mortgagees' consent."

Consideration

[129] It is appropriate to recapitulate the critical handwritten term of the HOA:[150]

> "The Call Option Agreement is subject to the [Grantor] obtaining the consent of its mortgagee to this transaction within the Due Diligence Period. If the Call Option Agreement is terminated by the [Grantor] due to it being unable to obtain the consent of its Mortgagee to this transaction, the [Grantor] agrees to compensate the [Grantee] for its reasonably incurred due diligence costs, capped at $50,000 and to be verifiable costs incurred by the [Grantee]."

[130] In my view the first sentence of the clause must be construed to create a condition for the benefit of the Grantor that the obligation of the parties to continue to perform the HOA depends on the occurrence or non-occurrence of a particular event, namely

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150 The primary judge explained that handwritten alterations had been finalised by communications between the parties between 3 and 7 October 2020: see reasons for the primary judge at [41] to [49].

the Grantor obtaining the consent of its mortgagees[151] to this transaction within the Due Diligence Period. If the event does not occur the Grantor has a right to terminate.

[131] Of course, as the primary judge concluded, and as was common ground in this Court, each party was the subject of an implied obligation "… to take such steps as were objectively required and reasonable in the circumstances to achieve the end specified by the HOA".[152] The significance of such an implied obligation is that its performance or non-performance by the Grantor may affect whether the Grantor is able to take advantage of its right to terminate.

[132] In *Al Achrafi v Topic*, Robb J was dealing with a contract in which the end specified was not the granting of a call option but was completion of a sale of land, but his Honour's helpful summary of applicable legal principle is, as the primary judge correctly found, nevertheless apposite:[153]

> "1 Where a contract for the sale of land gives a party a right to rescind the contract upon the occurrence or non-occurrence of a particular event, the party is subject to an implied obligation to do, or cooperate in doing, what is reasonably necessary to avoid the right to rescind arising, in order to permit completion of the contract.
>
> 2 The party is precluded from exercising the right to rescind if (a) the party has not performed its implied obligation; and (b) the failure has caused the event which entitles the party to rescind. Mere breach of the implied obligation is insufficient to preclude the right of rescission.
>
> 3 The same result arises where there is an express obligation upon a party to take steps to avoid the event that gives rise to the right of rescission, provided that performance of the obligation is not made a condition to the exercise of the right to rescind. Where performance of the obligation is not made a condition of the right to rescind, mere breach does not preclude rescission, but only does so if the breach has caused the right to rescind to arise.
>
> 4 The burden of proof falls on the party who denies the right of the party who has rescinded to do so, to prove both the breach of the implied or express obligation by the rescinding party, and that the breach caused the event that has given rise to the right to rescind.
>
> 5 Notwithstanding the placement of the legal burden of proof, the tender of limited evidence by the party subject of that burden may cause a burden of adducing evidence to shift to the other party, because relevant facts are peculiarly within the knowledge of the rescinding party, to lead evidence as to what

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151 It was not contended, correctly in my view, that the singular should not be construed as encompassing the plural.

152 Reasons of the primary judge at [169].

153 *Al Achrafi v Topic* [2016] NSWSC 1807 at [62] per Robb J.

happened, because otherwise inferences may be drawn against the rescinding party.

6 The rules that are applicable are materially different where, as in the present case, the contract makes the right of one party to rescind conditional upon the performance by that party of an obligation to take action intended to avoid the right to rescind arising.

7 If an action required by the obligation imposed on the rescinding party is not done, the right to rescind is lost, and it is immaterial that the breach of the obligation did not cause the right to rescind to arise.

8 If an action is required by the obligation imposed on the rescinding party, it must be done, even if the doing of that action would not necessarily avoid the right to rescind arising.

9 The issue of where the burden lies depends upon an analysis of the effect of the contract, to determine the substance of what must be proved by the parties to establish, or negate, the right to rescind. It should not depend solely on the fortuity of who is the plaintiff and who is the defendant.

10 In principle, the substance of the obligations should require the party who resists the validity of the rescission to prove that the right of rescission was conditional, and to establish the terms of the condition. It should then fall upon the rescinding party to prove that the condition has been satisfied, as the right to rescind will only exist in that event.

11 The possible shifting of the evidentiary onus may also arise in this context."

[133] I have mentioned that the Grantee adopted Robb J's reasoning both in this Court and below. The problem was that the contract before Robb J in *Al Achrafi v Topic* contained a term of the type referred to in proposition 6 and following. As the primary judge recognised, the HOA did not, and, accordingly, propositions 1 to 5 applied to the present circumstances. Therefore:

(a) The Grantor was the subject of the implied obligation to take reasonable steps in the circumstances to achieve the end specified by the HOA. The content of that obligation required the Grantor to take reasonable steps to obtain its mortgagees' consent to the transaction.

(b) Once the Grantor failed to obtain the consent of its mortgagees to the transaction within the Due Diligence Period, the Grantor had a right to terminate.

(c) However, the Grantor would be precluded from exercising the right to terminate if –

(i) it had breached its implied obligation; and

(ii) its breach had caused its failure to obtain the consent of its mortgagees.

(d) The burden of proof fell on the Grantee (as the party who denied the right of the Grantor to terminate), to prove both the breach of the implied obligation by the Grantor and that the breach caused its failure to obtain the consent of its mortgagees.

(e) Notwithstanding the placement of the legal burden of proof, the tender of limited evidence by the Grantee might cause a burden of adducing evidence to shift to the Grantor, where relevant facts were peculiarly within the knowledge of the rescinding party, to lead evidence as to what happened, because otherwise inferences may be drawn against the Grantor.

[134] I would add to the final proposition the observation that the evaluation of the evidence on whether the legal burden has been discharged must also comply with the principles identified at [127] above.

[135] As the primary judge recognised, the evidence clearly demonstrated that the Grantor failed to obtain the consent of its mortgagees within the Due Diligence Period. Once that position was reached the requisite next step in the analysis was to consider whether the Grantor was precluded from exercising its right to terminate because it had breached the implied term in causally significant ways. In other words, to the question whether the Grantor's failure to obtain the requisite consent was because it had failed to take reasonable steps so to do. Evidence as to whether Grantor was "able" or "unable" to obtain the mortgagees consent fell to be analysed within that context and not otherwise.

[136] To put it another way, it could be relevant for the Grantee (who carried the onus of proof that the Grantor had breached the implied term in causally significant ways) to prove that the Grantor was "able" to obtain consent, in the sense that there was a path to consent reasonably open to the Grantor and which would have led to consent. That evidence would certainly be relevant to the question of both breach and causal significance of breach. It will appear that the Grantee did not prove the existence of any such path.

[137] When the primary judge treated separately the question whether the Grantor was "able" or "unable" to obtain the mortgagees' consent as an antecedent issue to the question whether the Grantor had breached the implied term in causally significant ways, the primary judge should be understood as having sought to meet the false argument advanced by the Grantee.[154] As I have mentioned, the first sentence of the HOA clause had the result that the obligation of the parties to continue to perform the HOA depended on the occurrence or non-occurrence of a particular event, namely the Grantor obtaining the consent of its mortgagees to this transaction within the Due Diligence Period. The Grantee's false argument – repeated in the appeal grounds presently under consideration – was that the obligation depended on the occurrence or non-occurrence of a particular state of affairs, namely that the Grantor was not able to obtain consent. The Grantee argued that the onus was on the Grantor to prove that it was not able to obtain consent.

[138] There is no warrant in the language of the clause to construe it in that way. Presumably the Grantee seeks to justify the proposition by reference to the second

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[154] Nevertheless, in so doing, the primary judge made findings of fact which were relevant to his subsequent assessment of the questions of the fact and causal significance of any breach of the implied obligation.

sentence of the clause. But the second sentence of the clause is not expressed to affect the first sentence. Nor should it be so construed. Rather, the second sentence assumes that the first sentence is to be construed in the way I have described and then stipulates a particular obligation which operates if the circumstances described in the first clause of the second sentence exist. The operation of the obligation is not presently in issue.

[139] Having reached the position that the Grantor failed to obtain the consent of its mortgagees within the Due Diligence Period and had a prima facie right to terminate, the primary judge proceeded to identify the nature of the implied term and then to consider whether the Grantee could prove that the Grantor was precluded from exercising its right to terminate because it had breach the implied term in causally significant ways. The way in which his Honour framed the question was entirely consistent with the proper construction of the HOA; the nature of the implied term; and an understanding of the relevant principles concerning onus of proof and when breach of such an implied term might preclude termination.

[140] I turn briefly to summarise the significance of the foregoing discussion to the specific grounds of appeal:

(a) Appeal ground 1: This ground fails because it is based on a false construction of the relevant clause of the HOA. The evidence established that the Grantor failed to obtain the consent of its mortgagees. It then had a right to terminate unless the Grantee (the onus of proof being on it) proved that it was precluded from so doing because of causally significant breaches of the implied obligation.

(b) Appeal ground 2: This ground fails for the same reason as appeal ground 1. When considering whether a causally significant breach was established, the primary judge did not limit himself only to the proceeds question but considered the various bases of alleged breach in the way described at [87] *et seq*. above.

(c) Appeal ground 4: This ground fails because the onus was not as the appeal ground suggests. Rather, the Grantee had the onus of proving both the breach of the implied term by the Grantor, and that the breach caused the Grantor's failure to obtain the consent of its mortgagees. Questions of evaluation of the evidence and drawing of inferences fell to be considered in relation to the alleged errors in fact finding concerning the questions of the fact and causal significance of any breach of the implied obligation, and not otherwise.

(d) Appeal ground 5: This ground fails because the primary judge was right to frame the question in the way impugned by the appeal ground.

Alleged errors of fact concerning the findings as to non-fulfilment of the condition subsequent concerning mortgagees' consent: appeal ground 6

[141] Appeal ground 6 was as follows:

> "The finding made by the learned trial judge that [the Grantor] was unable to obtain the consent of [Oncore] and the CBA to the transaction (paras.159 and 161) was against the evidence or the weight of the evidence."

[142] This appeal ground is premised on the erroneous proposition of construction considered and rejected under the previous heading. It fails for the same reasons. The only relevant question analogous to that raised by appeal ground 6 was whether the Grantor had sought and failed to obtain that consent. The primary judge was plainly right to find that the evidence supported the conclusion that the Grantor had sought and failed to obtain consent. The relevant condition had not been fulfilled and the Grantor had a prima facie right to terminate. Alleged errors concerning the question of the fact and causal significance of any breach of the implied obligation must be dealt with under the next heading.

Alleged errors of fact leading to alleged erroneous conclusions concerning alleged breaches of the implied term: appeal grounds 7, 8, 9, 9A(a) and 10

Appeal grounds

[143] Appeal grounds 7, 8, 9, 9A and 10 were as follows:

> "7. The finding (at para.187) that the difference between the $41.5m purchase price and the total secured debt at 13 November 2020 was $57,582.04 was against the evidence or the weight of the evidence (para.187).
>
> 8. The findings by the learned trial judge (at para. 203, 204 and 210) that:
>
> (a) the net proceeds of sale (reduced by such 'transaction costs') would not be sufficient to discharge the whole of debts owing to CBA and Oncore as at 13 November 2020; and
>
> (b) it was for CBA to consider whether it would consent to the transaction on the basis that the net proceeds of sale, after the payment of transaction costs, would not be sufficient to discharge the whole of the debts owed to CBA and Oncore,
>
> were against the evidence or the weight of the evidence.
>
> 9. The learned trial judge ought to have made the following findings of fact based on the evidence:
>
> (a) as at the date of the agreement (7 October 2020):
>
> (i) the total amount owing to CBA and secured by its mortgage was not more than $36,165,817.39;
>
> (ii) [not pressed]
>
> (iii) the total amount owing to Oncore and secured by its mortgage was not more than $4,833,141.66; and
>
> (iv) the total amount owing to both CBA and Oncore and secured by their respective mortgages was not more than $40,998,959.05;

(b) the market value of the hotel and gaming business operated by ABH Operations Pty Ltd was $18.5m as at 7 October 2020 (as the respondent admitted);

(c) the market value of the Reef Gateway Hotel was $27.5m as at 7 October 2020 (as the respondent admitted);

(d) as at 13 November 2020, the total amount owing to CBA and secured by its mortgage was not more than $36,063,221.27;

(e) as at 13 November 2020, the total amount owing to Oncore and secured by its mortgage was not more than $4,857,196.69;

(f) as at 13 November 2020, the total amount owing to both CBA and Oncore and secured by their respective mortgages was not more than $40,920,417.96; and

(g) as at 13 November 2020 the purchase price exceeded the total amount owing to both CBA and Oncore and secured by their mortgages by not less than $579,582.04.

9A. The learned trial judge ought to have found (contrary to the findings in paras. 170 to 213) that

(a) the respondent acted in breach of the implied term (set out, in substance, at para. 169) to do all that was reasonable on its part to obtain the mortgagees' consent. By:

(i) delaying any request for Oncore's consent until 10 November 2020 and CBA's until 12 November 2020:

(ii) the terms in which it purported to seek the consent of both CBA and Oncore: and

(b) such breaches materially contributed to non-fulfilment of the condition

10. The finding by the learned trial judge that the respondent was unable to obtain the consent of its mortgagees:

(a) despite not seeking the consent of Oncore until 10 November, and despite not seeking the consent of the CBA until 12 November (para. 181); and

(b) despite not seeking the consent of the CBA on the basis of the pleaded contentions set out at paragraph 185 of the Judgement,[155] (para. 189),

was against the evidence or the weight of the evidence."

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155 This is a reference the Grantee's case that the Grantor breached the implied term by failing to seek both mortgagees' consent on the basis that they would be paid out in full out of the proceeds of sale at settlement.

Consideration

[144] Save for appeal ground 9A(b) – which will be dealt with under a separate heading below – the grounds considered under this heading all address alleged errors of fact made by the primary judge in relation to his analysis of whether the Grantee had established that the Grantor was in breach of the implied obligation.

Alleged errors concerning findings as to the sufficiency of the proceeds of any sale

[145] The relevant appeal grounds are appeal grounds 7, 8(a), 9(a), 9(d) to 9(g) and 10(b).

[146] Most of the findings criticised under this group of appeal grounds are to be found in this passage from the primary judge's reasons:[156]

> "[The Grantee] also contended that [the Grantor] breached the implied term by:
>
> (a) failing to seek CBA's consent on the basis that the proceeds of sale would be sufficient (after paying the principal and interest to Oncore) to repay the amount owing to CBA at that time for a principal and interest; and
>
> (b) failing to seek Oncore's consent on the basis that the principal and interest owning to Oncore would be paid out of the proceeds of sale at settlement.
>
> Various figures were put in written submissions at the end of the trial. These were derived from financial records and bank statements. On one calculation, on 13 November 2020, the outstanding debt secured by the CBA mortgage was $36,063,221.27, and that secured by the Oncore mortgage was $4,857,196.69; making a total of $40,920,417.96. This did not include the $1.5 million Oncore advanced to Mr McFie, which Oncore required to be repaid if it was to consent to the transaction.
>
> If [the Grantee] exercised the call option, then, [the Grantor] would have its own transaction costs. [The Grantor] would have to seek to negotiate a surrender of the existing leases and execution of new leases for each of the tenancies. This would necessarily involve [the Grantor] incurring some costs. One may assume CBRE, as [the Grantor's] agent, would be entitled to a commission, having introduced [the Grantee] as a buyer. It seems unlikely [the Grantor] could keep the transaction costs below the modest $57,582.04 difference between the $41.5 million purchase price and the total secured debt at 13 November 2020.
>
> In the circumstances, I am satisfied it was likely that the sale proceeds, due under a contract that might arise from an exercise of the call option, would be insufficient to pay CBA, Oncore and the transaction costs.
>
> At the trial, [the Grantee] seemed to concede that the proceeds of a sale for $41.5 million would not be sufficient (after paying the principal and interest to Oncore) to repay the amount owing to CBA

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156 Reasons of the primary judge at [185] to [190].

> for a principal and interest at that time. Indeed, the shortfall might be up to about $5 million. [The Grantor] could not have put [the Grantee's] pleaded contentions … to CBA without breaching the statutory prohibition on conduct likely to mislead. …
>
> In the circumstances, I am not satisfied that [the Grantor] breached the implied term by failing to do so."

[147] Appeal grounds 7, 8(a) and 9(g) identify that the primary judge made an error. However, in my assessment it was an immaterial error. I observe:

(a) The figures from which $40,920,417.96 was derived were those presented by the Grantor, the explanation for which appeared in two important places in the material before the primary judge.

(b) First, in attachment B to the Grantor's written submissions.[157] That was an analysis which identified the total amount secured by the CBA and Oncore mortgages calculated as at 13 November 2020, but excluding the $1.5 million Oncore loan and also transaction costs. Attachment B identified references to the documentary evidence which justified the calculations there expressed.[158]

(c) Second, in the table handed to the primary judge by the Grantee's senior counsel as:[159]

> "… a table where we've collected together the evidence about what was the debt at various dates to the two mortgages. … So this is an attempt to capture what the plaintiff says the debt was and the reference to the documentary evidence but also captures in the right-hand column what the defendant says the debt was at various times."

(d) Both documents recorded that the $40,920,417.96 was a figure deriving from the Grantor's analysis. The second document identified the Grantee's comparable figure was $40,606,025.61.

(e) It is plain that the $57,582.04 figure referred to by the primary judge was intended by him to represent the difference between $41,500,000 and $40,920,417.96, namely $579,582.04 (which is the figure which appeal ground 9(g) says the primary judge ought to have found). The error was typographical, in that it is obvious that when recording in figures the calculation he had described in words, he had omitted the "9". But that error was immaterial, because the words the primary judge used made it clear what calculation he had intended to reference.

(f) Moreover, the impugned figure was mentioned in the context of the primary judge's finding that it seemed to him unlikely that the Grantor could keep the transaction costs below the calculation he had intended to reference. The evidence before the primary judge was that CBRE's agent's commission was 1% of the sale price, plus GST, namely the sum of $456,500. That would only leave $123,082.04 out of the $579,582.04.

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157 ARB2 at 330 to 332.

158 It was conceded in oral argument that there was an error concerning a particular drawdown in one of the grantor's loan facilities which led to an overstatement of the amount of the indebtedness for that facility, but the fact of that error is not material to my analysis: see transcript 1-48.

159 ARB2 at 209 to 210 and see the transcript at ARB6 2259 lines 16 to 30

(g) It seems likely that in arriving at the finding he expressed, the primary judge took into account an estimate of $100,000 stated in a document which he had seen but which was not ultimately tendered.[160] On that basis I would find that he erred. The Grantor nevertheless sought to defend the finding on the basis that it could be justified as an estimate made by a commercial list judge where it was obvious that there must have been legal costs and they could not be *de minimis*. I am not persuaded that there was a sufficient evidentiary basis to justify a primary judge making that finding. Accordingly, I think error has been demonstrated.

(h) The finding of error does not matter. The impugned calculation becomes immaterial having regard to the analysis which follows.

[148] In relation to appeal grounds 9(a), 9(d) to 9(f) and 10(b), the two critical findings are those advanced in the third last and last paragraphs of the quote at [146] above. In my view, the primary judge's reasons for reaching those findings can legitimately be criticised. The primary judge did not actually find that the attachment B figures were the correct figures, let alone explain why he preferred those figures over those advanced by the Grantee. I propose to consider myself whether I should be persuaded that the two critical findings should be regarded as erroneous. I conclude they are not. I turn to explain why.

[149] First, we are here addressing the question whether it was a breach of the implied term for the Grantor not to seek the mortgagees' consent on or prior to 13 November 2020 on the basis that both mortgagees would be paid out in full from the proceeds of sale.

[150] Second, it must be recalled that the hypothesised basis cannot be regarded as a notional payment out in full on 13 November 2020, but rather must be regarded as a notional payment out in full consequent upon an exercise of the call option, a settlement of the contemplated conveyancing transaction and a reception of the proceeds of sale by the Grantor. In other words, answering the question posited in the previous paragraph requires a consideration of what was reasonable for the Grantor to do in the circumstances it was facing, where the facilities could foreseeably be further drawn down for ongoing renovation works and where interest would keep accruing. The Grantor would inevitably be engaged in a certain amount of prediction and estimation. When would the settlement be? What would be the amount of the mortgagee's debt as at that future date? What amount would be likely to be available from the proceeds of sale after the costs of the sale are deducted?

[151] Third, the evidentiary framework which the parties ultimately chose to present to the primary judge and from which he had to decide was that which was crystallised in the two tables to which I have earlier referred, namely attachment B to the Grantor's written submissions,[161] and the table handed up to the primary judge by the Grantee's senior counsel.[162]

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160 The primary judge had at [108] of his reasons earlier referred to that document (tab 151) and I would accept the Grantee's submission that that document did not find its way into evidence. The primary judge said he would note that documents 146 to 152 were admitted into evidence, but in context it was obvious that that was a statement in response to counsel having stated he proposed to tender documents 146, 147, 149 and 152. His Honour's statement should be understood as referring only to those four documents.

161 ARB2 at 330 to 332.

[152] Fourth, each of those documents sought to do calculations of the mortgagees' debt as at the date of the HOA (7 October 2020); the date by which consent had to be obtained (13 November 2020); and the date on which any real property contract to be created by the exercise of the option on the terms to be agreed in accordance with the HOA would have settled (25 January 2021).

[153] Fifth, notwithstanding the point I have made at [150] above, this was a legitimate course to take because if the Grantee had proved that the correct calculation demonstrated an apparent likelihood that the mortgagees would have been paid out in full, an evidentiary onus may well have then fallen on the Grantor to explain why it did not seek consent on that basis or why the calculations presented by the Grantee were wrong. Such evidence might have provided a real foundation on which the hypothesis that the Grantor had breached the implied term could have been developed.

[154] Sixth, however, the figures presented by the Grantee did not make out the starting point of its case.[163] For the sake of analysis, let it be assumed that the primary judge should have accepted the Grantee's calculations as presented in the Grantee's table because they are the figures which the Grantee told the primary judge correctly identified the debt at relevant times.[164] Even on the Grantee's table, as at 13 November 2020 the total debt owed to CBA and Oncore and secured by the Grantor's mortgages was $40,606,025.61. But 13 November 2020 was never going to be the date on which monies would be required to pay out the mortgagees. That date would be a hypothetical subsequent date on which any contract for sale entered into consequent upon exercise of the call option settled. The parties were evidently agreed on treating 25 January 2021 as that date. On the Grantee's table by 25 January 2021 the $40,606,025.61 secured debt would have grown to $42,788,079.08, a figure well in excess of the sale price of $41,500,000, thereby demonstrating the likely insufficiency of the sale proceeds to pay out in full the amounts secured by the mortgages.

[155] Seventh, the likely insufficiency of proceeds as at the time they would be needed (i.e. 25 January 2021) becomes more obvious when one takes into account the following matters in order to work out how much of the proceeds might be available to pay to the mortgagees to get their consent (as one must seek to do if one is to act consistently with the implied term requirement to take reasonable steps):

(a) the $456,500 commission which would have to be paid to CBRE;

(b) the legal costs of the transaction;

(c) the amount of any CBA Early Repayment Adjustment and Break Costs (see [20](g)above);

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162 ARB2 at 209 to 210.

163 And no evidentiary onus was cast on the Grantor. Nor was there any occasion to draw a *Jones v Dunkel* inference against the Grantor based on failure to call Mr McFie or any of its directors.

164 This assumption renders it unnecessary to consider the various criticisms of the Grantor's attachment B figures which senior counsel developed in the course of oral argument before this Court.

(d) the potential that there might have been further drawdown on the facilities the subject of the CBA Facility Agreement (the evidence suggesting that as at 13 November 2020 there was a little over $2 million available to be drawn down by ABHO);

(e) the fact that Oncore also required payment of the $1.5 million loan to Mr McFie (as to which see [18] and [53] to [58] above).

[156] The result is that in my view, the evidence presented by the Grantee did not justify a finding that performance of the implied term required the Grantor to seek its mortgagees' consent on the basis that the eventual proceeds of sale would be sufficient to pay out the debt secured by their mortgages. Indeed, the contrary was the case. On the evidence before the primary judge and given the way the parties had framed the issue for him it is difficult to see how the Grantor could reasonably have formed the view on or before 13 November 2020 that the proceeds of any eventual settlement would be likely to permit both mortgagees to get their debts paid out in full.

[157] It is appropriate to record three other arguments advanced in the course of oral argument before this Court. The first was abandoned, and there is no merit in either of the other two.

[158] The first argument was that the Grantee's own figures as set out in the Grantee's table were wrong in various respects. As to this, three things may be said. First, at trial the Grantee told the primary judge that its figures captured what the debt was at various times: see the quote from the transcript at [147](c) above. Second, the Grantee is bound by the way in which the issue was so framed for the primary judge. Third, the submission was ultimately withdrawn.

[159] The second argument concerned the correctness or otherwise of the primary judge's observation in the second last paragraph of the quote at [146] above about the Grantee seeming to have conceded an insufficiency of proceeds which may have been up to $5 million. As to this, three things may be said. First, the primary judge did not find that the Grantee had in fact made that concession. Second, the primary judge was right to conclude that the Grantee had seemed to make that concession, but for reasons which are unnecessary to develop, he would have been wrong had he found that the Grantee had in fact made that concession. Third, it is irrelevant whether or not there was a concession.

[160] The third argument was the suggestion that there was some flaw in the analysis of examining what was available to discharge the mortgagees' indebtedness out of the proceeds of sale. The suggestion was that there was no proof that there might not have been some other means of paying relevant expenses, including, for example, CBRE's commission and any other transaction costs. As to this, two things may be said. First, that was neither the Grantee's pleaded case nor its ground of appeal. Second, the onus of proof was on the Grantee.

Alleged errors concerning findings in relation to the timing and terms by which consent was sought

[161] The relevant appeal grounds concerning delay are appeal grounds 9A(a)(i) and 10(a). The remaining appeal grounds were appeal grounds 8(b), 9(b) and (c), 9A(a) and 10(a). They identified matters which affected the terms by which consent was

in fact sought and suggested that the Grantor's approach should have been framed more persuasively, whether –

(a) by pointing out to CBA the implications of granting consent by drawing particular attention to relevant financial information (see [100] above); or

(b) by proposing to CBA (whether on its own initiative or consequent upon inquiry of CBA) changes to the existing manner of securitization of its loans with a view to obtaining that consent (see [103], [107] and [109] above).

[162] The Grantor's contractual duty owed to the Grantee required it to take reasonable steps to obtain the consent of **both** Oncore and CBA.[165] In order to determine whether that duty was breached one must give thought to what its content was. A determination of the content in any particular case will require consideration of the steps which a reasonable and prudent mortgagor "acting in its own interests and determined to obtain approval would take."[166] It will necessarily depend on, amongst other things, whether a reasonable mortgagor in the shoes of the Grantor would have thought that taking such steps would advance its prospects of obtaining consent from the relevant mortgagee, or conversely that failing to take the steps would necessarily diminish those prospects.

[163] The pleaded case of breach in relation to obtaining the consent of Oncore was limited to contending that the duty was breached by –

(a) the failure to seek Oncore's consent until 10 November 2020; and

(b) the failure to seek consent on the basis that the principal and interest owing to Oncore would be paid out of the proceeds of sale at settlement.

[164] For the reasons expressed by the primary judge, there is no reason to think that there was any breach of the implied term in relation to the timing of seeking Oncore's consent. There was no evidentiary basis for a conclusion that a reasonable mortgagor would have thought it necessary to approach Oncore earlier than Oncore was in fact approached. And Mr O'Neill's evidence demonstrated that delay was not an issue for him. A reasonable mortgagor would have thought (rightly as Mr O'Neill's evidence demonstrated) that the principal issue for Oncore would be payment of all of what Mr O'Neill regarded was the debt. For reasons already expressed the Grantee has not demonstrated breach of the implied term in relation to the basis on which Oncore was approached in relation to payment.

[165] The focus then turns to whether breach was established in relation to the timing and terms of the approach to CBA.

[166] In the present case it seems to me that a reasonable mortgagor in the Grantor's shoes would have appreciated at least the following:

(a) First, and for reasons already expressed, the proceeds of any sale would likely be insufficient at the time of settlement to pay out both the full amount of debt the Grantor would then owe to Oncore and the full amount of debt that

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165 As previously mentioned, the primary judge found that the implied term was that each party was to take such steps as were objectively required and reasonable in the circumstances to achieve the end specified by the HOA.

166 *Joseph Street Pty Ltd v Tan* (2012) 38 VR 241 at [49] per Warren CJ, Nettle JA and Cavanough AJA. The observation was made in relation to a clause which required "best endeavours" to procure registration of a subdivision plan but is nevertheless apposite to the present implied term.

the Grantor would then owe to CBA under the CBA Facility Agreement. Accordingly, any prospect of getting both CBA and Oncore to consent necessitated asking either or both of them to concede at least some part of their positions.

(b) Second, there was no point seeking CBA's consent unless the Grantor could get Oncore's consent. An attempt had been made to do that, in the terms discussed at [53] to [55], but that attempt failed.

(c) Third, CBA was entitled to refuse consent unless it was offered payment in full of all the debts secured by the Grantor's mortgage. And CBA was entitled to insist that it was paid before Oncore was paid. Further, as explained at [28] above, the Grantor was liable not merely for the amounts owing under the six specified facilities from time to time but was liable also for any monies otherwise owed to CBA by any of the other corporate guarantors.

(d) Fourth, Oncore's position meant that if there was going to be any prospect of getting consent, CBA would have to make significant concessions from its position.

(e) Fifth, CBA's letter of 15 October 2020 (see [27] above) suggested, first, that CBA must have relatively recently reviewed the then current state of its rights under the CBA Facility Agreement in light of the manner of securitization of its loans and its appetite for risk, and determined to continue to support the borrowers despite the fact that they were in breach of the CBA Facility Agreement. The letter suggested, further, that although CBA had decided not to act, it was monitoring the performance of its debtors under that agreement.

(f) Sixth, the same letter suggested that Mr Bignell or the author of the letter were the appropriate people to contact.

[167] Having regard to those considerations, I would conclude that as between 15 October 2020 and the time CBA's consent was sought, a reasonable mortgagor in the Grantor's shoes would have thought that CBA was unlikely to need much time to make up its mind in response to a request for consent. Such a mortgagor would have thought that CBA had only recently reviewed its approach to the relevant indebtedness and might reasonably be thought to know its own mind as to whether it wanted to concede its position in any respect at all. In hindsight that seems to be confirmed by the fact that Mr Bignell was able to send his actual email response within 11 minutes of the request being sent. Finally, a reasonable mortgagor in that position would have appreciated that it was approaching CBA seeking concessions from the vulnerable position of already being in breach of the CBA Facility Agreement and already having been given a concession. There was good reason to be tentative in the approach to CBA.

[168] Against that background, I am not persuaded that it was unreasonable conduct by the mortgagor to delay approaching CBA until after it had established what Oncore's attitude was to the consent. And given Oncore's attitude and absent any evidence which suggested there would be reason to think that CBA would be motivated to give away its contractual advantages under the Priority Deed, the reasonable mortgagor would be most pessimistic of the prospects of obtaining consent from CBA. The approach which the Grantor in fact made to CBA sought consent on the basis that CBA would have to make real concessions. In the context

in which it occurred that was the only reasonable way in which CBA could have been approached.

[169] In its oral submissions before this Court the Grantee suggested that the performance of its obligation to take reasonable steps to obtain CBA's consent should have led to it offering to restructure its lending arrangements with CBA in ways which might have rendered it more attractive to CBA to grant its consent.

[170] The first thing to be said about that was that the Grantor's actual approach to CBA was in effect such an offer. It was implicit in the approach it made that if CBA consented it would be allowing an incomplete reduction of the full amount of its indebtedness in return for a changed securitization picture.

[171] But the second thing to be said concerns what was, to my mind, the most compelling obstacle to any acceptance of that proposition, namely the inadequacy of the evidence in relation to matters which would have affected whether reasonable steps would require proposing a restructure, or to put it another way, whether it would be unreasonable not to propose a restructure. The evidence painted an insufficiently complete picture of the extent of the knowledge which the reasonable mortgagor would have had–

(a) of the extent of the indebtedness owed by all persons who fell within the definition of "obligor" under the CBA;

(b) of the extent and worth of the securities held by CBA in relation to that indebtedness; and

(c) (to the extent that the decision making by the reasonable mortgagor would necessarily be affected by the likely decision making of other corporate bodies), whether steps to be taken in any proposed restructure by other corporate bodies could be regarded as reasonable from the other corporate bodies own independent point of view.

[172] The hypothesis that reasonable steps would have required proposing a restructure to CBA was essentially speculative in the absence of a more complete picture.

[173] For completeness I should address a further proposition which was advanced during oral argument in this Court, namely that when one has regard to the timing and terms of the approaches made to the two mortgagees one could hardly imagine any more half-hearted an approach to mortgagees to obtain consent. It was then suggested that the Grantor's motivation for so doing might have been the valuation figures ascertained in the Knight Frank Valuation, which seemed to suggest the Hotel was worth more than the Grantee would be paying for it.

[174] The first response to that argument lies in the analysis I have just expressed. There was good reason to be tentative in the manner of approaching CBA once Oncore had refused consent. The second response is that there is no pleaded bad faith case. The third response is that it attributes rather too much significance to the Knight Frank Valuation.[167] As to this:

(a) On 10 December 2019, Ian Skelsey, a registered valuer, and Richard Nash, had prepared a valuation of the Airlie Beach Hotel on the assumption the

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167 ARB5 at 1573 to 1700.

operating lease to ABHO had expired. They valued the Hotel as a "going concern" at $60 million, based on an estimated net annual operating profit of $6,199,594 from the hotel business and adopting a yield of 10.33%.[168]

(b) The Knight Frank Valuation represented an increase of 27% in the "going concern" value over about ten and a half months since the Skelsey valuation.[169] And this occurred during a period in which the hotel industry had been adversely affected by the Covid-19 pandemic.

(c) The Knight Frank Valuation as produced, however, was for Michael McFie "for internal accounting purposes only" and stated specifically "[t]his valuation may not be relied upon for mortgage security purposes by any party/parties."[170]

(d) Moreover, the Knight Frank Valuation report had specifically warned that:[171]

> "In the current COVID-19 pandemic the reliant party should apply an abundance of caution and monitor and review the situation utilising internal and external research and resources on a regular basis and as it evolves.
>
> …we make the following Significant Valuation Uncertainty Disclosure - per the IVS Valuation Report Disclosure Requirement:
>
> The market that the property/asset is transacted and/or valued in is being impacted by the uncertainty that the COVID-19 outbreak has caused. Market conditions are changing daily at present. As at the date of valuation we consider that there is a Market Uncertainty resulting in Significant Valuation Uncertainty…"

(e) These considerations do not seem to me to suggest that a reasonable mortgagor standing in the shoes of the Grantor would necessarily have thought that the Knight Frank Valuation revealed that the HOA had committed the Grantor to a sale at an undervalue.

(f) I would not arrive at any inference adverse to the Grantor from the fact that the Grantor had in its possession the Knight Frank Valuation.

[175] The result is that I am not persuaded that the primary judge was wrong to reject the breach case in relation to CBA. I would not conclude that the Grantor had breached the implied term as alleged.

Alleged errors of fact in failing to find that breaches of the implied term materially contributed to the non-fulfilment of the condition subsequent concerning mortgagees' consent: appeal ground 9A(b)

[176] In light of my conclusion that there was no error in failing to find breach of the implied term, further consideration of this appeal ground is just as irrelevant as it was to the primary judge. Nevertheless, I should address what I see to be the

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168 Reasons of the primary judge at fn 23.
169 Reasons of the primary judge at fn 23.
170 ARB5 at 1581.
171 ARB5 at 1579.

critical flaws in the notion that the primary judge erred in his conclusions in relation to this issue.

[177] In order to make good the challenge, the Grantee must persuade this Court that the findings recorded at [114] and [115] above should be overturned. That involves the Grantee persuading this Court that the primary judge erred in failing to find that the Grantee had discharged its onus to persuade his Honour of two counterfactuals, namely:

(a) In relation to Oncore, the proposition that if the Grantor had done all of the things the Grantee alleged it was obliged to do, Oncore's consent would have been obtained.

(b) In relation to CBA, the proposition that if the Grantor had done all of the things the Grantee alleged it was obliged to do, CBA's consent would have been obtained.[172]

As to Oncore

[178] The primary judge rejected the Grantee's argument because he found that on the evidence of Mr O'Neill, he had no doubt Oncore would have maintained its refusal to consent.[173]

[179] The finding was affected by the primary judge having the opportunity to see and hear the witness. This approach of this Court to the assessment of error in this regard is affected by the principles of appellate restraint identified at [122] above.

[180] Mr O'Neill was called by the Grantee, who had the onus of proof. Yet the Grantee failed to elicit from Mr O'Neill any support for the proposition that he would have given a different decision if –

(a) the Grantor had approached him earlier; or

(b) particular information had been provided to him which he was not provided.

[181] Indeed, Mr O'Neill's evidence was to the contrary, as his Honour correctly found: see at [58] above. There is no basis in the matters raised by this appeal ground to overturn the primary judge's finding.

[182] For completeness I should address the significance to the causation analysis of the primary judge's findings concerning what Oncore would have required in order to release its mortgage.

[183] First, the primary judge found that Oncore would not have released its mortgage without also obtaining repayment of the $1,500,000 personal loan which had been made to Mr McFie for the initial acquisition by the Grantor (as to which see [18] and [53] to [58] above).

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172 Reasons of the primary judge at [234].

173 His Honour's analysis assumes that the counterfactual does not involve the proposition that Oncore should have been approached on the basis that it would be paid out in full (including the $1.5 million loan). It is implicit in his analysis that in those circumstances Oncore would have provided its consent.

[184] Second, that finding involved no error. Mr O'Neill 's attitude to that question was very clear and was not impugned in any way:[174]

> "So if Oncore's consent to the sale of the Airlie Beach Hotel had been sought on the basis that the 4.5 million debt owed by the company would be repaid in full to Oncore, as the price for obtaining Oncore's consent of the transaction, can you explain how would the $1.5 million have been involved?---Well, the 1.5 was lent as part – for the acquisition of the hotel, and the understanding with Mr McFie, bearing in mind the limitations with the documentation that the CBA was insisting on, prevented any sort of cross guarantee between the two agreements. So as I say, if he'd tendered the 4.5 and asked for a discharge of the mortgage, I would have obviously obtained specific legal advice. My initial view would be that that loan was immediately repayable and we'd basically have a very messy situation with the CBA involved. So basically, it didn't arise, and it was always the understanding that it would be paid out in any refinance at the same time as the 4.5.
>
> So you would have sought legal advice about whether you had to accept repayment 15 of the 4.5 and release the mortgage?---Yes. My view was that we wouldn't accept it, but clearly, I would need to have some legal advice to shore up that position.
>
> If the legal advice was that the mortgage only secured the $4.5 million loan from the company, and the company had a right to make early repayment of that loan, what would your position have been?---My position would be that that's only part of what's required. As I understand from the document that was signed, the letter of intent, on looking at the detail, it actually asks for the mortgagees to consent to the transaction, which – as I say, it's not my position to put any particular point of view in relation to that, but it didn't simply say that – refer to the discharge of this – or that we'd agree to accept the 4.5. If we got the 4.5, then obviously, this other question arises that I didn't need to get legal advice on.
>
> Yes. But if the legal advice was that the borrower, that is, the company ABH Hotel Pty Ltd had the legal right to make earlier repayment of the 4.5 loan thereby 30 discharging the mortgage, what would your position as - - -?---The position would be I still would not have accepted – wouldn't have discharged the mortgage without, basically, having taken to the nth degree in terms of, you know, some legal order or a judgment or something similar because, clearly, that was totally against the commercial basis of the transaction and it would be something that, knowing Michael McFie, he would not put forward as a reasonable position that he'd expect me to accept in commercial terms."

[185] Third, the result is to render causally insignificant any of the alleged breaches of the implied term by the Grantor because they would have had no impact on Oncore's refusal.

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174 ARB6 at 2157.

[186] Fourth, in theory once the evidence had been elicited from Mr O'Neill, an argument could have been mounted that the Grantor could have compelled Oncore to release its mortgage on payment of the amount it secured, the $1.5 million not forming part of that amount, or, possibly, that the Grantor should have compelled Mr McFie to pay his personal debt to Oncore. But:

(a) Such a case was not pleaded. That may well be explicable given the fact that the evidence came out in Mr O'Neill's oral evidence when he was called by the Grantee. But no attempt was made to respond to the obvious problem created by the evidence by seeking an adjournment or leave to amend. So such a case was not run at trial. Nor was such a case identified as a ground of appeal.

(b) In any event, the proposition that compliance with the implied term by the Grantor would have required such a robust course would need at the least some factual basis for thinking that such a course could have been pursued to success in the Due Diligence Period of 7 October 2020 to 13 November 2020, and there was none.

(c) Further, it could not have been thought that the implied term would have required such conduct unless there was reason to believe that the course had (at least) reasonable prospects of success. The problem for the Grantee is that it did not elicit any evidence which would be sufficient to give rise to that conclusion.

(d) Mr O'Neill's evidence was that the $1.5 million was advanced for the acquisition of the Airlie Beach hotel, and he plainly regarded it as part of one overall transaction which had to be repaid.[175] Indeed, he said that being forced to accept repayment only of the $4.5 million loan was "totally against the commercial basis of the transaction and it would be something that, knowing Michael McFie, he would not put forward as a reasonable position that he'd expect me to accept in commercial terms",[176]

(e) The Grantee did not establish a proper basis for the conclusion that either legal advice or a litigated outcome would have been to the contrary, as the Grantee did not explore in any detail with Mr O'Neill the nature of the commercial arrangement between Oncore, the Grantor and Mr McFie. If, as Mr O'Neill thought, Mr McFie was in fact the guiding will and mind of the Grantor and the personal loan was one part of an overall transaction in which Oncore made advances for the acquisition of the Hotel by the Grantor, then Mr O'Neill's evidence gave rise to the real possibility of the existence of an equity affecting the ability of the Grantor to insist upon its rights at law against Oncore.

[187] The appeal ground fails in relation to Oncore. And unless it could succeed against Oncore, it fails completely as the consent of both mortgagees was required. Nevertheless, I turn to consider the position of CBA separately.

As to CBA

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175 ARB6 at 2152, 2153 and 2157.

176 ARB6 at 2157

[188] As already mentioned (see at [62]), neither party called any relevant officer of CBA. But it was the Grantee who had the onus. Of course, there is no basis for drawing any *Jones v Dunkel* inference against the Grantee for not calling someone from CBA, but its failure so to do made it difficult for it to establish the necessary counterfactual about what CBA would have done in various circumstances (putting to one side, obviously, any counterfactual which involved full payment of CBA's secured debt). The primary judge was left in the position of drawing inferences from documents, including documents produced by CBA in response to a subpoena.

[189] In my view, the evidence does not provide any reason to infer that CBA would have reached any different decision from the decision it did, had the Grantor approached CBA earlier. Nor is there any reason to think that CBA's attitude would have been different if only the Grantor had sought to push it to consent; or to ask it what more it might have needed to consent; or to suggest to CBA that it should consent based on some form of restructure. To my mind, all of these possibilities would have been obvious to any experienced banker invited to assess whether to release one part of its securitization for the subject indebtedness. Certainly, I would find it difficult to be persuaded to find that such steps would have made a difference without a witness from CBA explaining why that was so, or at the least, some strong documentary evidence setting out a basis for drawing such an inference. There was no such witness, nor any such documentary evidence. I remain unpersuaded of the alleged error by the primary judge.

[190] At trial the Grantee had sought to deal with this obvious gap in its ability to prove the counterfactual, first, by arguing that the onus was on the Grantor to prove that its breaches were causally insignificant and, second, by calling an expert witness with a view to having that witness say what a bank would do and then inviting the primary judge to infer from that evidence what CBA would do. As I have mentioned, the primary judge correctly found that it was the Grantee who had the onus of proving breaches of the implied term which were relevantly causally significant. Further, the primary judge found the expert report was without substantial foundation and of no probative value and there is no challenge to that finding on appeal.

Conclusion

[191] In my view, the state of the evidence was such that even if, contrary to the view that I have expressed, I should have been persuaded that the Grantor had breached its implied obligation, there is no reason to think that consent would have been obtained if the Grantor had performed the implied obligation in the way it is alleged that it should have.

[192] This appeal ground also fails.

The orders which should be made

[193] The appeal must be dismissed, with costs. It is not necessary to consider the issues raised by the Grantor's notice of contention. However, as will appear, it is appropriate to make a number of ancillary orders. In this section of my reasons and in the formulation of the orders which I would propose, I will refer to the Grantee as the appellant and the Grantor as the respondent.

The orders sought by the respondent

[194] In the event that the appeal was dismissed, the respondent sought the following orders:

> "1. The Appellant's appeal be dismissed.
>
> **Costs**
>
> 2. The Appellant pay the Respondent's costs of and incidental the appeal, including the interlocutory applications in the appeal and the costs reserved on the injunction application, to be agreed or assessed on the indemnity basis.
>
> 3. The Appellant pay the Respondent's costs thrown away by reason of the amendments to the Notice of Appeal and Appellant's Outline of Argument to be agreed or assessed on the indemnity basis.
>
> **Injunction damages**
>
> 4. The injunction ordered by Dalton JA on or about 11 October 2022 be discharged forthwith.
>
> 5. The proceeding be remitted to the Trial Division for an assessment of damages on the undertaking offered by the Appellant (by its solicitors in the Affidavit of Stephen Charles Russell sworn 28 September 2022 or by its counsel).
>
> **Release of security**
>
> 6. The security paid into Court by the Appellant on or about 25 October 2022, together with accretions thereon (if any) be paid out to the trust account of the solicitors for the Respondent for the Respondent's damages to be determined before the Trial Division in accordance with order 5 above.
>
> 7. The $150,000 sum held in the Appellant's solicitors' trust account as security for the Respondent's costs, together with accretions thereon (if any) be paid out to the trust account for the solicitors for the Respondent for the Respondent's costs identified in paragraphs 3 and 4 above.
>
> 8. The funds be held in the Respondent's solicitors' trust account and may be released to the Respondent or the Respondent's solicitors upon:
>
> (a) in relation to the damages on the undertaking, an agreement between the parties or order of the Trial Division;
>
> (b) in relation to the costs identified in paragraphs 3 and 4 above, an agreement between the parties or costs assessment being completed.
>
> 9. In the event the security held and released in accordance with paragraphs 6, 7 and 8 of this Order is insufficient to discharge

> the amounts agreed, assessed or ordered above for costs and damages, the Appellant pay the Respondent the balance."

As to proposed orders 1, 2 and 3

[195] It is obvious that the appeal must be dismissed and it is also obvious that costs of the appeal must follow the event. In my view the costs should be assessed (if assessment becomes necessary) on the standard basis but, pursuant to r 702 of the *Uniform Civil Procedure Rules 1999*, there is no need for an order to specify that that is so.

[196] Nor is there any need to order that the costs of the appeal which must be paid are the "costs of and incidental" of the appeal: cf *Mio Art Pty Ltd v Macequest Pty Ltd (No 2)* [2013] QSC 271, [6]-[22] and *LM Investment Management Limited (in liq) v EY (also known as Ernst & Young)* [2019] QSC 258 at [14].

[197] There is also no need for a costs order to refer to the possibility of agreement or assessment. The possibility of the parties sensibly reaching agreement on the quantum of costs which would otherwise have to be assessed is always open to them. If they do not agree, then they must follow the procedures for assessment set out in the UCPR.

[198] In this hard-fought appeal, there were a number of interlocutory applications which resulted in orders that costs be reserved. Rules 681 and 698 of the UCPR operate such that those costs will follow the event unless the court orders otherwise. I would not order otherwise. Similarly, r 692 of the UCPR provides that a party who amends a document must pay the costs thrown away by the amendment, unless the court orders otherwise. I would not order otherwise.

[199] Accordingly, it is sufficient to order:

> "1. The appeal is dismissed.
>
> 2. The appellant must pay the respondent's costs of the appeal."

[200] The respondent had entered into a transaction to sell the land which was the subject of the appeal, as part of a larger transaction involving the sale of ABHO's hotel business. Although the appellant's claim to an interest in the land failed below, the appellant advanced an application for an interlocutory injunction restraining the respondent from completing any such sale until final disposition of the appeal. That application succeeded before Dalton JA. On 11 October 2022, Dalton JA made an order in these terms:

> "UPON the Appellant giving, by its counsel, the usual undertaking as to damages
>
> PROVIDED THAT by 4.30 pm on 25 October 2022, the Appellant delivers to the Registrar a banker's undertaking in the sum of $2,000,000.00 in a form satisfactory to the Registrar, such undertaking to be held as security for the Appellant's undertaking as to damages
>
> THE ORDER OF THE COURT IS THAT:

1. The Respondent is restrained, until the final determination of this appeal, from selling, transferring or otherwise dealing with the land the subject of this appeal (namely land situated at 16 The Esplanade, Airlie Beach more properly described as Lot 18, Registered Plan 900236, Local Government Whitsunday) (the Land) so as to defeat the interest in the Land claimed by the Appellant, namely as purchaser of an estate or interest in fee simple.

2. The costs of the Application are reserved."

[201] The appeal having failed, the appellant must pay the respondent's costs of the application for interlocutory injunction. The costs should be assessed on the standard basis, but, again, there is no need for an order to specify that outcome. Accordingly, it is appropriate to order further:

> "3. The appellant must pay the respondent's costs of the application for interlocutory injunction the subject of the order made by Dalton JA on 11 October 2022."

As to proposed orders 4 and 5

[202] Once this Court orders that the appeal be dismissed, then the appeal has been finally determined. Order 1 of the order made by Dalton JA on 11 October 2022 would no longer be operative. However, out of an abundance of caution, I agree that an order should be made which makes that absolutely clear.

[203] Affidavit evidence filed by the respondent supports the existence of an apparently arguable case that the respondent may have sustained damages because of the order made by Dalton JA on 11 October 2022.[177] The respondent contends that the amount of such damages is recoverable from the appellant pursuant to the appellant's usual undertaking as to damages, recorded in the order made by Dalton JA.

[204] The appellant argues that no order is necessary and that the respondent should file an application identifying the relief it seeks together with appropriate supporting material. I am prepared to treat the submission which the respondent has made for an order in the form of proposed order 5 as an application for an order or orders pursuant to r 264 of the UCPR. However, I do not think that this Court is the appropriate forum to determine any part of the merits of such an application and would remit the application to the trial division for determination. A judge of the trial division can then make appropriate directions for the final resolution of all aspects of the respondent's contention that it should recover damages pursuant to the usual undertaking and proceed to determine any matters which are disputed.

[205] Accordingly, it is appropriate to order further:

> "4. Order 1 of the order made by Dalton JA on 11 October 2022 is discharged.
>
> 5. The respondent's application for any orders pursuant to r 264 be remitted to the trial division for determination."

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177 Affidavit of Peter John Hamilton sworn 4 September 2023.

As to proposed orders 6 to 9

[206] The respondent provided a banker's undertaking to the Registrar in compliance with the proviso to the order made by Dalton JA on 11 October 2022. Further, a sum of $150,000 is held in the appellant's solicitor's trust account as security for the respondent's costs pursuant to a solicitor's undertaking.

[207] The respondent submits that the appropriate course is for the banker's undertaking to be called upon, for the proceeds of the call to be paid to the respondent's solicitor's trust account, and for the proceeds to be held as investment money and not released until agreement by the parties or the determination by the Trial Division of the amount of damages payable by the appellant.

[208] The appellant submits, and I agree, that no such order is presently necessary. It is not suggested that there is any risk associated with the banker's undertaking remaining in place. It will remain available as security pending the determination of the respondent's application for orders in reliance on the usual undertaking as to damages. If the respondent succeeds to obtain an award then, if it is necessary so to do, the undertaking can be called upon. If there is some factual exigency which supports a call being made before the determination of the application, that can be dealt with in the trial division. Of course it is open to the parties at any time to reach an agreement on these matters.

[209] The respondent submits that the sum of $150,000 presently held in the appellant's solicitor's trust account as security for costs of the appeal be paid into its solicitor's trust account for the costs which have been ordered against the appellant. In my view no such order should be made in advance of a quantification (whether by agreement or assessment) of those costs. If it becomes clear that there is no dispute that the amount of that liability must exceed $150,000 then such an order could be made. It is not necessary presently to make such an order.

Conclusion

[210] I would make the following orders:

1. The appeal is dismissed.
2. The appellant must pay the respondent's costs of the appeal.
3. The appellant must pay the respondent's costs of the application for interlocutory injunction the subject of the order made by Dalton JA on 11 October 2022.
4. Order 1 of the order made by Dalton JA on 11 October 2022 is discharged.
5. The respondent's application for orders pursuant to r 264 is remitted to the trial division for determination.

BODDICE JA:

[211] I agree with Bond JA.