ACT CIVIL & ADMINISTRATIVE TRIBUNAL

ASTON & VALLIS v AUSTRALIAN NATIONAL UNIVERSITY (Civil Disputes) [2023] ACAT 74

XD 1099/2021
XD 18/2022

Catchwords: **CIVIL DISPUTES** – applications for compensation arising from alleged frustration of Australian National University residential accommodation occupancy agreements – consideration of the doctrine of frustration – whether occupancy agreements were frustrated consequent on COVID-19 public health orders and travel restrictions – whether occupancy agreements frustrated by border closure – no temporary frustration – occupancy agreements capable of performance – occupancy agreements not frustrated – applications dismissed

Legislation cited: *Greater Sydney Commission Act 2015*

Subordinate Legislation cited:
Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020 NI2020-153
Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.1)
Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.6)
Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.7)
Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.8)
Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.9)
Public Health (COVID-19 Northern Beaches) Order 2020
Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.7)
Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.8)
Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.9)

	Public Health (COVID-19 Areas of Concern) Notice 2021 (No 21) to (No 194) Public Health (COVID-19 Greater Sydney) Order 2021 Public Health (COVID-19 Greater Sydney) Order (No.2) 2021 Public Health (COVID-19 Greater Sydney) Order No.2) 2021 amended by Public Health (COVID-19 Greater Sydney) Order (No 2) Amendment Order 2021 dated 25 June 2021 and Public Health (COVID-19 Greater Sydney) Order (No 2) Amendment Order (No 2) 2021 dated 26 June 2021 Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.10)
Cases cited:	*Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [1981] AC 675 *Beresford v AJ Mackenzie Pty Ltd* [2021] VCAT 236 *Brisbane City Council v Group Projects Pty Ltd* [1979] HCA 54 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* [1982] HCA 24 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The "Sea Angel")* [2007] EWCA Civ 547 *Foster & Sieker v Theodor* [2021] VCAT 1025 *Gem Ezy Flights Pty Ltd v Gribble* [2021] NSWCATAP 76 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 *oOh! Media Roadside Pty Ltd (Formally Our Panels Pty Ltd) v Diamond Wheels Pty Ltd* [2011] VSCA 116 *Roberts v Toor Bros (Aust) Pty Ltd* [2022] SADC 77 *Scanlan's New Neon Ltd v Tooheys Ltd* [1943] HCA 43; (1943) 67 CLR 169 *Snowtime Tours Pty Ltd v Lavecky* [2022] NSWCATAP 219
List of Texts/Papers cited:	D.W. Grieg and Davis, *The Law of Contract*, (Law Book Company, 1987)
Tribunal:	Presidential Member G McCarthy Senior Member K Katavic

Date of Orders: 28 November 2023
Date of Reasons for Decision: 28 November 2023

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 1099/2021

BETWEEN:

SIGOURNEY VALLIS
Applicant

AND:

AUSTRALIAN NATIONAL UNIVERSITY
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member K Katavic

DATE: 28 November 2023

ORDER

The Tribunal orders:

1. The application is dismissed.

………………………………
Presidential Member G McCarthy
For and on behalf of the Tribunal

AUSTRALIAN CAPITAL TERRITORY)
CIVIL & ADMINISTRATIVE TRIBUNAL) XD 18/2022

BETWEEN:

KATE ASTON
Applicant

AND:

AUSTRALIAN NATIONAL UNIVERSITY
Respondent

TRIBUNAL: Presidential Member G McCarthy
Senior Member K Katavic

DATE: 28 November 2023

ORDER

The Tribunal orders:

1. The application is dismissed.

………………………………
Presidential Member G McCarthy
For and on behalf of the Tribunal

REASONS FOR DECISION

Introduction

1. It is difficult to find a part of the world that was not affected by the pandemic occasioned by the novel coronavirus SARS-Cov-2 (**COVID-19**) in 2020 and 2021. The Australian National University (**ANU**) is no exception.

2. By March 2020, Commonwealth, State and Territory governments in Australia had implemented a range of measures and restrictions in response to the emerging pandemic (**Public Health Orders**).

3. From this time, terms such as "lockdown", "border closure", "hotspot", "isolation" and "quarantine" were commonly used in the context of the pandemic.

4. By separate applications, two students at the ANU, Kate Aston and Sigourney Vallis (**the Applicants**), brought proceedings against the ANU (**the Respondent**)[1] in relation to their on-campus accommodation, governed by occupancy agreements (**the Occupancy Agreements**) for the period 3 February 2021 to 15 December 2021 (**the Occupancy Period**), for which the Applicants paid a fee (**the Occupancy Fee**). Each Occupancy Agreement signed by each Applicant is in materially the same terms for the same Occupancy Period.

5. The Applicants' accommodation was at Burton & Garran Hall (**B&G**), which is a residential college on the ANU campus. Students shared kitchen, dining, and laundry facilities. B&G was operated by the Respondent throughout the Occupancy Period.

6. During the Occupancy Period, both students experienced the effects of border closures and lockdowns in NSW and the ACT. Midway through the term of the Occupancy Agreements, the Applicants left the ACT at different times and travelled into NSW after which, they say, they could not return.

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[1] In these reasons for decision, a reference to the 'Respondent' is a reference to the ANU in its capacity as the respondent to these proceedings and a reference to the 'ANU' is a reference to the campus.

7. Notwithstanding the Applicants' claims, the Respondent enforced the terms of the Occupancy Agreements for the duration of the Occupancy Period by requiring the Applicants to pay the Occupancy Fee payable under the Agreements.

8. These proceedings arise from the Applicants' claim that the Occupancy Agreements were legally frustrated from the date they say they were unable to return to the ACT and then to their rooms at B&G. The Applicants seek repayment of the portion of the Occupancy Fee they paid the Respondent referenced to the date from which they say they were unable to return to the ACT. They claim the repayment is payable on grounds the Occupancy Agreements were frustrated and discharged from that date.

The applications before the Tribunal and evidence

9. The proceedings commenced by way of Civil Dispute Applications both dated 28 April 2022. Orders were made for them to be heard together.

10. The Applicants' claim was refined by a "Further Amended Statement of Claim" dated 23 August 2022 filed by each of them, respectively. The claim was confined to two causes of action, frustration of the Occupancy Agreements and, in the alternative, repudiation of the Occupancy Agreements by the Respondent. In the course of the hearing, the Applicants abandoned the claim of repudiation.[2]

11. The Respondent relied upon its "Response to Applicant's Further Amended Statements of Claim filed in each application dated 16 September 2022.

12. The Applicants relied upon the following witness statements:

    (a) Witness Statement of Kate Aston dated 27 May 2022;[3]

    (b) Witness Statement of Sigourney Vallis dated 27 May 2022;[4]

    (c) Witness Statement of Georgie Forrest dated 27 May 2022;[5]

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[2] Transcript of proceedings dated 11 November 2022, page 288, lines 25-32

[3] Exhibit A5 – 'Witness statement of Kate Elizabeth Aston' dated 27 May 2022, including annexures KA1 to KA33

[4] Exhibit A4 – 'Witness statement of Sigourney Vallis' dated 27 May 2022, excluding paragraph 55 and including annexures SV1 to SV34

[5] Exhibit A3 – 'Witness statement of Georgie Forrest' dated 27 May 2022

(d) Witness Statement of Maya Konakci dated 26 May 2022;[6] and

(e) Witness Statement of Nina Rewitzer dated 26 May 2022.[7]

13. The Applicants also relied upon other documents that included:

(a) email dated 23 December 2020 sent at 2:18pm from Mr Mosley to Ms Vallis; email dated 23 December 2020 at 2:35pm sent by Di Riddell to Ms Vallis; and email dated 24 December 2020 sent at 10:37am from Di Riddell to Ms Vallis regarding confirmation of payment received.[8]

(b) Document SV37 – 'Webpage creation for Students in COVID-19 affected areas in Australia' dated 16 August 2021, located on pages 105 to 109 of all the Applicants' bundle of evidence dated 22 May 2022;[9]

(c) Document SV38 – 'ANU FOI disclosure 202100087' dated 10 March 2022, located on pages 110 to 126 of the Applicants' bundle of evidence dated 22 May 2022;[10]

(d) Document SV39 – 'Transcript of forum hosted by ANU' dated 27 July 2021, located on pages 127 to 148 of the Applicants' bundle of evidence dated 22 May 2022;[11]

(e) Bundle of documents "Index to Occupancy Agreement and Handbook 2019-2022".[12]

14. The Respondent relied upon the following witness statements:

(a) Witness Statement of Scott Walker dated 1 July 2022;[13] and

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[6] Exhibit A1 – 'Witness statement of Mary Konakci dated 26 May 2022

[7] Exhibit A2 – 'Witness statement of Nina Rewitzer' dated 26 May 2022

[8] Exhibit A6 – Various email correspondence sent to Ms Vallis dated 23-24 December 2022

[9] Exhibit A7 – Document SV37 to Applicants' bundle of evidence dated 22 May 2022– 'Webpage creation for Students in COVID-19 affected areas in Australia' dated 16 August 2021

[10] Exhibit A8 – Document SV38 to Applicants' bundle of evidence dated 22 May 2022 – 'ANU FOI disclosure 202100087'dated 10 March 2022

[11] Exhibit A9 – Document SV39 to Applicants' bundle of evidence dated 22 May 2022 – 'Transcript of forum hosted by ANU' dated 27 July 2021

[12] Exhibit A10 – 'Index to occupancy agreement and handbook bundle 2019-2022' filed 27 May 2022

[13] Exhibit R3 – 'Witness statement of Scott Walker' dated 1 July 2022, including annexures A to H with corrections and additions.

(b) Witness Statement of Professor Tracy Smart dated 1 July 2022.[14]

15. The Respondent also relied upon other documents that included:

(a) Email from "Emily – bgpastoral" dated 16 June 2021;[15]

(b) Screenshot of email from "bgpastoral" to Ms Vallis dated 16 June 2021.[16]

16. The Respondent relied upon many Public Health Orders made by the NSW and ACT Governments. The more relevant ones are referred to below.

17. We have considered all the material and submissions relied upon by the parties in these proceedings in our preparation of these reasons.

Public Health Orders

18. On 11 March 2020, the World Health Organisation declared COVID-19 a pandemic. On 16 March 2020, the Commonwealth Minister for Health declared a public health emergency in relation to COVID-19 (**the Declaration**).[17] By 31 March 2020, significant travel restrictions had been put in place Australia-wide and the country was effectively 'in lockdown'. Australia's international borders were closed, save for some exemptions, and anyone entering the country was required to undertake 14 days of quarantine.[18]

19. From May 2020, there was a progressive easing of restrictions with lockdown lifted and most interstate borders reopened. However, throughout 2020, restrictions on movement and gatherings, and efforts to limit the spread of the virus such as quarantine and isolation, were structural features of life, particularly in metropolitan areas.

20. At various times after the Declaration, health officers and government ministers in all Australian States and Territories made orders in response to COVID-19

[14] Exhibit R4 – 'Witness statement of Professor Tracy Smart' dated 1 July 2022, including annexures A to F

[15] Exhibit R1 – Email correspondence between 'Emily – bgpastoral' (email address redacted) dated 16 June 2021, see transcript of proceedings dated 9 November 2023, page 83, lines 25-29, where the date is corrected and clarified

[16] Exhibit R2 – Screenshot of email correspondence (email address redacted) dated 16 June 2021

[17] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Declaration 2020

[18] For example, this was usually required to be in a hotel

which restricted activity and movement. For the purposes of these proceedings, the Tribunal regarded the relevant orders, directions, or declarations relevantly made in NSW and the ACT, set out below, as Public Health Orders despite their varying formal legal titles.[19]

21. During 2020, the ACT Chief Health Officer made emergency directions regarding 'COVID-19 Interstate Hotspots' (**Hotspot Orders**) requiring a person entering the ACT from a declared COVID-19 Hotspot to quarantine. Declared COVID-19 Hotspots included areas in Victoria[20] and NSW. Similar kinds of orders were made in NSW.

22. On 18 December 2020, the ACT Chief Health Officer made a Hotspot Order in relation to the Northern Beaches local government area, Sydney.[21]

23. On 19 December 2020, the NSW Government made a Public Health Order in relation to the Northern Beaches local government area in Sydney which, amongst other things, constituted a lockdown. It meant a person could not leave that area or enter that area without a reasonable excuse.[22]

24. On 20 and 21 December 2020, the ACT Chief Health Officer made Hotspot Orders in relation to multiple local government areas (**LGAs**) in the greater Sydney area.[23]

25. In 2021, the Declaration was still in effect and the ACT Chief Health Officer made various emergency directions regarding 'COVID-19 Affected Areas'

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[19] References in these reasons to 'Hotspot Orders' and 'Affected Areas Orders' are references to 'Public Health Orders'

[20] Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (NI2020-387) dated 2 July 2020

[21] Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.6) (NI2020-812) dated 18 December 2020; Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.7) (NI2020-819) dated 18 December 2020

[22] Public Health (COVID-19 Northern Beaches) Order 2020 (NSW) (n2020-4855) dated 19 December 2020

[23] Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.8) (NI2020-820) dated 20 December 2020; Public Health (COVID-19 Interstate Hotspots) Emergency Direction 2020 (No.9) (NI2020-834) dated 21 December 2020

(**Affected Areas Orders**).[24] These Affected Areas Orders contained a series of defined terms and requirements, some of which evolved over time.

(a) 'Resident of the Australian Capital Territory' was defined to mean a person whose principal place of residence or home that the person primarily occupies on an ongoing and permanent basis is in the Australian Capital Territory.[25]

(b) 'Affected person' included a close contact or a person who had been in a COVID-19 affected area at a relevant time (with some exceptions);

(c) 'COVID-19 Place of Concern' referred to an area or place referred to as a COVID-19 Place of Concern identified in a COVID-19 Areas of Concern Notice issued by the ACT Chief Health Officer; and

(d) 'Affected area subject to a stay-at-home requirement' referred to an area or place identified in a COVID-19 Areas of Concern Notice issued by the ACT Chief Health Officer; and

(e) 'COVID-19 affected area' was an area or place identified in a COVID-19 Areas of Concern Notice issued by the ACT Chief Health Officer.

26. Many COVID-19 Areas of Concern Notices were issued by the ACT Chief Health Officer in 2021. For the purposes of these reasons, we have referred only to those applicable to the Affected Areas Orders referred to below.

27. Between 5:00pm on 25 April 2021 and 11:58pm on 9 July 2021, pursuant to Affected Areas Order No.7 (**AAO7**),[26] Affected Areas Order No.8 (**AAO8**),[27] and Affected Areas Order No.9 (**AAO9**)[28]:

(a) an ACT resident who had been in a COVID-19 Affected Area or an 'affected area subject to a stay-at-home requirement', was required to

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[24] Similar kinds of Public Health Orders were also made in NSW during 2021

[25] This definition remained the same in each Affected Areas Order

[26] Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.7) (NI2021-244) commenced at 5:00pm 25 April 2021 and ended at 11:58pm on 4 June 2021

[27] Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.8) (NI2021-340) commenced at 11:59pm on 4 June 2021 and ended at 5:59pm on 11 June 2021

[28] Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.9) (NI2021-355) commenced at 6:00pm on 11 June 2021 and ended at 11:58pm on 9 July 2021

complete a self-declaration form and either quarantine in designated premises or stay-at-home for 14 days on returning to the ACT;

(b) a person who was not an ACT resident was not permitted to enter the ACT from a COVID-19 Affected Area or an 'affected area subject to a stay-at-home requirement' unless they had obtained an exemption prior to arrival. If granted an exemption, the person was required to quarantine for 14 days in 'designated premises', being suitable quarantine accommodation;

(c) a person who had been in a COVID-19 Place of Concern but was not an affected person needed to abide by any conditions or guidance stated in a COVID-19 Areas of Concern Notice applicable to that place of concern.

28. Between 5:00pm on 25 April 2021 and 11:58pm on 9 July 2021, pursuant to AAO7, AAO8 and AAO9, the Affected Areas Orders contained guidance for exemptions for non-ACT residents. The significant features of the exemption guidance were:

(a) an application for an exemption to enter the ACT needed to be made not more than two weeks in advance of the proposed travel and not less than 72 hours before travel;

(b) a person was required to obtain an exemption to leave a State or Territory before applying for an exemption to enter the ACT;

(c) exemptions would only be granted in 'highly exceptional circumstances'; and

(d) only certain exceptional circumstances would be considered, namely:

(i) the person would be providing a nominated essential service in the ACT;

(ii) compassionate grounds;

(iii) attending a funeral for an immediate family member;

(iv) attending a medical appointment;

(v) needing a time-critical service only available in the ACT;

(vi) child access or critical care arrangements;

(vii) attending court or legal proceedings; or

(viii) permanently moving to the ACT.

29. On 25 April 2021, the ACT Chief Health Officer made AAO7 which had the effect set out at paragraphs 27 and 28 above. COVID-19 Areas of Concern Notices No.21 to No.77 applied to AAO7 but did not list any areas in NSW.[29]

30. On 6 May 2021, the NSW Government made a Public Health Order in relation to the Greater Sydney Area (**First Greater Sydney Order**).[30] Greater Sydney Area was defined to mean the Greater Sydney Region within the meaning of the *Greater Sydney Commission Act 2015* (NSW) and the LGAs of the Central Coast and Wollongong. Amongst other things, this Public Health Order placed restrictions on gatherings and the use of premises. This Public Health Order was in place until 17 May 2021.

31. On 4 June 2021, the ACT Chief Health Officer made AAO8 which had the effect set out at paragraphs 27 and 28 above. COVID-19 Areas of Concern Notices No.78 to No.91 applied to AAO8 and listed close contact and casual contact locations in NSW.[31]

32. On 11 June 2021, the ACT Chief Health Officer made AAO9 which had the effect set out at paragraphs 27 and 28 above. COVID-19 Areas of Concern Notices No.92 to No.124 applied to AAO9.[32]

33. As at 4:00pm on 22 June 2021, only close and casual contact locations in NSW were identified in the relevant COVID-19 Areas of Concern Notices.[33]

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[29] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 21) to Public Health (COVID-19 Areas of Concern) Notice 2021 (No 77)

[30] Public Health (COVID-19 Greater Sydney) Order 2021 (NSW) (n2021-0923)

[31] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 78) to Public Health (COVID-19 Areas of Concern) Notice 2021 (No 91)

[32] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 92) to Public Health (COVID-19 Areas of Concern) Notice 2021 (No 124)

[33] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 115) dated 22 June 2021; Public Health (COVID-19 Areas of Concern) Notice 2021 (No 116) dated 22 June 2021

34. On 23 June 2021, the NSW Government made a further Public Health Order in relation to the Greater Sydney Area (**Second Greater Sydney Order**),[34] which incorporated the areas of Bayside, City of Sydney, Canada Bay, Inner West, Randwick, Waverley, Woollahra and any other declared areas in Greater Sydney, and also incorporated the City of Shellharbour. The effect of the Second Greater Sydney Order was to lock down the Metropolitan Sydney Area, continue restrictions on gatherings and the use of premises and to introduce the requirement to wear face coverings (masks) in indoor areas. Significantly, a person was not permitted to travel from the Metropolitan Sydney Area, without reasonable excuse, to a place in NSW, if their place of residence or usual place of work was in any of several stated LGAs. A person could leave the Metropolitan Sydney Area and travel to a place outside the Metropolitan Sydney Area if the place was their principal place of residence.

35. On 23 June 2021, the ACT Chief Health Officer issued COVID-19 Areas of Concern Notice No.118.[35] As at 4:00pm on 23 June 2021, several Sydney LGAs including Inner West were listed as affected areas subject to stay-at-home orders. Relevantly, any non-ACT resident leaving a LGA listed as an affected area subject to a stay-at-home order between 4:00pm on 23 June 2021 and at least 11:59pm on 30 June 2021 required an exemption to enter the ACT. Several LGAs, including Ku-ring-gai, were listed as areas of concern, meaning any person who had spent time in one of those areas was required to comply with any directions in place in that other jurisdiction, complete a self-declaration form within 24 hours of arrival in the ACT or the commencement of the notice and monitor for COVID-19 symptoms for 14 days.

36. On 25 June 2021, the ACT Chief Health Officer issued COVID-19 Areas of Concern Notice No.123[36] with effect from 4:00pm on 25 June 2021. This listed both the Inner West and Ku-ring-gai LGAs as affected areas subject to a stay-at-home requirement, meaning any non-ACT resident required an exemption before entering the ACT from 4:00pm on 25 June 2021.

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[34] Public Health (COVID-19 Greater Sydney) Order (No.2) 2021 (NSW) (n2021-1298)
[35] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 118) dated 23 June 2021
[36] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 123) dated 25 June 2021

37. On 25 and 26 June 2021, the NSW Government amended the Second Greater Sydney Order which, by 26 June 2021, had the effect of locking down the entire Greater Sydney Area (**Third Greater Sydney Order**).[37] The effect of these amendments was that residents in those named LGAs and later the Greater Sydney Area, could not leave those locations without a reasonable excuse.

38. On 9 July 2021, the ACT Chief Health Officer made Affected Areas Order (No.10) (**AAO10**).[38] It differed from AAO7, AAO8, and AAO9 by requiring any ACT resident returning to the ACT from a COVID-19 Affected Area (including the Greater Sydney Area) after 11:59pm on 9 July 2021 to obtain an exemption from the ACT Chief Health Officer (or authorised person) prior to arrival and to quarantine for 14 days in designated premises. The exemption in this case was defined to:

    (a) verify the person's identity and residency in the ACT;

    (b) confirm their quarantine location and its suitability; and

    (c) confirm the person had obtained any necessary permission to leave the jurisdiction from which the person was travelling.

39. Any non-ACT resident wishing to enter the ACT from the Greater Sydney Area after 11:59pm on 9 July 2021 needed to obtain an exemption and to quarantine for 14 days in approved designated premises.[39] This remained in place until 11:59pm on 31 October 2021.

40. On 9 July 2021, the ACT Chief Health Officer also issued COVID-19 Areas of Concern Notice No.155,[40] which applied to AAO10. It listed many NSW LGAs, including Inner West and Ku-ring-gai, as COVID-19 Affected Areas. It had the effect of closing the ACT border with NSW to anyone in the Greater Sydney Area. It was not until 5 August 2021 that other parts of regional NSW were

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[37] Public Health (COVID-19 Greater Sydney) Order (No.2) 2021 amended by Public Health (COVID-19 Greater Sydney) Order (No 2) Amendment Order 2021 (n2021-1346) dated 25 June 2021, and the Public Health (COVID-19 Greater Sydney) Order (No 2) Amendment Order (No 2) 2021 (n2021-1367) dated 25 June 2021

[38] Public Health (COVID-19 Affected Areas) Emergency Direction 2021 (No.10) (NI2021-424) commenced at 11:59pm on 9 July 2021

[39] The criteria for obtaining an exemption were set out in Attachment B of AAO10

[40] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 155) dated 9 July 2021

identified in a COVID-19 Areas of Concern Notice as COVID-19 Affected Areas.[41] Subsequent COVID-19 Areas of Concern Notices applied to the entire state of NSW.

41. On 12 August 2021, the ACT Chief Health Officer made a Public Health Order which imposed stay-at-home orders on all people in the ACT, meaning the ACT went into lockdown. This remained in place until 14 October 2021.

42. The State of NSW was no longer a COVID-19 Affected Area from 11:59pm on 31 October 2021, meaning the ACT/NSW border was no longer closed to people in the Greater Sydney Area or most of regional NSW.

The Occupancy Agreements

43. The standard form occupancy agreement defined some terms in the Occupancy Agreements by using references and links to other documents. For example:

    (a) The term 'Resident Handbook' was defined to be the document at http://www.anu.edu.au/study/accommodation/advice-procedures/handbooks.

    (b) The 'Commencement Date' was defined to be "[t]he date the Occupant(s) accepts the terms and conditions contained in the letter of offer via http://portal.rcc.anu.edu.au".

    (c) The 'Termination Date' was defined to be "[t]he date contained in the letter of offer".

    (d) The 'Full Occupancy Fee (Tariff)' was defined to be the amount that could be found at http://www.anu.edu.au/study/accommodation/advice-procedures/accommodation-fees.

    (e) The 'Room Deposit' was defined to be "[t]he amount notified to the Occupant in the letter of offer".

[41] Public Health (COVID-19 Areas of Concern) Notice 2021 (No 194) dated 5 August 2021

44. The Occupancy Agreements, which both Applicants say they agreed to and signed, are identical in their terms.[42]

45. According to the letters of offer and the emails of acceptance:[43]

    (a) the Occupancy Agreements commenced on 3 February 2021 and ended on 15 December 2021;

    (b) required payment of a refundable room deposit of $1,000, in advance;

    (c) required fortnightly payments by direct debit, of $245, two-weeks in advance.

46. Relevant clauses in the Occupancy Agreements were:

    (a) clause 1(b) c, which required the Applicants to "pay the Occupancy Fee and other sundry fees from the Commencement Date and on every agreed instalment date two weeks in advance";

    (b) clause 2, which provided that the Resident Handbook, the University Hall of Residence Policies, and the Rules and Policies of the ANU "form a part of this occupancy agreement";

    (c) clause 3, which obliged the Respondent to grant the Applicants permission to, among other things, occupy the allocated room, provided the Applicants maintained compliance with their obligations under the Occupancy Agreement;

    (d) clause 10, which entitled the Applicants to give four weeks written notice if they wished to permanently vacate their room, in which case clause 12 would apply;

    (e) clauses 11(a) and 11(b)(i), which caused the Applicants to be deemed to have breached the Occupancy Agreements if a default event occurred, one of which was the Applicants failing to pay an amount due under the agreement by the due date, and the amount remaining unpaid for seven days;

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[42] Exhibit A4 at [1]-[2], annexure SV1, annexure SV2; Exhibit A5 at [2]-[3], annexure KA1, annexure KA2

[43] Exhibit A4, annexure SV 2; Exhibit A5, annexure KA2

(f) clause 12(b), by which the Applicants agreed that if they permanently vacated their room prior to the termination date, they would remain liable to pay the Occupancy Fee until the earlier of the termination date or the date the Respondent enters into a replacement occupancy agreement for the room;

(g) clause 16, by which the Applicants acknowledged, among other things, they had read and received a letter of offer, the Resident Handbook and the Schedule of Fees; have entered into the Occupancy Agreements freely and voluntarily; and that no promises, representations, warranties, or undertakings had been given by on behalf of the Respondent in relation to the suitability of the room or the services; and

(h) clause 17, which provided that the Occupancy Agreements constituted the entire agreement between the Applicants and the Respondent "and supersede[d] all previous" occupancy agreements.

Sigourney Vallis

47. Ms Vallis completed her Year 12 studies in 2019 and accepted an early offer at the ANU for 2020. She deferred her commencement until the 2021 academic year.

48. After completing Year 12, Ms Vallis said she intended to take a 'gap year' and travel overseas. She was in New York City, USA, when the pandemic began. When New York City went into lockdown, she travelled to Berlin, Germany, to stay with family. When the Australian Government announced the international border would be closed, and anyone returning to Australia would be required to undertake 14-days quarantine, Ms Vallis made arrangements to return to Australia before the quarantine requirement came into effect. She left Germany on 15 March 2020 and made it back to Australia without having to quarantine.

49. Ms Vallis applied for residential on-campus accommodation at B&G. On 23 December 2020, B&G sent her an offer of accommodation which she accepted via the Respondent's portal. She said that, before doing so, she read the terms of the proposed Occupancy Agreement, everything that was provided to

her on the portal and the pre-acceptance information.[44] She said she understood if she decided not to continue her studies at ANU or "got kicked out or couldn't hack study" and wanted to go back to her parents that there might be consequences in terms of having to continue paying rent for her room at B&G.[45] Ms Vallis' attention was drawn to clause 12 of the Occupancy Agreement which she was required to acknowledge on the portal before submitting her acceptance of the offer. She said she read the Occupancy Agreement and understood she was required to pay rent until the end of the term of the Occupancy Agreement (i.e. the whole of the Occupancy Period) following which she clicked 'accept' and 'submit'.[46]

50. Ms Vallis also said she was aware of the COVID-19 lockdown which occurred between March 2020 and May 2020.[47] She said she was also aware of the lockdowns in Victoria in 2020, which closed the border between NSW and Victoria,[48] and the lockdown of the Northern Beaches in Sydney which occurred from about 18 December 2020, both of which were before she received her offer of accommodation.[49]

51. Ms Vallis commenced residing at B&G at the start of Semester 1 in 2021.

52. Just prior to the end of Semester 1, on 31 May 2021, Ms Vallis left the ACT and travelled to Sydney to stay with her family in Ashfield. Ashfield is located in the Inner West of Sydney. She said she intended to remain there until the start of Semester 2 around 26 July 2021.[50]

53. On 6 May 2021, the First Greater Sydney Order came into effect. Ms Vallis said she could not recall whether she was aware of this Public Health Order or not.[51] She also said she could not recall checking the situation regarding COVID-19

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[44] Transcript of proceedings dated 9 November 2022, page 35, lines 7-28
[45] Transcript of proceedings dated 9 November 2022, page 23, lines 11-16
[46] Transcript of proceedings dated 9 November 2022, page 36, lines 4-17
[47] Transcript of proceedings dated 9 November 2022, page 31, lines 9-29
[48] Transcript of proceedings dated 9 November 2022, page 31, line 43-page 32, line 3
[49] Transcript of proceedings dated 9 November 2022, page 33, line 12-page 34, line 14
[50] Exhibit A4 at [4]-[5]; Transcript of proceedings dated 9 November 2022, page 24, lines 24-25
[51] Transcript of proceedings dated 9 November 2022, page 39, lines 3-4

restrictions in Sydney before she left the ACT.[52] She accepted that at no point in 2021 did B&G or the Respondent direct or recommend that she return to her family home wherever that may be.[53] She agreed that she "took the risk"[54] that the place to which she was returning to live (meaning her family home in Ashfield) might become an area of concern to ACT Health. She also said she knew that if her area was declared a hotspot "then, yes, there was the potential she might need to quarantine or complete orders".[55]

54. Ms Vallis said she checked her emails quite regularly and agreed she would have received an email dated 15 June 2021 from B&G Hall if it was sent to the student body.[56] She acknowledged the email informed students that things could change quickly and encouraged students to check the health websites regularly. Ms Vallis agreed, notwithstanding the email, that she did not do anything at this point about returning to the ACT.[57]

55. On 23 June 2021, the Second Greater Sydney Order came into effect. Ms Vallis was affected by this public health order.

56. Ms Vallis referred to an email she received on 23 June 2021 from Mr Mosley, Head of Burton and Garran Hall on behalf of B&G (**the Mosley Email**).[58] She explained she understood the main 'message' of this email was telling her to stay where she was and, if she was at B&G, she was not to travel.[59] She accepted that if she was in an area that became a COVID-19 hotspot, entry to the ACT would be subject to quarantine requirements which could not be carried out at B&G. She said she did not do anything in response to the Mosley Email and did not call ACT Health to enquire about her options as she took this as a direction to stay where she was.[60]

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[52] Transcript of proceedings dated 9 November 2022, page 39, lines 14-18
[53] Transcript of proceedings dated 9 November 2022, page 39, lines 20-29
[54] Transcript of proceedings dated 9 November 2022, page 41, lines 6-21
[55] Transcript of proceedings dated 9 November 2022, page 41, lines 27-33
[56] Transcript of proceedings dated 9 November 2022, page 40, lines 29-45; Exhibit R1
[57] Transcript of proceedings dated 9 November 2022, page 41, lines 1-5
[58] Exhibit A4 at [7], annexure SV 4; Exhibit R3, annexure F
[59] Transcript of proceedings dated 9 November 2022, page 47, lines 13-14, lines 31-34
[60] Transcript of proceedings dated 9 November 2022, page 48, lines 36-41

57. Ms Vallis accepted that as at 23 June 2021 she was not in lockdown but said she was unsure if she was in an affected area.[61] She also accepted that if she was not in an affected area as at 23 June 2021 she was able to return to B&G.[62] She said she was trying to follow the advice of the Respondent and said she "didn't want any complications"[63] on her return to the ACT so she took the Mosley Email to mean she should stay where she was.

58. On 26 June 2021, the Third Greater Sydney Order came into effect which locked down people in the areas stated in the order, meaning they were not to be away from their principal place of residence except for an acceptable reason.

59. Ms Vallis said she understood the effect of the NSW public health orders to be that only in exceptional circumstances could she return to the ACT. She understood the travel restrictions to mean (as a general rule) she could not return to the ACT.[64] She told the Tribunal she was not sure, as of 26 June 2021, what ways she could return to the ACT, and agreed she could have contacted ACT Health or looked up the public health order for further information, but did not do so.[65]

60. Ms Vallis was subject to the Greater Sydney lockdown which commenced on 26 June 2021. She said this lockdown was originally set until 9 July 2021, but was extended and lasted until November 2021 which she said she could never have predicted.[66]

61. Ms Vallis' witness statement details various email correspondence she received from various operational parts of the Respondent between 26 June 2021 and 9 July 2021.[67] These emails referred to the Respondent's intention to make Davey Lodge available for some students to comply with stay-at-home or quarantine

[61] Transcript of proceedings dated 9 November 2022, page 87, lines 30-44
[62] Transcript of proceedings dated 9 November 2022, page 89, lines 33-46
[63] Transcript of proceedings dated 9 November 2022, page 88, line 3-page 90, line 9
[64] Transcript of proceedings dated 9 November 2022, page 51, lines 42-44
[65] Transcript proceedings dated 9 November 2022, page 52, lines 1-16
[66] Exhibit A4 at [9]
[67] Exhibit A4 at [11]-[19]

orders. Ms Vallis said she followed the instructions in these emails in her endeavour to return to the ACT.

62. On 8 July 2021, Ms Vallis, applied to ACT Health for an exemption to return to the ACT. On 9 July 2021, ACT Health rejected the request on the basis Ms Vallis was not considered a resident of the ACT. ACT Health advised Ms Vallis that the ACT was only granting exemptions to persons who were not a resident of the ACT in exceptional circumstances, and she had not provided a letter from her university residential college to support an exceptional circumstance.[68]

63. On 9 July 2021, AAO10 came into effect.

64. On 9 July 2021, Ms Vallis made a further application for exemption to enter the ACT, this time attaching a letter from the Respondent by way of proof of her residence at B&G.[69] On 13 July 2021, ACT Health rejected her request for an exemption and advised Ms Vallis that after discussions between ACT Health and the various universities and higher education providers in the ACT, all student applications would be rejected at this time if travelling to the ACT was solely for study purposes. Ms Vallis was told she was welcome to reapply once she received notification from her respective education provider of an approved plan for her return. She was told she was not able to quarantine on campus at this time.[70]

65. Ms Vallis said that in the meantime she made enquiries with ACT Health about returning to the ACT and also discussed with Ms Aston and Ms Konakci the possibility of using ‘Airbnb’ (**Airbnb**) accommodation in Canberra to complete quarantine.[71] She said she was informed ACT Health did not consider she was an ACT resident and that her ANU address ‘didn’t count’ and that only quarantine in an approved facility was allowed.[72] She was told that Airbnb accommodation would not be regarded as an approved facility.

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[68] Exhibit A4 at [18], annexure SV 10
[69] Exhibit A4 at [19]
[70] Exhibit A4 at [25], annexure SV 16
[71] Exhibit A4 at [21]
[72] Exhibit A4 at [21], annexure SV 13

66. At hearing, Ms Vallis was asked about whether she had taken steps to try and quarantine in an approved facility off-campus, to which she said she was not aware there were other approved quarantine facilities, and understood Davey Lodge was her only option.[73] Ms Vallis acknowledged the email from Mr Maclaine, A/g Head of Hall, B&G, dated 15 July 2021[74] which presented two possible pathways for quarantine with a process to follow if off-campus and a process to follow if on-campus.[75] Ms Vallis could not recall if she made enquiries with ACT Health about acceptable off-campus quarantine other than her enquiry about Airbnb.[76]

67. After 9 July 2021, Ms Vallis continued to receive email correspondence from the Respondent about the possibility of Davey Lodge being available as a quarantine facility and other updates from ACT Health in relation to students in Australia but located outside of the ACT. [77]

68. Ms Vallis said that from 26 July 2021 she began making enquiries of the Respondent about pausing or ending her Occupancy Agreement.[78] On 1 October 2021, she followed this up,[79] and, on 5 October 2021, was formally advised that being prevented from returning to campus by a Public Health Order was not a reason to terminate her Occupancy Agreement.[80]

69. On 27 July 2021, Ms Vallis applied to B&G for a bursary.[81] On 14 September 2021, she was advised she would receive a bursary of $550.[82]

70. With effect from 1 November 2021, Public Health Orders changed and enabled Ms Vallis to return to Canberra, which she did on 8 November 2021. She said she removed all of her belongings out of her accommodation at B&G and vacated her

[73] Transcript of proceedings dated 9 November 2022, page 66, line 12-page 68, line 44
[74] Exhibit A4 at [27], annexure SV 17
[75] Transcript of proceedings dated 9 November 2022, page 69, lines 3-35
[76] Transcript of proceedings dated 9 November 2022, page 70, line 29-page 71, line 23
[77] Exhibit A4 at [21]-[31]
[78] Exhibit A4 at [32], annexure SV 21
[79] Exhibit A4 at [46]-[47], annexures SV 28-SV 30
[80] Exhibit A4 at [49], annexure SV 31
[81] Exhibit A4 at [35], annexure SV 22
[82] Exhibit A4 at [44]

accommodation as her studies for the academic year had concluded.[83] She paid the balance owing on her Occupancy Fee, being the fee for her accommodation until 15 December 2021, being the termination date under her Occupancy Agreement. Ms Vallis paid $9,795 for the period of the Occupancy Agreement.[84]

71. Ms Vallis sought an order she be repaid $4,755,[85] referenced to the period from 9 July 2021 from when she was unable to return to the ACT as a consequence of AAO10 to 15 December 2021.[86]

Kate Aston

72. Ms Aston completed Year 12 in 2019 and accepted an offer to study at the ANU in 2020. She deferred her commencement until the 2021 academic year and had a ‘gap year’. During 2020, she remained in Australia.

73. Like Ms Vallis, Ms Aston applied for residential on-campus accommodation at B&G. On 23 December 2020, B&G offered her a place which she accepted on 24 December 2020 by signing the Occupancy Agreement and accepting its terms using the ‘StarRez’ portal. Ms Aston said she read all of the information provided to her in relation to the proposed Occupancy Agreement, including the college handbook prior to signing the Occupancy Agreement and accepting the offer.[87] She said she did not recall reading anything amongst the documents provided to her about COVID-19.[88]

74. Ms Aston said she was aware of the various lockdowns that occurred during 2020, including the lockdown which closed the border between NSW and Victoria and the lockdown of the Northern Beaches in Sydney in December 2020.

75. Ms Aston commenced her occupancy at B&G on 3 February 2021. She resided at B&G throughout Semester 1. She became friends with Ms Vallis.

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[83] Exhibit A4 at [50]
[84] Exhibit A4 at [51]
[85] Email correspondence received from applicants – ‘Update from parties’ dated 29 November 2022
[86] Email correspondence received from applicants – ‘Update from parties’ dated 29 November 2022
[87] Transcript of proceedings dated 9 November 2022, page 105, lines 21-44
[88] Transcript of proceedings dated 9 November 2022, page 106, lines 18-24

76. Ms Aston agreed that on 16 June 2021 she received, but did not specifically recall, an email from 'Emily' at B&G telling residents about the emerging COVID-19 outbreak in the eastern suburbs of Sydney and advising students to stay up to date with the situation if leaving for the winter break, as things can change quickly.[89]

77. On 22 June 2021, a few days after receiving the email from Emily, Ms Aston left the ACT and travelled to her parents' home in East Lindfield, NSW. East Lindfield is located in the Upper North Shore of Sydney and in the Ku-ring-gai LGA. Ms Aston agreed she took a risk that she might "get stranded"[90] but assessed the risk to be manageable or low. She also agreed neither the Respondent nor anyone at B&G directed her or suggested to her that she should return home to Sydney.[91]

78. On 23 June 2021, the Second Greater Sydney Order came into effect, but Ms Aston was not affected by it.

79. On 23 June 2021, Ms Aston received the Mosley Email.[92] She acknowledged that because she had already left the ACT, she may now be at risk of some travel restrictions and an obligation to quarantine if she returned to the ACT.[93]

80. Ms Aston accepted that at the time she received the Mosley Email she was not in an affected area and agreed that at this point she could have returned to the ACT.[94] She agreed she did not do anything about returning to the ACT upon receiving the Mosley Email.[95]

81. On 26 June 2021, the Third Greater Sydney Order came into effect which 'locked down' people in the areas stated in the order, meaning they were not to be away from their principal place of residence except for an acceptable reason. Ms Aston was now in an affected area.[96] She said this lockdown was originally set to operate

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[89] Exhibit R1; Transcript of proceedings dated 9 November 2022, page 117, line 6-page 118, line 6

[90] Transcript of proceedings dated 9 November 2022, page 118, lines 25-26

[91] Transcript of proceedings dated 9 November 2022, page 118, line 41-page 119, line 7

[92] Exhibit A5 at [7], annexure KA4

[93] Transcript of proceedings dated 9 November 2022, page 120, lines 13-30

[94] Transcript of proceedings dated 9 November 2022, page 121, lines 2-17

[95] Transcript of proceedings dated 9 November 2022, page 122, lines 19-22

[96] Exhibit A5 at [9]; Transcript of proceedings dated 9 November 2022, page 123, lines 1-20

until 9 July 2021, but was extended and did not end until November 2021 which she said she could not have predicted.[97]

82. Ms Aston's witness statement details various email correspondence she received from various operational parts of the Respondent between 26 June 2021 and 9 July 2021.[98] These emails referred to the Respondent's hope to make Davey Lodge available for some students to complete stay-at-home or quarantine orders. Ms Aston said she followed the instructions in these emails in relation to her intention to return to the ACT.

83. Ms Aston said she recalled that on 17 June 2021, Davey Lodge had been provided as a quarantine facility for 30 attendees returning from the G7 summit.[99] Ms Aston said she kept up to date with correspondence from the Respondent and B&G by checking her emails and relevant website links about the possibility of her quarantining at Davey Lodge.

84. On 9 July 2021, AAO10 came into effect, which effectively closed the border between the ACT and NSW. She told the Tribunal she was aware of the specific terms of AAO10. She understood she did not qualify as an ACT resident and as a non-resident she could only enter the ACT with an exemption granted in highly exceptional circumstances which she considered she could not meet.[100]

85. Ms Aston told the Tribunal that she never made her own inquiries of ACT Health regarding how she might return to the ACT and relied on information from Ms Vallis. Ms Aston never applied for an exemption to enter the ACT. She told the Tribunal she did not do so because she thought it was unlikely an exemption would be granted based on her understanding of the exemption requirements and what Ms Vallis had told her, which was that university addresses were not being accepted as evidence to show that a student was an ACT resident.[101] Ms Aston told the Tribunal she was waiting on further correspondence from the Respondent

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[97] Exhibit A5 at [9]
[98] Exhibit A5 at [10]-[19]
[99] Exhibit A5 at [5]
[100] Transcript of proceedings dated 9 November 2022, page 109, line 33-page 110, line 5
[101] Exhibit A5 at [17]; Transcript of proceedings dated 9 November 2022, page 108, line 34-page 109, line 19

and B&G with advice, directions and instructions on applying for an exemption which she said she did not receive.[102]

86. After 9 July 2021, Ms Aston continued to receive email correspondence from various operational components of the Respondent about the possibility of Davey Lodge being available as a quarantine facility and other updates from ACT Health in relation to students in Australia but located outside the ACT. [103]

87. Ms Aston said she explored the possibility of securing short-term rental accommodation through Airbnb with Ms Vallis and Ms Konakci as a place to quarantine, but Ms Vallis advised her this was not acceptable according to information she had obtained from ACT Health.[104] Ms Aston also explored the possibility of entering the ACT via other areas in NSW after completing a mandatory period of quarantine, such as in Young, NSW, where her grandmother lived and the Shoalhaven area which she heard about from Ms Forrest.[105] She did not pursue these options.

88. On 8 August 2021, Ms Aston raised the possibility of a rent pause with the Respondent.[106] In response to her enquiry, she received an email from B&G stating:

> *All students were advised before they signed their Occupancy Agreement this year that if they were unable to use their room because of a public health direction, they would continue to be liable for the cost of that room.*[107]

89. The email directed Ms Aston to a website. Ms Aston said, however, that she was not given such advice before she signed her Occupancy Agreement and was unable to view the 'StarRez' portal to confirm.[108]

90. By 1 September 2021, Ms Aston began enquiring about how she could terminate her Occupancy Agreement and was advised by Mr Maclaine, the B&G

[102] Transcript of proceedings dated 9 November 2022, page 109, lines 21-31
[103] Exhibit A5 at [18]-[29]
[104] Exhibit A5 at [18]
[105] Exhibit A5 at [37]-[41]
[106] Exhibit A5 at [32]
[107] Exhibit A5 at [33], annexure KA19
[108] Transcript of proceedings dated 9 November 2022, page 107, lines 1-44

Residential Wellbeing Coordinator, that being prevented from returning to campus because of a public health order was not a reason to terminate the Occupancy Agreement without an obligation to pay the balance owing of the Occupancy Fee unless someone else entered into an occupancy agreement for use of her room.[109]

91. On 10 September 2021, Ms Aston cancelled her fortnightly direct debit for her Occupancy Fee, but after receiving advice that a debt for unpaid occupancy fees would build up, which would result in a negative service indicator being placed on her academic record, she resumed the direct debit in November 2021.[110] By this stage she had accumulated a debt.

92. On 8 November 2021, following changes to applicable Public Health Orders with effect from 1 November 2021, Ms Aston returned to B&G removed all her belongings from her room, vacated her accommodation and returned to Sydney, as her studies for the academic year were concluding.[111]

93. Ms Aston paid $9,795 to the respondent referenced to the period of her Occupancy Agreement from its commencement on 3 February 2021 to the termination date, namely 15 December 2021.[112] Ms Aston sought an order that she be repaid $5,305, referenced to the period from 9 July 2021 (from when she was unable to return to the ACT) to 15 December 2021.[113]

Maya Konakci

94. Ms Konakci was friends with Ms Vallis and Ms Aston and was a resident at B&G in 2021. She provided a witness statement in these proceedings,[114] but was not required for cross-examination.

95. On 11 July 2021, Ms Konakci exchanged messages with Ms Vallis and Ms Aston about them potentially quarantining in an Airbnb accommodation together. She

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[109] Exhibit A5 at [44]-[48]
[110] Exhibit A5 at [48]-[55]
[111] Exhibit A5 at [61]
[112] Exhibit A4 at [51]
[113] Email correspondence received from applicants - 'Update from parties' dated 29 November 2022
[114] Exhibit A1

understood from Ms Vallis that ACT Health had told Ms Vallis that accommodation through Airbnb was not an approved quarantine facility, so the idea was not pursued.[115]

96. On 20 July 2021, upon enquiring with B&G about a rent pause while she was in Sydney and in lockdown, Ms Konakci said she was advised that "[u]nfortunately, as you have a contract with the university you still have to continue [to] pay your accommodation fee regardless of the current Covid-19 situation".[116]

97. Ms Konakci said that on 21 July 2021 she was advised by B&G that ACT Health had deemed Davey Lodge as not appropriate for completing stay-at-home orders, and students were asked to remain where they were or arrange their own quarantine accommodation if ACT Health permitted it.[117]

98. On 9 August 2021, Ms Konakci informed B&G that ACT Health had denied her exemption request to return to the ACT, and inquired about a rent refund or pause to which she was told "[a]ll students were advised … that if they were unable to use their room because of a public health direction they would continue to be liable for the cost of that room".[118]

99. On 11 August 2021, Ms Konakci had a further discussion with Ms Vallis and Ms Aston about staying with Ms Aston's grandmother in Young, NSW, following a discussion she understood Ms Aston had with Ms Forrest, who had quarantined in the Shoalhaven area, but this idea was not pursued.[119]

Georgie Forrest

100. Ms Forrest provided a witness statement in these proceedings,[120] but was not required for cross-examination. Ms Forrest was a student at ANU and in 2021 she similarly entered into an occupancy agreement for accommodation at B&G from

[115] Exhibit A1 at [2]
[116] Exhibit A1 at [3]
[117] Exhibit A1 at [4]
[118] Exhibit A1 at [5]
[119] Exhibit A1 at [6]; Exhibit A4, annexure SV13
[120] Exhibit A3

3 February 2021 to 15 December 2021. She set out her experience between June and August 2021 in relation to her studies and accommodation.

101. On 10 June 2021, Ms Forrest left the ACT and returned to her family home in Balgowlah Heights, NSW. She was subject to the travel restrictions imposed on the Greater Sydney Area on 26 June 2021.[121]

102. She said she made various enquiries about how to return to the ACT for Semester 2 and on 2 July 2021, together with three friends, she travelled to a private dwelling at North Durras, NSW, to quarantine.[122] While there, the group were visited by police officers and monitored.[123] North Durras is in the Shoalhaven LGA.

103. On 6 August 2021, the group became aware that the ACT had closed its border to the Shoalhaven region which affected their anticipated return to the ACT.[124] She said ACT Health denied exemption requests made by the group seeking to return to the ACT on the basis they were in an Affected Area and did not meet the criteria for an exemption.[125]

104. While completing quarantine at North Durras, the ACT closed its border to NSW. Ms Forrest therefore decided to return to her parents' home in Sydney.[126] She remained there until 25 November 2021, following changes to applicable public health orders on 31 October 2021 which permitted her to do so. On her return to B&G, Ms Forrest collected her belongings from her room, vacated her accommodation and again left. Ms Forrest paid for her accommodation for the duration of time she was away from B&G, commencing 10 June 2021, until the terminate date specified in her Occupancy Agreement, being 15 December 2021.

105. Ms Forrest said that on 10 August 2021 she had a telephone conversation with Ms Aston about ACT Health not permitting entry from the Shoalhaven area despite her location being only 200m within that LGA unless the exemption

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[121] Exhibit A3 at [2]
[122] Exhibit A3 at [3]-[6]
[123] Exhibit A3 at [6]
[124] Exhibit A3 at [7]
[125] Exhibit A3 at [9]
[126] Exhibit A3 at [10]-[12]

criteria were met, but ACT Health still did not allow people to return for the purposes of returning to university.[127]

Nina Rewitzer

106. Ms Rewitzer provided a witness statement in these proceedings,[128] but was not required for cross-examination. Ms Rewitzer was a student at ANU and a resident at B&G in 2020. She was a resident at B&G when the first lockdown occurred on 23 March 2020.

107. In her witness statement Ms Rewitzer states she experienced an academic pause between 23 and 27 March 2020 and was advised that if there was a possibility of returning home she should go as soon as possible. She returned home to Sydney. Her rent was covered by her parents for about a month after she left B&G in 2020.[129]

108. Ms Rewitzer states she became aware through word of mouth that rent paid after commencement of the academic pause would be reimbursed. Her rent refund was received before June 2020.[130]

109. Ms Rewitzer said she understood some international students could not leave B&G and remained there as residents. Students such as herself who chose to leave had their occupancy agreements terminated.[131]

110. Ms Rewitzer returned to B&G on a new occupancy agreement for Semester 2, 2020 for a six-month period. After her return, she received an email from B&G Admissions outlining answers to "Frequently Asked Questions".[132] In her witness

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[127] Exhibit A3 at [16]
[128] Exhibit A2
[129] Exhibit A2 at [3]
[130] Exhibit A2 at [4]
[131] Exhibit A2 at [5]
[132] Exhibit A2 at [10

statement, she drew attention to answer 14 of that document, which stated, among other things:

> *A resident always has the option to cancel their Occupancy Agreement, but it is unlikely you will be able to do this with the same financial leniency that the ANU provided in semester one.*[133]

111. Ms Rewitzer said that in about July 2021 she told Ms Vallis about her experience in Semester 1 2020 regarding the termination of her agreement and her receiving a refund.[134]

Scott Walker

112. From December 2017 to January 2022, Mr Walker was the Deputy Director of Residential Experience. Since April 2022, he has been the Head of B&G.

113. Mr Walker explained the process by which students entered into occupancy agreements with the Respondent for accommodation in 2021 at one of the Respondent's residential halls, of which B&G was one.

114. Mr Walker explained that students entered into occupancy agreements online through the Respondent's portal. The process commenced with a student registering their interest in an offer of accommodation, through the portal. If a student met the eligibility criteria, and the Respondent decided to offer a student a room at a residential hall, the Respondent sent the student an email containing an offer. The email contained a link to the portal where the student could access a copy of the standard occupancy agreement for the relevant academic year. Other related documents, in particular the Residential Handbook, could also be reviewed through the portal.

115. Mr Walker explained that if a student wished to accept the offer they needed to 'tick a box' online to indicate they agreed to the terms and conditions in the occupancy agreement, following which they received an email confirming their acceptance of the offer. By this means, the Respondent and the student, in each case, entered into an occupancy agreement, the terms and conditions of which

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[133] Exhibit A2, attachment A, page 5
[134] Exhibit A2 at [11]

were per the standard occupancy agreement available to be viewed through the Respondent's portal.

116. Mr Walker agreed the occupancy agreement was a "take it or leave it" offer and that students were not able to negotiate the terms of the agreement.[135]

117. Mr Walker acknowledged the 2021 occupancy agreement varied from the 2020 version by causing the Resident Handbook to "form a part" of the occupancy agreement. Under the 2020 version, clause 3(l) required students "to be aware of and comply with the rules and regulations in accordance with the Resident Handbook".[136] He agreed too that the 2021 version of the Handbook contained an amendment from the 2020 version to include COVID-19 as one of the communicable diseases that empowered ANU to exclude someone from residential halls during an infectious period.[137]

118. Mr Walker contended the Respondent could not terminate a student's occupancy agreement early, other than in specified circumstances caused by the student or for which the student was held responsible under the agreement. Those circumstances were misbehaviour and/or misconduct on the part of the student, the student's guest or an overnight visitor (clauses 4.2, 4.3 and 8(f)); the student's course of study at the ANU being terminated, suspended or completed (clause 9(b)(i)); the student's academic workload being reduced below 18 units in any one semester, except where approved by the ANU Registrar (clause 9(b)(i)); or the student committing an act of default as set out in clause 11(b).

119. Mr Walker contended that, pursuant to clause 12(a)-(c) of the 2021 Occupancy Agreement, if a student wished to permanently vacate their room before the Termination Date, the student remained liable to pay the occupancy fee until the earlier of the Termination Date or the date the Respondent entered into a replacement occupancy agreement with another student to occupy the room.

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[135] Transcript of proceedings dated 10 November 2022, page 204, lines 38-45

[136] See exhibit A10; Transcript of proceedings dated 10 November 2022, page 210, line 44-page 211, line 6

[137] Transcript of proceedings dated 10 November 2022, pages 211, lines 34-46

120. Mr Walker acknowledged that from time to time the Respondent had agreed to requests from students to terminate an occupancy agreement before the Termination Date and be released from their obligation to pay the Occupancy Fee until the Termination Date or a new occupant of the room is secured. Mr Walker said the Respondent agreed to such requests on a discretionary basis depending on circumstances of hardship impacting the student making the request.[138] Mr Walker said that whether to exercise the discretion was determined on a case-by-case basis depending on the hardship impacting the student, not the hardship that might impact the Respondent.[139]

121. The Respondent issued a guideline identifying circumstances in which the discretion may be exercised.[140] It was common ground that the guideline did not contemplate the impact of COVID-19 or public health orders as a reason to exercise the discretion.

122. Mr Walker rejected the proposition that the Respondent made a decision not to waive the obligation on a student to pay accommodation fees, where the student could not return to a residential hall as a consequence of public health orders, because the Respondent could not afford to do so.[141]

123. Mr Walker explained the Respondent's responses to the COVID-19 pandemic in 2020. He said that in March 2020, ANU directed students in the residential halls owned and operated by the Respondent, including B&G, to return home if they could safely do so. Mr Walker said the Respondent's residential halls remained open for a small number of students who were unable to return home, but the overwhelming majority of students in the residential halls left the ACT.

124. Mr Walker explained that because the Respondent had directed students to leave the residential halls, it agreed to implement special measures to change the Termination Date for the purposes of the 2020 occupancy agreements so that

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[138] Exhibit R3, page 4 at [18]
[139] Transcript of proceedings dated 10 November 2022, page 215, lines 22-30
[140] Exhibit R3, pages 4-5 at [19], annexure C
[141] Transcript of proceedings dated 10 November 2022, page 217, lines 17-20

students who left the residential halls in accordance with the Respondent's direction would not be liable for occupancy fees after the new termination date.

125. Mr Walker explained that by late 2020 measures and protocols had been introduced to mitigate the risks of COVID-19. Travel restrictions were being relaxed or removed. For these reasons, the Respondent decided to offer accommodation in its residential halls, including B&G, for 2021. In addition, some students were offered accommodation for Semester 2, 2020, including Nina Rewitzer, who came back for Semester 2, 2020.

126. Mr Walker said, and we accept, that Semester 1 of 2021 ended on 19 June 2021. Semester 2 of 2021 commenced on 26 July 2021 and ended on 15 December 2021.

127. Mr Walker said, and we accept, that it was "not unusual"[142] for students living in residential halls to return to their family homes or go elsewhere during the semester break. Mr Walker said that during the 2021 semester break approximately 50-60% of students at B&G remained in residence at B&G and continued to reside there during the ACT lockdown between 12 August and 1 November 2021.[143]

128. It was common ground that in May-June 2021, there was an outbreak of the Delta variant of COVID-19 which began in the eastern suburbs of Sydney and then spread to other parts of Sydney.

129. Mr Walker said that on 16 June 2021,[144] Ms McLeod, the pastoral worker at B&G, sent an email to all the students at B&G,[145] including the Applicants,[146] about the outbreak. The email stated:

> *Hi everyone,*
>
> *This is just a quick update to let you know there have been Covid-19 exposure sites added to the areas of concern page on the ACT Health website. Most recently, a number of sites located in the eastern suburbs of*

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[142] Exhibit R3, page 6 at [29]

[143] Exhibit R3, page 6 at [24]

[144] Transcript of proceedings dated 10 November 2022, page 197, line 46

[145] Transcript of proceedings dated 10 November 2022, page 203, lines 4-11

[146] Transcript of proceedings dated 10 November 2022, page 200, line 39

Sydney have been added. Here is a full list of the areas of concern - Covid-19 areas of concern-Covid-19 (ACT.gov.au).

As some of you are heading away for the winter break, it's really important that you stay updated with all of the latest updates, so please continue to check the ACT Health website as things can change very quickly.

Below is an important message from the ACT Health website:

If you are an ACT resident currently in the ACT and have been to one of the following close contact exposure locations in New South Wales at the dates and times specified below, you must:

- *call ACT Health on (02) 5124 6209*
- *complete an online declaration form within 24-hours from the commencement of the Areas of Concern notice*
- *immediately quarantine for 14 days since you were last at the exposure location*
- *get tested for Covid-19, regardless of whether you have any symptoms or not.*

If you are an ACT resident who is not currently in the ACT and you have been to one of the close contact exposure locations you must follow public health requirements of the jurisdiction you are in. He

If you wish to return to the ACT, you must seek an exemption from the jurisdiction that you are in. ACT Health is also asking ACT residents who are not in the ACT to seek an exemption from ACT health prior to entering the ACT, so that we can assist you with your safe return to the ACT. Quarantine requirements will apply.

This includes people who have received the Covid-19 vaccine.

If you have any questions or concerns, please reach out.[147]

130. Mr Walker said the Respondent was doing everything it could to facilitate the return of students to the ANU and did its best to disseminate information about COVID-19 that was relevant to students.[148]

131. Mr Walker said that students who remained in residence at B&G during the 2021 semester break continued to receive services at B&G. B&G was ordinarily a self-catered residential hall. However, to reduce the risk of COVID-19 infection, B&G closed the communal kitchens and the Respondent supplied catered meals to the students at the Respondent's expense between 12 August and 1 November

[147] Exhibit R3, page 6 at [30](a), annexure E

[148] Transcript of proceedings dated 10 November 2022, page 214, lines 15-25

2021.[149] Mr Walker said, and we accept, that lectures and tutorials continued in an on-line format during this period.[150]

132. Mr Walker said that from the start of the COVID-19 pandemic, the standard form occupancy agreement was not amended to include the impact of public health orders (such as lockdowns or border closures) as a ground for a student to vacate before the termination date without having to continue paying the occupancy fee.[151] We presume this comment is subject to the qualification that in 2020 the Respondent revised the termination date consequent upon its direction to students to leave the residential halls as discussed above.

133. Mr Walker agreed that during 2021 when the ACT was in lockdown (which commenced on 12 August 2021) and the Respondent was conducting all classes online, there was no realistic prospect of finding another resident occupying a room vacated by a student until the lockdown had ceased. Mr Walker was accepting, as we understood it, that a student who chose to terminate their occupancy agreement under clause 10 of their occupancy agreement should have expected their room not to be filled and, as a consequence, would be required to pay the occupancy fee until the Termination Date.

134. Mr Walker was shown a printout dated 16 August 2021 from an online "Q & A" forum for students in COVID-19 affected areas in Australia managed by the Respondent on which a student posted a question about their obligations regarding their occupancy agreement and rent. Mr Walker was directed towards the Respondent's posted answer:

> *You were advised before you signed your Occupancy Agreement that if you were unable to use the room because of a public health direction, you would continue to be liable for the cost of that room.*[152]

135. Mr Walker said ANU staff were "working through" a statement to that effect at the beginning of the year but (for health reasons) he was not at ANU when it was finalised. Mr Walker said he did not know whether the statement was made, and

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[149] Exhibit R3, pages 6-7 at [25]
[150] Exhibit R3, page 7 at [26]
[151] Exhibit R3, page 7 at [27]
[152] Exhibit A7, page 106

that in preparation for the hearing he had been unable to find any document containing that information.[153]

136. Mr Walker agreed the Respondent could have included a clause in the 2021 occupancy agreement to address "the unknowns and the risks of COVID-19",[154] but said he did not believe it was necessary because the termination clause (clause 10) "is a blanket termination clause and we have a process to consider case-by-case" requests."[155]

137. Mr Walker agreed that consequent upon ACT Health issuing AAO10, on 9 July 2021 (the day after commencement of Semester 2) the Respondent conducted an online forum with students to discuss, among other things, the options for students wishing to return to the ANU. Ms Helyar, ANU's Director of Residential Services, explained three "pathways" by which students could return.

138. The first was for people who had an urgent need to return because of a safety or a housing problem (for example, homelessness).

139. The second was a "priority need", defined as a need to commence or maintain work, especially if the person was at risk of losing employment that supported their ability to continue studying or circumstances that were having a negative impact on their mental health and well-being or a need to attend an "in person placement" or "face-to-face class" to meet course requirements.

140. The third was by completing a period of quarantine outside a COVID-19 affected area that was not in the ACT. For students in a COVID-19 affected area, this would require approval from NSW Health to leave the COVID-19 affected area in order to quarantine outside the COVID-19 affected area for 14 days before returning to the ACT.[156]

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[153] Transcript of proceedings dated 10 November 2022, page 221, lines 8-36
[154] Transcript of proceedings dated 10 November 2022, page 226, lines 15-20
[155] Transcript of proceedings dated 10 November 2022, page 226, lines 45-46
[156] Exhibit A9, pages 129–130

141. Ms Helyar explained that, at the time, the Respondent was pursuing a fourth pathway, namely a place on campus at Davey Lodge where returning students could 'quarantine' for 14 days. Mr Walker agreed the fourth pathway never eventuated.[157]

142. Mr Walker agreed that neither of the Applicants fell into the category of people who could have returned to the ACT under the first or second pathway,[158] even if they organised and paid for their own quarantine in an approved facility,[159] although he could not be sure what ACT Health would have decided regarding the grant of an exemption to permit a student to return to the ACT.[160] He agreed that provisions governing travel to the ACT were changing continuously.[161]

143. Mr Walker agreed the Respondent was doing all it could to enable students to return to the ANU but was striking difficulties with the viewpoints of ACT Health. In particular, the Respondent considered students at its residential halls to be residents of the ACT, but ACT Health did not agree. As proof of residency in the ACT, ACT Health stated it required, for example, an ACT driver licence: an ACT address was not sufficient. Mr Walker agreed he was not aware of any communication from the Respondent to students whose permanent addresses were in Greater Sydney that ACT Health would consider them to be ACT residents.[162]

144. Mr Walker agreed the Respondent was doing all it could to enable students to return to the ANU but was unsuccessful whilst the ACT was in lockdown.[163]

Professor Tracy Smart

145. Professor Smart commenced employment with the Respondent in May 2020. From August 2020 to February 2022, she held the position of Public Health Lead in the Respondent's COVID-19 Response Office. The main function of the Office was to provide public health advice and to disseminate public health information

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[157] Transcript of proceedings dated 10 November 2022, page 233, line 46
[158] Transcript of proceedings dated 10 November 2022, page 232, lines 10–26
[159] Transcript of proceedings dated 10 November 2022, page 246, line 46
[160] Transcript of proceedings dated 10 November 2022, page 248, lines 19–22
[161] Transcript of proceedings dated 10 November 2022, page 244, lines 1–5
[162] Transcript of proceedings dated 10 November 2022, page 243, lines 32–34
[163] Transcript of proceedings dated 10 November 2022, page 245, lines 10–31

issued by government authorities to the Respondent and to its students during the COVID-19 pandemic.[164]

146. Professor Smart spoke about the use of an on-campus residential premises, Davey Lodge, as a quarantine facility for persons returning to Australia from overseas. She said approximately 50 residential students completed a mandatory 14-day quarantine at Davey Lodge in January and February 2021. In June 2021 Davey Lodge was used as a quarantine facility for Commonwealth Government officials returning from overseas. Professor Smart said she and others at ANU negotiated with ACT Health for Davey Lodge to continue to be used as a quarantine facility for interstate students wanting to return to ANU, but this did not eventuate. The use of Davey Lodge as a quarantine facility ceased on 5 July 2021.[165] The prospect of using Davey Lodge as a quarantine facility was abandoned when the ACT went into lockdown on 12 August 2021, although it was used for isolating students already in the ACT who had been a 'close contact' of a person with COVID-19.[166]

147. Professor Smart referred to AAO9 and described its effect as requiring individuals travelling to the ACT from places listed in AAO9 to be under 'stay-at-home' restrictions for 14 days upon their arrival in the ACT. Professor Smart said that, on 25 June 2021, AAO9 was amended to add Greater Sydney as another place to which AAO9 applied.[167]

148. Professor Smart referred to AAO10 and described its effect as follows:

> [F]*irst of all they had to apply for an exemption from … ACT* [Health] *to actually enter the territory. If that was approved, that it – the approval of that required them to have a place of – proof of a place of residence in the ACT, and then they would have to quarantine in that place of residence for 14 days.*[168]

149. Professor Smart agreed that despite the Respondent's submissions to the contrary, ACT Health's view was that "a room in a residence at ANU did not qualify as an

[164] Exhibit R4 at [3]
[165] Exhibit R4 at [5]-[8]
[166] Transcript of proceedings dated 10 November 2022, page 265, line 8-page 266, line 30
[167] Transcript of proceedings dated 10 November 2022, page 273, lines 4–5
[168] Transcript of proceedings dated 10 November 2022, page 260, lines 33–37

ACT residence".[169] She also agreed that ACT Health did not regard University residences as appropriate places for quarantine.[170]

150. Professor Smart said that on 11 July 2021, officers from ACT Health expressed their concern to Professor Smart that students returning to the ACT from Sydney LGAs "represented one of the greatest COVID-19 risks to the ACT at that time".[171]

151. In her oral evidence, Professor Smart agreed that the Delta variant of the COVID- 19 virus was a "game changer" regarding public health responses to COVID-19. She said it was difficult "to put a finger on a date" as to when the seriousness of the Delta variant was recognised, but "by later in the year [2021] it was obvious".[172]

152. Professor Smart agreed that whilst she and others at ANU continued to try and identify pathways for students to return to ANU, they were unable to identify a pathway acceptable to ACT Health that would permit members of the student body to return to the ACT.[173] Professor Smart acknowledged that under AAO10 a person could apply for an 'exemption' enabling them to return to the ACT, but there were great difficulties for a student trying to gain an exemption, having regard to the grounds stated in AAO10 for obtaining an exemption. She said there were "two sticking points". The first was ACT Health's decision that students living in ANU's residential halls were not residents of the ACT. The second was that students did not have a place to quarantine.[174]

The Applicants' submissions

153. At the commencement of these proceedings the Applicants, Ms Vallis sought relief on five grounds: frustration of contract, repudiation of contract, breach of sections 18 and 23 of the *Australian Consumer Law* (**the ACL**) and breach of the Occupancy Principles in the *Residential Tenancies Act 1997* (**the RT Act**).

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[169] Transcript of proceedings dated 10 November 2022, page 262, lines 18–19
[170] Transcript of proceedings dated 10 November 2022, page 263, lines 30–31
[171] Exhibit R4 at [14]
[172] Transcript of proceedings dated 10 November 2022, page 253, lines 41–43
[173] Transcript of proceedings dated 10 November 2022, page 263, line 39-page 264, line 1
[174] Transcript of proceedings dated 10 November 2022, page 268, line 44-page 269, line 7

Ms Aston sought relief on the same five grounds, with an additional ground: breach of section 21 of the ACL.

154. Prior to hearing, the Applicants abandoned their claims under the ACL and the RT Act.[175] At hearing, the Applicants abandoned their claims that the Respondent had repudiated the Occupancy Agreements.[176] This left the Applicants' claim that the Occupancy Agreements were frustrated at law as the only issue for determination.

155. The Applicants initially submitted the Occupancy Agreements were frustrated as at 26 June 2021 when the Moseley Email was sent to the Applicants (and all other residents at B&G) in response to the Sydney lockdown stating "if you are in the Greater Sydney area you cannot return to B&G until the travel restrictions have been lifted."[177] The Applicants characterised this as a direction to stay away from to B&G until the travel restrictions had been lifted.

156. In closing submissions, the Applicants submitted instead the Occupancy Agreements were frustrated from midnight on 9 July 2021, being the time from which persons were prohibited from travelling to the ACT pursuant to AAO10 other than in the circumstances described in AAO10. In this respect, the Applicants submitted that none of the circumstances described in AAO10 would have enabled them to return to the ACT or to B&G.[178]

157. In support of their claim, the Applicants relied on a number of facts and circumstances said to have been established on the evidence.

158. First, they submitted the Occupancy Agreements were offered on a "take it or leave it"[179] basis, with no scope for negotiation. They characterised the Occupancy Agreements as "very thin ice"[180] agreements. They referred to clause 4.3(a) entitling the Respondent to take "such action as deemed necessary,

[175] See applicant's further amended statement of claim dated 23 August 2022
[176] Transcript of proceedings dated 11 November 2022, page 288, lines 25-32
[177] Exhibit A4, annexure SV6; Exhibit A5, annexure KA6
[178] Transcript of proceedings dated 11 November 2022, page 289, lines 37-40
[179] Applicants' submissions dated 7 July 2022, page 13; Transcript of proceedings dated 11 November 2022, page 278, lines 40-45
[180] Transcript of proceedings dated 9 November 2022, page 11, line 28

including … immediate termination of the Agreement" if the Applicant's behaviour was "deemed unacceptable" by the Respondent. They referred also to clause 4.1(g) which would place the Applicants in breach of their agreements if they did "not comply with "reasonable directions" from the Respondent.

159. With reference to these allegedly onerous clauses, the Applicants submitted the Tribunal should apply what they described as the "Red Hand Rule" which, they said, stands for the proposition that the more unreasonable or unusual a clause, the more it should be drawn to the attention of the other party "such as being printed in red ink with a red hand pointing to it".

160. The Applicants submitted the Respondent had not fairly brought to their attention clause 12(b) in their Occupancy Agreements that required them to pay out the Occupancy Fee for the entirety of their contract even if they were legally prohibited from entering the ACT and having the benefit of their rooms at B&G.

161. Second, by reference to AAO10, the Applicants submitted their Occupancy Agreements were incapable of being performed because there was no prospect of them obtaining an exemption to enable them to return to the ACT (or to B&G). They submitted that return to the ACT was "an impossibility"[181] based on their objective circumstances, despite the best efforts of the Respondent to facilitate their return. In this respect, they relied on ACT Health's view, if not determination, that they were not residents of the ACT despite the Respondent's efforts to persuade ACT Health to the contrary. They submitted that even if ACT Health were to have accepted they were residents of the ACT, they still would not have obtained an exemption to permit their return to B&G because they could not have fulfilled any of the grounds for the ACT Chief Health Officer granting them an exemption.

162. Third, with reference to whether the impossibility of them returning to B&G as a consequence of AAO10 was foreseeable, the Applicants submitted this must be assessed by reference to the facts and circumstances at the time they entered into their Occupancy Agreements with the respondent – meaning 23 December 2020 in the case of Ms Vallis and 24 December 2020 in the case of Ms Aston. At that

[181] Transcript of proceedings dated 11 November 2022, page 289, line 18

time, with reliance on the evidence of Mr Walker, the Applicants submitted there was reasonable confidence that the residential halls could resume "normal operations in 2021"[182] after the "significant upheavals … in 2020".[183] The Applicants relied on the increasing availability of COVID-19 vaccinations, the community's better understanding of social distancing, greater use of online classes at ANU and "other ways of doing business"[184] to mitigate the risks of COVID-19.

163. The Applicants submitted that even if travel restrictions consequent upon efforts to control the spread of COVID-19 were foreseeable, as of December 2020, the prospect that the ACT would close the border with NSW was not foreseeable. They pointed out that this was the first time since about 1908 this had occurred.[185] The Applicants likened the closure of the border to the bushfires that devastated Canberra on 18 January 2003 in the sense that, whilst fires, the spread of fires and ongoing inconvenience consequent upon the fires was foreseeable when the fires started on 8 January 2003, no one could have foreseen the firestorm that struck Canberra on the afternoon on 18 January 2003.[186]

164. The Applicants relied upon the High Court's statement in *Codelfa Constructions Pty Ltd v State Rail Authority of NSW*[187] (***Codelfa***) about the law of frustration, widely cited in later cases:

> *Frustration occurs, as Lord Radcliffe said in Davis Contractors Ltd. v. Fareham Urban District Council:*
>
>> *… whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.*[188]

[182] Transcript of proceedings dated 11 November 2022, page 281, line 22
[183] Transcript of proceedings dated 11 November 2022, page 281, line 16
[184] Transcript of proceedings dated 11 November 2022, page 281, line 20
[185] Transcript of proceedings dated 11 November 2022, page 297, lines 1-4
[186] Transcript of proceedings dated 11 November 2022, page 284, lines 41-44
[187] [1982] HCA 24
[188] [1982] HCA 24 at [30], quoting *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] AC 696, 729

165. The Applicants submitted the events and decisions that occurred on 26 June 2021 (the Third Greater Sydney Order) and 9 July 2021 (AAO10), and the non-availability of Davey Lodge as a quarantine facility, among other events, made it "impossible" for them to return to the ACT. These events, they said, radically changed performance of their Occupancy Agreements and were sufficient to establish the Occupancy Agreements were frustrated.[189]

166. The Applicants also relied on the absence of a *force majeure* clause in the Occupancy Agreements to submit it was open for the Tribunal to find that the events which frustrated the contract led to termination of the Occupancy Agreements from the date of the frustrating event (9 July 2021).

167. The Applicants submitted their inability to return to the ACT "was not merely [of] a passing nature or a temporary obstruction"[190] as the Respondent contended. It was impossible for them to return to the ACT between 26 June 2021 and 1 November 2021, a period of 129 days. They submitted that 129 days is "an unreasonable delay in the performance of the contract as it forms 41% of the full period of their contract [which] is a significant loss of benefit".[191]

168. The Applicants also relied on the fact that by 1 November 2021, when they were allowed to return to the ACT, their classes at ANU had concluded and there was no further reason for them to be on campus to attend classes. The Applicants submitted that "frustration of contract is permitted in matters of unreasonable delay",[192] although we were not taken to any authority for that proposition.

169. By way of remedy, the Applicants submitted that upon frustration of their Occupancy Agreements they are entitled to recover the money paid under the agreements referenced to the period from when it was impossible for them to enter the ACT. They submitted the Respondent should not be allowed to receive "a windfall gain" by keeping the Applicants' fees during the 129-day period when it was impossible for them to enter the ACT or access B&G.

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[189] Applicants' submissions dated 7 July 2022, page 10
[190] Applicants' submissions dated 7 July 2022, page 11
[191] Applicants' submissions dated 7 July 2022, page 11
[192] Applicants' submissions dated 7 July 2022, page 11

170. In support of their submissions, the Applicants relied on two decisions of the Appeal Panel of the NSW Civil and Administrative Tribunal (**NCAT**): *Gem Ezy Flights Pty Ltd v Gribble* (***Gem Ezy***)[193] and *Snowtime Tours Pty Ltd v Lavecky* (***Snowtime Tours***).[194]

171. In *Gem Ezy*, the respondent paid $5,665.02 to the appellant, a travel agent, being the fee payable for her daughter to travel overseas on a school trip. The money was paid between November 2019 and late January 2020. The trip was scheduled for April 2020. The school cancelled the trip consequent upon restrictions on overseas travel. In particular, the appellant's daughter was unable to travel overseas (with effect from midnight on 25 March 2020) consequent upon a Commonwealth determination that prohibited her from leaving Australia without an exemption which, for her daughter, was unobtainable.

172. An original tribunal of NCAT determined the contract was frustrated, which engaged the remedies (by way of entitlements to repayment of money) under the *Frustrated Contracts Act 1987* (NSW) (**the FC Act**). The appellant appealed. The NCAT Appeal Panel dismissed the appellant's appeal.

173. In *Snowtime Tours*, on 11 March 2021 the appellant entered into a contract to provide the respondent with seven nights of accommodation at Thredbo, NSW, from 4 July 2021 for a fee of $16,419. The accommodation was at all material times open and operating, but the respondent was unable to travel to Thredbo and use the accommodation because of COVID-19-related government travel restrictions imposed subsequent to the parties entering into the contract that prevented the respondent from leaving Sydney.

174. An original tribunal of NCAT determined the contract was frustrated, consequent upon the respondent being unable to access the accommodation, because of the travel restrictions, and ordered the appellant to refund the accommodation fee.

175. The NCAT Appeal Panel dismissed the appellant's appeal. One of the grounds of appeal was that the original tribunal "erred in not finding that the government

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[193] [2021] NSWCATAP 76
[194] [2022] NSWCATAP 219

lockdowns were foreseeable".[195] In dismissing that ground, the Appeal Panel referred to the High Court's decision in *Codelfa*, following which the Appeal Panel said:

> 22. *In summary, frustration will be satisfied*
>
> (1) *if the frustration event causes the contractual obligation owed by either party under the contract to become impossible or radically different from the obligation contemplated at the time that the parties entered the contract.*
>
> (2) *The frustration event was not the fault of either party; and*
>
> (3) *The contract does not deal with what will happen on the occurrence of the alleged frustration event.*
>
> 23. *The appellant submits that the Tribunal erred in not finding that the government lockdowns were foreseeable. However, that is not the relevant test. The test is whether the contract became impossible or radically different because of the intervening event, in this case, being the lockdowns in Sydney which resulted in the respondent not being able to travel to Thredbo. Lord Radcliffe in Davis refers to an event as having to be 'unexpected', but he does not refer to the event as having to be foreseeable. While the COVID-19 pandemic had been in existence for some time when the respondent booked the accommodation in March 2021, there is nothing to suggest that the lockdowns which subsequently occurred in Sydney from June 2021 were expected and indeed it is difficult to see why someone would book the accommodation if they did expect the lockdowns.*
>
> ...
>
> 28. *... The test as set out in Davis above establishes that frustration occurs when 'without default of either party a contractual obligation has become incapable of being performed". That the appellant could still provide the service is not relevant, because it is the unexpected event of the government lockdown which frustrated the contract.*[196]

176. The Applicants submitted that *Gem Ezy* and *Snowtime Tours* are "persuasive"[197] because the circumstances in those cases were materially similar to the circumstances in this case, namely the Applicants were unable to travel to the ACT consequent upon government travel restrictions. Applying the reasoning in *Gem Ezy* and *Snowtime Tours*, the Applicants submitted their Occupancy Agreements were frustrated.

[195] *Snowtime Tours* at [23]

[196] *Snowtime Tours* at [22]-[23], [28] (emphasis added)

[197] Applicants' submissions dated 7 July 2022, page 12

177. The Applicants also relied on a decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Foster & Sieker v Theodor* (***Foster***).[198] In that case, the applicants booked short-stay holiday accommodation for two nights (17 and 18 July 2020) in an alpine lodge owned by the respondent for a booking tariff of $2,950. They made the booking and paid the tariff of $2,950 in May 2020. A few weeks prior to the booked dates, the Victorian Government introduced COVID-19 travel restrictions that prevented the applicants from travelling to the lodge. The restrictions also prevented the respondent from operating the lodge. VCAT determined the contract had been frustrated, consequent upon the introduction of the travel and operating restrictions.

178. VCAT accepted that in late March 2020 the Victorian Government had promulgated travel and business restrictions as a consequence of the COVID-19 pandemic and that these restrictions were known to all parties. It accepted the likelihood of further government restrictions remained a real prospect, as at 27 May 2020 when the applicants booked the accommodation at the lodge, and that a person of ordinary intelligence would have foreseen the imposition of government restrictions as a "real possibility". VCAT found, nevertheless, that the foreseeability of further government restrictions was not determinative of a finding that the applicants, when they booked the accommodation, accepted the risk of further government restrictions.

179. In *Foster*, VCAT drew on a decision of the UK Court of Appeal in *Edwinton Commercial Corporation v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The "Sea Angel")* (***Edwinton***),[199] in which the Court found the application of the doctrine of frustration required a "multi-factorial approach". It noted the following comment of the Court:

> *Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind.*[200]

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[198] [2021] VCAT 1025
[199] [2007] EWCA Civ 547
[200] *Edwinton* at [112]

180. Applying that approach, VCAT found there was nothing in the contract to suggest the applicants intended to assume the risk if further government restrictions prevented them from travelling to the lodge. It noted the respondent had done nothing to address her position should that occur.

181. As for assumption of risk, VCAT found the respondent was in a "better position" to assume the risk, knowing the profit margins on the booked accommodation, and so could mitigate the risk by factoring it into her margins.

182. As for context, VCAT noted the contract was a standard form contract without any "genuine level of negotiation of the terms of the contract."[201] It noted the respondent used an on-line booking system, that the customer was obliged to "click on a box to acknowledge that the customer had read and had accepted the terms, as they stood" and that the applicants "were given no real opportunity to negotiate the impact of prospective government restrictions on the contract".[202]

183. VCAT noted the absence of any force majeure clause in the contract dealing with the occurrence of a contingent event and how the contract would be modified as a consequence, for example the extent of a refund. It noted the respondent's offer to refund 50% of the booking tariff as suggesting "some level of fairness" was appropriate.

184. VCAT then applied these considerations to find that the loss of the contractual benefit, by reason of the frustrating event, was born largely, although not entirely by the applicants and that the respondent's retention of the booking tariff "would result in an unjust enrichment, particularly in circumstances where the respondent was excused from providing the accommodation and where she did not incur any of the direct expenses involved in providing those services."[203]

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[201] *Foster* at [47]
[202] *Foster* at [47]
[203] *Foster* at [50]

185. VCAT concluded:

> *Therefore, having regard to the above matters, I have no hesitation in finding that the doctrine of frustration remains applicable in the circumstances of this contract, notwithstanding that the relevant contingency was or ought to have been foreseen by the parties.*[204]

186. In finding the contract had been frustrated, VCAT noted that "a subsequent change in the law or in the legal position affecting a contract is well recognised as a head of frustration."[205] VCAT relied on several authorities including the High Court's decision in *Scanlan's New Neon Ltd v Tooheys Ltd* (***Scanlan's***)[206] and VCAT's decision in *Beresford v AJ Mackenzie Pty Ltd* (***Beresford***)[207] in support of that proposition but made no reference to anything in those cases to support the proposition.

187. In *Scanlan's*, a decision of the High Court published in 1943, Tooheys Ltd leased a neon sign from Scanlan's New Neon Ltd for five years to be placed on Scanlan's building. The lease agreement was executed prior to Japan entering World War II following which the NSW Government issued an order making it illegal to illuminate neon signs with effect from 19 January 1942. We deal further with this case below, but note the High Court found the order preventing illumination of the sign did not frustrate the contract.

188. In *Beresford*, in early February 2020, the applicants entered into a contract with the respondent to hire a houseboat on the Murray River from 6 to 9 April 2020. On 10 February 2020, the applicants paid $1,900 as a part payment of the amount payable under the contract. Those planning to use the houseboat included friends of the applicants from Queensland and Victoria. On 29 March 2020, the Queensland Government issued a health direction preventing Queensland residents from leaving their homes except for specific reasons. A holiday was not one of those reasons. On 30 March 2020, the Victorian Government issued a similar direction. The directions "spanned the period leading up to and during the period for which the contract provided for the hire of the houseboat. All the

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[204] *Foster* at [52]
[205] *Foster* at [18]
[206] (1943) 67 CLR 169
[207] [2021] VCAT 236

persons who were to participate … were not able to attend to take possession of and occupy the houseboat for the period from 6 to 9 April 2020."[208] VCAT found "that due to the Queensland and Victorian COVID-19 Directions, the contract for the hire of the houseboat was frustrated."[209]

189. The Applicants submitted that:

(a) their decisions to return to Sydney during the mid semester break;

(b) their decisions not to return to the ACT during the 'window of opportunity' when they could have returned without needing an exemption from the ACT Chief Health Officer, in Ms Vallis' case before 23 June 2021 and in Ms Aston's case before 26 June 2021 (when neither Applicant was in an Affected Area or subject to a Greater Sydney Order, respectively); and

(c) their decisions not to apply for an exemption in order to return to the ACT

are all irrelevant to the question whether their Occupancy Agreements were frustrated because what was or should have been contemplated under the Occupancy Agreements must be assessed as at December 2020, when they entered the Occupancy Agreements, and the closure of the ACT border with NSW was never contemplated.

190. The Applicants relied on the absence of anything in the Occupancy Agreements concerning performance of the contract or allocation of risk consequent upon restrictions arising from COVID-19 in support of their submission that the Respondent, not them, should carry the risk.

191. The Applicants also relied on the absence of any direction from the Respondent that they not travel, implying the Respondent accepted they were free to stay or go as they chose. Consequently, the Applicants contended that questions about what they could have done or could not have done do not arise because the Occupancy Agreements "did not contemplate the effects of COVID-19".[210] The

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[208] *Beresford* at [23]

[209] *Beresford* at [25]

[210] Transcript of proceedings dated 11 November 2022, page 302, lines 4-20

Applicants submitted that the effects of COVID-19 "were unforeseeable, unpredictable and rendered the contract impossible".[211]

192. The Applicants relied on the summary of *Codelfa* provided in *Snowtime Tours*[212] in submitting that the Greater Sydney lockdowns were not in contemplation at the time they signed the Occupancy Agreements on 23 December and 24 December 2020, respectively. They submitted that whilst the COVID-19 pandemic was a known event, lockdowns to prevent people from travelling interstate, in particular between the ACT and NSW were not in contemplation.

193. The Applicants submitted, by relying on *Foster*, that the foreseeability of a lockdown and consequential travel restrictions did not preclude a finding that the Occupancy Agreements were frustrated.[213] They submitted that if the impossibility of them being unable to travel to the ACT had been foreseen, the Respondent would have made provision for COVID-19 within the Occupancy Agreement as it did with the 2021 short term accommodation agreement. It did not.

194. The Applicants submitted that clause 12(b) of their Occupancy Agreements should not be construed as an assumption of risk on the part of the Applicants for COVID-19 related lockdowns and travel restrictions.

195. The Applicants submitted we should reject the Respondent's submission that clause 12 (the termination clause) should be construed or interpreted as a *force majeure* clause. The Applicants submitted that such an interpretation would require each of them to keep paying rent, even if the accommodation ceased to exist. In any event, they submitted that such clauses "become moot, once the contract is frustrated"[214] and that if a contract does not have a *force majeure* clause, a contract may be found to have been frustrated.

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[211] Transcript of proceedings dated 11 November 2022, page 302, lines 19-20

[212] *Snowtime Tours* at [22]

[213] Applicant's written submissions dated 7 July 2022, page 13, citing D.W. Grieg and Davis, *The Law of Contract*, (Law Book Company, 1987) 1316-1318

[214] Applicants' submissions dated 7 July 2022, page 13

196. The Applicants submitted their inability to return to the ACT occurred through "no fault of the parties" and despite the best efforts of the Respondent (per the evidence of Mr Walker and Professor Smart) to facilitate their return.

197. The Applicants submitted the Occupancy Agreements were "incapable of being performed" because every effort by the Applicants to return to the ACT in accordance with ACT Health requirements, for example by quarantining at an Airbnb or in regional NSW, was not acceptable.

198. The Applicants submitted we should reject the Respondent's submission that it was fulfilling its obligations to the Applicants by allowing them to continue to store their belongings in their room for the whole of the relevant period because the submission mischaracterises the Occupancy Agreements. The Applicants submitted the Occupancy Agreements were, for all practical purposes, agreements for residential accommodation not storage of belongings.

199. In response to the Respondent's submission that the Occupancy Agreements were not frustrated because the Applicants were able to apply for an exemption in order to return to the ACT, the Applicants submitted the submission was artificial because, on the evidence, an exemption was unobtainable. They referred to ACT Health's opinion that students returning to the ACT "represented the greatest risk"[215] to the health of ACT residents and could not come back. They likened themselves to the student in *Gem Ezy* who did not apply but would never have qualified for an exemption to leave the country.[216]

Respondent's submissions

200. The Respondent began by noting statements of principle regarding the law of frustration. Applying those principles to the facts, the Respondent submitted the Occupancy Agreements were not frustrated.

201. Like the Applicants, the Respondent's starting point was the High Court's articulation of the doctrine of frustration in *Codelfa*, although it relied on further passages in that decision.

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[215] Transcript of proceedings dated 11 November 2022, page 287, lines 38-46
[216] Transcript of proceedings dated 11 November 2022, page 287, lines 34-46

202. In *Codelfa*, the High Court, per Brennan J (as he then was), said:

> *Frustration occurs, as Lord Radcliffe said in* *__Davis Contractors Ltd. v. Fareham Urban District Council__* *[1956] UKHL 3; (1956) AC 696, at p 729:*
>
> > *[30] ... whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.* *__Non haec in foedera veni__*. *It was not this that I promised to do.*
>
> *...*
>
> *The test may be put in ways other than that stated by Lord Radcliffe, for there are various juridical bases of the doctrine of frustration: see, for example, the review by Latham C.J. of the bases suggested in Scanlan's New Neon Ltd. v. Tooheys Ltd. Though Lord Radcliffe's judgment has found favour both here (Brisbane City Council v. Group Projects Pty. Ltd. [1979] HCA 54; (1979) 145 CLR 143, at pp 160-161) and in England (*__*Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd.*__ *(1982) AC 724) there is much to be said in favour of Lord Wilberforce's view that the various theories "shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration"" (*__*National Carriers Ltd. v. Panalpina (Northern) Ltd.*__ *[1980] UKHL 8; (1981) AC 675, at p 693). (at p409).*[217]

203. The Respondent also drew on the statements of Aitkin J in *Codelfa*:

> *25. There is one further comment to be made on the judgment of Stephen J. in the Brisbane City Council Case. He quoted from Lord Radcliffe the following passage: "... it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for", and after further comment, said: "His Lordship's emphasis upon change in obligation is, I think, to be understood in the context of the factual situation under discussion in the Davis Contractors Cas" (1979) 145 CLR, at p 161 . I do not take his Honour to use the expression "change in obligation" in a sense different from that in which Lord Radcliffe used the expression "change in the significance of the obligation". It was in my opinion that formulation which led his Lordship to say (1956) AC, at p 729 :*
>
> > *"There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."*
>
> *That formulation necessarily involves questions of degree.*

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[217] *Codelfa* at [33]

> 26. *We are of course not bound by the decisions of the House of Lords but the decisions in Davis Contractors, National Carriers [1980] UKHL 8; (1981) AC 675 and Pioneer Shipping (1982) AC 724 provide valuable guidance on the present topic. The fact that their Lordships have now firmly adopted a basis for the application of the doctrine of frustration which departs from that adopted in earlier decisions of the House of Lords and from the manner in which the doctrine was expressed in this Court by Latham C.J. in Scanlan's New Neon Ltd. v. Tooheys Ltd. [1943] HCA 43; (1943) 67 CLR 169 presents no reason why we should not now apply the doctrine adopted by their Lordships in those cases if we think that it is right.*
>
> 27. *For my own part I would with respect adopt the reasons of the House of Lords in those three cases as being preferable to the other bases which have been suggested from time to time. Their test has the advantage of being flexible and capable of application to a wide range of circumstances and lacks the degree of unreality involved in the implied term theory. I would, like Stephen J. in the Brisbane City Council Case [1979] HCA 54; (1979) 145 CLR 143 , prefer to express my conclusion in the present case on the basis of Lord Radcliffe's formulation.* [218]

204. The Respondent also drew on the Victorian Court of Appeal's articulation of the doctrine in *oOh! Media Roadside Pty Ltd (Formally Our Panels Pty Ltd) v Diamond Wheels Pty Ltd* (***oOh! Media***).[219] In that case, Nettle JA (as he then was) said:

> *70. Consistently with Codelfa, I take the law* [of frustration] *to be that a contract is not frustrated unless a supervening event:*
>
> *(a) confounds a mistaken common assumption that some particular thing or state of affairs essential to the performance of the contract will continue to exist or be available, neither party undertaking responsibility in that regard; and*
>
> *(b) in so doing has the effect that, without default of either party, a contractual obligation becomes incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.*[220]

205. The Respondent submitted, in summary, there are two limbs that must be satisfied in order for a contract to be frustrated.

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[218] *Codelfa* at [25]-[27]
[219] [2011] VSCA 116
[220] *oOh! Media* at [70]

206. The first limb considers the facts and circumstances at the time the contract was entered into. These include the terms of the contract, in particular the manner in which risk was contemplated under the contract and what was foreseen or was reasonably foreseeable at that time.

207. The second limb considers the facts and circumstances at the time of the alleged frustrating event. This contemplates consideration of whether there is a "radical difference"[221] between the facts and circumstances known or reasonably foreseeable by the parties at the time the contract was entered into and the facts and circumstances at the time of the alleged frustrating event. The second limb also requires consideration of whether the radical difference has arisen "without default of either party".

208. In *oOh! Media*, Nettle JA said of foreseeability:

> *72. A number of the single instance decisions to which Stephen J referred in Brisbane City Council were concerned with application of the doctrine of frustration in circumstances where a supervening event was foreseeable or foreseen at the time of entry into the contract. As Lord Wright said in Maritime National Fish Ltd v Ocean Trawlers Ltd, where a supervening event is not only foreseeable but actually foreseen at the time of entry into a contract, it is more difficult to conceive of the parties as having entered into the contract on the basis of a common understanding that the event could not occur during the life of the contract. Where, however, a supervening event, although foreseeable, was not foreseen at the time of entry into the contract, the fact that it was foreseeable may not be of much significance unless the degree of foreseeability is particularly high.*
>
> *73. Consequently, as later cases demonstrate, it is important to be precise about the nature and degree of foresight. So far as foreseen events are concerned, the parties to a contract may have foreseen an event but not foreseen the nature or extent of it. In The Sea Angel, Rix LJ gave as an example, based on The Nema, a case where the possibility of an industrial strike was foreseen, and actually provided for in the contract, but lasted so long as to go beyond the risk assumed under the contract. It was held to have frustrated the contract. Cheshire and Fifoot's Law of Contract suggests that in some cases it may also appear that, 'Failure to provide expressly for an event that was foreseen* [is] *due to … a deliberate decision to leave matters to be sorted out by the parties, or by the law'.*
>
> *74. In the case of foreseeable but unforeseen events, the nature and extent of foreseeability is critical. Since most events are foreseeable in one*

[221] Transcript of proceedings dated 11 November 2022, page 307, line 21

> *sense or another, the parties to a contract will not ordinarily be taken to have assumed the risk of an event occurring during the life of the contract unless the degree of foreseeability of that event is very substantial. Hence, as the position is summarised in Chitty on Contracts:*
>
> > *Much turns on the extent to which the event was foreseeable. The issue which the court must consider is whether or not one or other party has assumed the risk of the occurrence of the event. The degree of foreseeability required to exclude the doctrine of frustration is ... a high one: 'foreseeability' will support the inference of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur or ... 'one which the parties could reasonably be thought to have foreseen as a real possibility'.*[222]

209. The Respondent submitted, by reference to *Brisbane City Council v Group Projects Pty Ltd* (***Brisbane City Council***),[223] that whether a contract has been frustrated:

> [I]*nvolves a value judgement by the court and often depends on numerous factors of varying weight. The relevant factors include the terms and content of the contract; the mutual and objective knowledge of the parties; contemplations and expectations, particularly as to risk at the time of the execution of the contract; the nature of the supervening event; the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance of the new circumstances and the demands of justice.*[224]

210. In support the Respondent drew on comments of the High Court in *Brisbane City Council*, per Stephen J:

> *It is no doubt true, as critics complain, that the various expositions of the true basis of the doctrine of frustration leave imprecise its actual operation when applied to the facts of particular cases. How dramatic must be the impact of an allegedly frustrating event? To what degree or extent must such an event overturn expectations, or affect the foundation upon which the parties have contracted, or, again, how unjust and unreasonable a result must flow or how radically different from that originally undertaken must a contract become (to use the language of some of the various expositions), before it is to be regarded as frustrated? The cases provide little more than single instances of solutions to these questions. These difficulties of application of the doctrine of frustration were keenly appreciated both by Latham C.J. and by Williams J. in their consideration*

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[222] *oOh! Media* at [72]-[74] (citations omitted)

[223] [1979] HCA 54

[224] Respondent's written submissions dated 15 July 2022 at [62], citing *Brisbane City Council* at [29]-[30] (Stephen J)

> *of the doctrine in Scanlan's New Neon Ltd. v. Tooheys Ltd. ... They are, perhaps, inevitable in questions of degree arising when a broad principle must be applied to infinitely variable factual situations.*[225]

211. The Respondent relied also on the UK Court of Appeal's decision in *Edwinton*, as did the Applicants, to submit that frustration "requires a multi-factorial approach" dependent on the facts in each case.[226] In *Edwinton*, the Court stated:

> *111. In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.*
>
> *112. What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed.*[227]

212. The Respondent relied also on the High Court's decision in *Scanlan's* as authority for several relevant principles concerning the law of frustration. In that case, as mentioned, the Court considered a contract, as one of many similar contracts executed between 1937 and 1941, by which Scanlan's contracted with Tooheys for the construction and installation of a neon sign on Scanlan's building. The

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[225] *Brisbane City Council* at [29] (citations omitted)
[226] Transcript of proceedings dated 11 November 2022, page 287, lines 34-46
[227] *Edwinton* at [111]-[112]

"principal value" of the sign was that it could be illuminated "and so be made conspicuous and attractive"[228] by night. However, by day, when unilluminated, the sign was visible and legible and had "a substantial advertising value".[229] Tooheys leased the sign for five years.

213. On 19 January 1942, as a matter of national security at a time of war, the Premier of New South Wales prohibited the display of external lights. This prevented illumination of the neon sign. Tooheys refused to continue paying rent for the sign, contending the contract had been frustrated. The High Court disagreed, referencing several factual aspects of the dispute:

(a) All the terms of the contract could be performed.[230] There was no impossibility of performance in any sense, even though Tooheys was prevented from obtaining the full benefit (i.e., illumination) that it expected to receive.

(b) There was no breach of contract by Scanlan's.[231]

(c) Tooheys had had the full benefit of the sign, illuminated, for a substantial period of the contract and continued to receive some benefit from the sign (unilluminated) by day for the remainder of the contract.[232]

(d) The Premier's ban on external lighting did not make performance of any part of the contract illegal. The ban prevented Tooheys from receiving the full benefit of the sign which they expected from the illumination, but it did not prevent either party from performing fully the contract they chose to make.[233]

(e) Tooheys accepted that if the failure to receive the expected full benefit under the contract, meaning an illuminated sign, had resulted from some act on its part "the defence of frustration would not apply".[234]

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[228] *Scanlan's*, 183
[229] *Scanlan's*, 183
[230] *Scanlan's*, 186
[231] *Scanlan's*, 185
[232] *Scanlan's*, 184-185
[233] *Scanlan's*, 185-186
[234] *Scanlan's*, 186

214. Drawing on *Brisbane City Council*, *oOh Media!* and *Edwinton*, the Respondent submitted that foreseeability of the supervening event said to have frustrated the contract is one of the factors to consider when deciding whether a contract is frustrated.[235] Consequentially, the Respondent submitted NCAT's statement in *Snowtime Tours* that foreseeability "is not the relevant test"[236] is not correct.[237] The Respondent submitted that to take no account of whether the supervening event was foreseeable, or the extent of its foreseeability, is to overlook an aspect of the 'first limb', as described in *oOh! Media*, that must be met in order to establish that a contract has been frustrated.

215. Drawing on these principles, and the need for a multi-factorial approach, the Respondent referred to many facts in support of its submission that the Occupancy Agreements were not frustrated.

216. The Respondent first noted the Occupancy Agreements provided the Applicants with accommodation at B&G for approximately 11 months. At the time of the alleged frustrating event, whether that be 26 June or 9 July 2021, the Applicants had already had the benefit of the Occupancy Agreements for approximately 50 percent of the contract period. This factual scenario, the Respondent submitted, was quite different from the circumstances considered in *Snowtime Tours* or *Foster* where the agreements involved bookings for short-term accommodation that could not even be commenced.

217. Then there was the difference between the accommodation period under the Occupancy Agreements with the Applicants, namely approximately 11 months that was ongoing when the Applicants were able to return to their accommodation on 1 November 2021, and the accommodation period under consideration in *Snowtime Tours* (7 days) and *Foster* (2 days) where there was no prospect the applicants could use the accommodation at all prior to the expiry of the contracted accommodation period.

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[235] Transcript of proceedings dated 11 November 2022, page 326, lines 7-138
[236] *Snowtime Tours* at [23]
[237] Transcript of proceedings dated 11 November 2022, page 306, lines 43-47; page 312, lines 26-34

218. The Respondent noted that Government directed lockdowns and border closures to limit the spread of COVID-19 were known actions at the time the Applicants entered their Occupancy Agreements. In particular, the Applicants agreed they knew about the previous lockdowns that had occurred in Sydney's Northern Beaches area and in Victoria. In other words, where the Applicants knew at the time they executed the Occupancy Agreements that COVID-19 was an ongoing major health concern and that governments in the ACT, NSW and throughout Australia were continuing to take actions of different kinds to limit the spread of the virus, they knew or should have known that further actions to limit the spread of the virus (i.e. more lockdowns and more border closures of different kinds and at different places) were foreseeable events depending on the nature, severity, place and occurrence of further COVID-19 outbreaks.

219. The Respondent noted it had not given any warranty or promise that it would facilitate the Applicants coming and going from or B&G or that it would provide quarantine facilities to enable students to return in compliance with ACT Health requirements. In other words, there was no acceptance of risk by the Respondent should the Applicants choose to go from B&G and later be unable to return.

220. In this respect, the Respondent drew on the statements of the High Court in *Scanlan's* and of the UK Court of Appeal in *Edwinton* about the allocation of risk. In those cases, both Courts noted that where a contract provides by some means for an allocation of risk the doctrine of frustration "is not to be lightly invoked"[238] to, in effect, reverse the onus by finding the contract is at an end with the result that a party liable to pay under the contract is no longer liable to pay.

221. The Respondent submitted that to reverse the allocation of risk "is a very serious thing".[239] The Respondent submitted the Applicants faced "a very high bar" in persuading the Tribunal to do so. The Respondent, like the Applicants, drew on the comment in *Edwinton* that "the purpose of the doctrine is to do justice"[240] – although the Respondent drew on it in the context of whether "justice" should

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[238] *Edwinton* at [111]
[239] Transcript of proceedings dated 11 November 2022, page 318, lines 11-15
[240] *Edwinton* at [112]

permit the Applicants to be relieved of their contractual obligations under the Occupancy Agreements.

222. Applying that principle to the facts, the Respondent noted that, under clauses 1 and 12 of the Occupancy Agreements, each Applicant was liable to pay the accommodation fee for their accommodation up to the termination date unless the Respondent entered into a replacement occupancy agreement for the Applicant's room or other circumstances applied, none of which was applicable. The Respondent noted it drew each Applicant's attention to their obligation to pay in the pre-acceptance form sent to them prior to them entering their Occupancy Agreement. The form stated, "You have to pay until the end of the contract".[241]

223. As the Respondent noted, the Applicants both acknowledged they had read the pre-acceptance form and the proposed Occupancy Agreement before entering their Occupancy Agreement.[242]

224. Under the Occupancy Agreements, the Applicants were entitled to the use and occupancy of their rooms for the period of the Occupancy Agreements but were not restricted in any way regarding 'coming and going' from their rooms and from B&G. The Respondent relied on the fact that the Applicants, notwithstanding rising concerns about COVID-19 and the Delta variant in particular, chose to leave B&G and return to their family homes in Sydney. By doing so, they created the situation where they were "unable to get the full benefit of the contract".[243] In other words, B&G was open and operating, and the Applicants' rooms were available at all material times for their exclusive use. The Applicants were unable to do so for part of that time because they elected to leave and, having done so, were unable to return until the border reopened on 1 November 2021.

225. The Respondent submitted that where the Applicants were on notice of their unconditional obligation to pay the Occupancy Fee (save in circumstances that never arose) and then entered the Occupancy Agreements, considerations of

[241] Transcript of proceedings dated 11 November 2022, page 318, lines 22-29, referring to Exhibit A4, annexure SV29

[242] Transcript of proceedings dated 11 November 2022, page 318, lines 25-36

[243] Transcript of proceedings dated 11 November 2022, page 308, lines 22-29

justice require "compelling evidence" for why they should be released from that obligation and why the Respondent should carry the risk and bear the loss arising from the Applicants being unable to occupy their rooms for the period when the border was closed and they had placed themselves on the other side of the border.[244]

226. In this respect, the Respondent submitted that, to the extent the Occupancy Agreements were frustrated, it was the conduct of the Applicants that brought about that frustration. In substance, the frustration was "self-induced"[245] by the Applicants choosing to return to NSW during the semester break and then finding themselves unable to return.

227. The Respondent drew parallels between the circumstances considered in *Maritime National Fish, Limited v Ocean Trawlers, Limited* (***Maritime National Fish***)[246] where the appellant hired a fishing trawler (**the St Cuthbert**) from the respondent, together with four other trawlers, in the hope of obtaining five fishing licences to operate the trawlers but was granted only three licences. The appellant chose to use the three licences for trawlers other than St Cuthbert with the consequence that it was unable to use the St Cuthbert for the purpose it was hired, namely fishing.

228. The appellant submitted that the issue of only three licences frustrated its contract with the respondent. The Privy Council disagreed. It pointed out that the respondent gave no warranty or promise that the St Cuthbert could be used for fishing, and it was the election of the appellant to apply the three licences to trawlers other than the St Cuthbert that prevented the appellant from using the St Cuthbert for fishing.

229. So, in this case, the Respondent noted it gave no warranty the appellants would be able to use their rooms regardless of any COVID-19 government directives and, it said, their decision to leave the ACT was what prevented their use of their rooms for accommodation during the period when they were unable to return.

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[244] Transcript of proceedings dated 11 November 2022, page 308, line 34
[245] Transcript of proceedings dated 11 November 2022, page 308, line 22
[246] [1935] AC 524

230. The Respondent noted that at the time of the alleged supervening event (whether 26 June or 9 July 2021) no one knew how long the Applicants would be unable to return to their rooms at B&G by reason of Public Health Orders. The Applicants agreed with that factual proposition.[247] It necessarily followed, the Respondent submitted, that the Occupancy Agreements could not have been frustrated – meaning brought to an end – as at either of the nominated dates because the Applicants could have returned to B&G and so resumed receiving the benefit of the Occupancy Agreements as soon as the Public Health Orders were varied in a way that permitted them to do so. To prove that proposition, the Respondent noted the Applicants were able to return to their rooms on and from 1 November 2021 before the conclusion of the accommodation period granted under the Occupancy Agreements and did so.

231. The Respondent submitted the fact that the Applicants were unable to return to their rooms for a much longer period of time than they or anyone else might have anticipated on 26 June 2021 or 9 July 2021 is irrelevant to the question whether the Occupancy Agreements were frustrated as at the nominated date.

232. With reference to these facts, the Respondent submitted that, at best, there was only a temporary frustration of their Occupancy Agreements. In this respect, the Respondent submitted that temporary frustration is not a concept known to the law. The Applicants agreed.[248] Frustration, the Respondent said, does not entertain the proposition that a contract can revive when the effect of the alleged supervening event ceases.

233. In this respect, the Respondent relied on a decision of the High Court of Justice, Queens Bench Division in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd (**Bank of New York**)*[249] in which a series of tenants of commercial premises resisted a claim for unpaid rent on many grounds, including that their lease agreements were frustrated during the period of a COVID-19 lockdown

[247] Transcript of proceedings dated 11 November 2022, page 309, lines 30-31
[248] Transcript of proceedings dated 11 November 2022, page 349, lines 35-36
[249] [2021] EWHC 1013 (QB)

when they were forced (for economic reasons) to close their premises. The Court rejected the proposition there could be a temporary frustration. The Court said:

> *Frustration is a doctrine which generally provides that where a wholly unexpected event, for which the parties have not made an agreement, occurred which sufficiently affects the contract so as to in some way negate (i.e. frustrate) its purpose, then the contract will be discharged and end.*[250]

234. The Respondent referred to similar statements of the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* (***National Carriers***).[251] In that matter, the Court considered whether a 10-year commercial lease of a warehouse was frustrated consequent upon the closure of a street that provided the only vehicular access to the warehouse. The street was closed for just over 18 months. The closure occurred approximately midway through the term of the lease. The Court accepted, contrary to earlier authority, that a lease could be the subject of frustration but rejected that the lease in question had been frustrated. The Respondent relied on the following passage of the Court's reasons, per Lord Wilberforce:

> *At first sight, it would appear to my mind that the case might be one for possible frustration. But examination of the facts leads to a negative conclusion.*
>
> …
>
> *So the position is that the parties to the lease contemplated, when Kingston Street was first closed, that the closure would probably last for a year or a little longer. … Assuming that the street is reopened in January 1981, the lease will have three more years to run.*
>
> … [N]*o doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of 10 years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased. This is a case, similar to others, where the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end. The obligation to pay rent under the lease is unconditional, with a sole exception for the case of fire, as to which the lease provides for a suspension of the obligation. No provision is made for suspension in any other case: the obligation remains. I am of opinion therefore that the lessee has no defence*

[250] *Bank of New York* at [195]
[251] [1981] AC 675

> *to the action for rent, that leave to defend should not be given and that the appeal must be dismissed.*[252]

235. The Respondent submitted that, on analysis, the Applicants' claim was "truly a temporary frustration argument."[253] The Respondent noted there was no dispute that from 1 November 2021 when the lockdown was materially lifted, the Applicants were able to come back to B&G. Nor was there any dispute that, under the Occupancy Agreements, they were liable to pay for their accommodation until the Termination Date on 15 December 2021, more than six weeks later. It followed, the Respondent submitted, that even on their own case the Occupancy Agreements were only temporarily frustrated during the period of the lockdown.

236. In support of that proposition, the Respondent relied on a decision of the District Court of South Australia in *Roberts v Toor Bros (Aust) Pty Ltd* (***Roberts***).[254] In that case, Mr Roberts contracted to lease taxi plates to Toor Bros for 12 months commencing 13 March 2020 for $160 per week. The weekly rental had been reduced from $220 per week in the previous year because COVID-19 had commenced but its full effects were not known. When the effects of COVID-19 became more pronounced and the State Government restricted entry into South Australia, Toor Bros tried to return the taxi plates because there was very little work for taxis and the operation of taxis was not profitable. Mr Roberts did not accept return of the plates and sued for payment of the weekly rental under the contract. In issue was whether the contract had been frustrated. On appeal, the District Court found it had not. After noting relevant principles of law, the Court said:

> 62. *This case concerns an alleged frustrating event that does not render performance of the Agreement impossible or illegal but which, it is contended, renders it commercially impossible. The authorities to which I have referred, including Krell v Henry, Herne Bay and Ooh! Media confirm that commercial impossibility is an event that can give rise to a frustration of contract.*
>
> 63. *However, the basis of the Agreement has not been destroyed either by the lockdown and other steps taken for public health measures or COVID-19 itself. The Agreement has still been able to be performed, although not as profitably. There has been no total of failure of*

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[252] *National Carriers*,697-698

[253] Transcript of proceedings dated 11 November 2022, page 329, line 29

[254] [2022] SADC 77

consideration. Applying the test proposed by Carter, there may have been commercial impracticality, but there was no commercial impossibility.

64. *Matters that may have an effect on the profitability of a contract do not typically constitute an event of frustration. Any number of events may affect the profitability of the Agreement, but do not constitute an event of frustration. Toor Bros, in the absence of some profitability warranties, are to be regarded as having accepted that risk.*

65. *As stated earlier in these Reasons, an accepted restriction on the doctrine of frustration is that the frustrating event must not be an event that was foreseeable and foreseen at the time of the entry into of the contract. Insofar as Toor Bros seeks to rely on COVID-19 itself as the frustrating event, that was an event that was foreseeable and foreseen at the time of the entry into of the Agreement. That was a risk that Toor Bros was prepared to accept under the terms of the Agreement. The licence fee was adjusted to accommodate that risk.*

66. *I accept that the consequences of COVID-19 such as the lockdown may have not been able to have been foreseen at the time of the entry into of the Agreement. However, as stated by Kariywasam and Palliyaarachchi, it was not those lockdowns which were the cause of the alleged commercial impossibility, but the reduction in use of the taxis. That reduction in use of the taxi was a reasonably foreseeable commercial risk.*[255]

Consideration

The law of frustration and principles

237. Frustration has the effect of bringing a contract to an end and discharging the parties of their obligations under the contract. The parties generally agreed on the principles to be applied when determining whether frustration has occurred, and those principles have been properly noted by the parties. Drawing on the authorities referred to by the parties and the principles referred to therein, we accept, and have applied, the following principles:

(a) An assessment of whether a contract has been frustrated requires a comparison between the facts and circumstances at the time the contract was entered into and the facts and circumstances at the time of the supervening event said to have frustrated the contract.[256]

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[255] *Roberts* at [62]-[66] (citations omitted)
[256] *Roberts* at [36], quoting *Scanlan's*, 184

(b) A contract is not frustrated unless each of these two circumstances are met:[257]

(i) A supervening event confounds an assumption essential to the performance of the contract continuing to exist or be available; and

(ii) The supervening event said to have frustrated the contract must have occurred without default of either party, (meaning not due to the act or election of a party) with the effect that a contractual obligation is incapable of being performed.[258]

(c) Foreseeability of the event said to have frustrated the contract is not determinative of whether a contract has been frustrated, but the foreseeability of the event and the degree of its foreseeability are factors to be taken into account.[259]

(d) Whether a contract has been frustrated requires a multi-factorial approach.[260]

(e) The contract must not have provided for the event said to have frustrated the contract;[261]

(f) The law does not recognise temporary frustration.[262]

238. Having regard to those principles, the cases cited herein and the evidence before the Tribunal, we set out our findings below.

The facts and circumstances at the time the Occupancy Agreements were entered vs the facts and circumstances at the time of the claimed supervening event

239. The Tribunal is satisfied that both Applicants read and understood the terms of the Occupancy Agreement before accepting the offer. Both Applicants appreciated that the Occupancy Agreement required them to pay the Occupancy Fee for the duration of the Occupancy Period. Both Applicants were aware of the

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[257] See: *oOh Media!*, per Nettle JA at [70]
[258] *oOh! Media* at [70]; *Maritime National Fish* at [530]
[259] *oOh! Media* at [72]-[74]; *Roberts* at [65]
[260] *Edwinton* at [111]
[261] *Codelfa* at [44]
[262] *Bank of New York* at [211]; *National Carriers* at 697-698

COVID-19 lockdowns that occurred in 2020 and, in particular, the closure of the NSW and Victorian border and the Northern Beaches lockdown before they entered into the Occupancy Agreements.

240. In particular, both Applicants knew or should have known that accepting residential accommodation at B&G – and then residing at B&G – might mean them becoming unable to travel from B&G or return to B&G by reason of government regulation during the term of the Occupancy Agreements. In this respect, they were in materially the same position as people all over Australia who knew or should have known that government regulation might require them at short or no notice to 'stay home' or preclude them from travelling.

241. The Tribunal accepts it was not unusual for students living at B&G to leave their accommodation temporarily during semester break (and at other times). During such absences B&G continued to operate and the Respondent was required to make the provided rooms available for the exclusive use and enjoyment of their occupants. The Occupancy Agreements were not suspended or paused at any time. During the 2021 mid-year semester break and from 9 July 2021, about half the students at B&G remained at B&G and continued to receive services in accordance with the terms of their Occupancy Agreements. Instead of being self-catered using communal kitchens, meals were provided by the Respondent to the students at the Respondent's expense.

242. Ms Vallis voluntarily left the ACT on 31 May 2021 to return to her parents' home in Ashfield intending to return around 26 July 2021, being the beginning of Semester 2. She left at B&G her possessions and continued to occupy her room in that sense. She did not leave the ACT at the direction of the Respondent or B&G. The Tribunal is satisfied she did so by choice and accepted the risk, by doing so, that she might find herself in an area of concern or a 'hotspot' which could have consequences for her ability to return to the ACT.

243. Ms Vallis said she regularly checked her emails whilst she was away from B&G and regarded the Mosley Email, sent at a time when the Second Greater Sydney Order came into effect, as a direction to stay where she was. The Tribunal does not agree with Ms Vallis' characterisation of this email. The Mosley Email

provided an update to B&G residents on travel advice from ACT Health and what residents should do in relation to their travel, particularly in circumstances where they may have left the ACT or were considering leaving the ACT. At this point in time, being 4.00pm on 23 June 2021, and beforehand, the Tribunal is satisfied Ms Vallis was able to return to the ACT but chose not to do so.

244. Faced with a quickly changing situation in relation to lockdowns, Ms Vallis continued to take the risk that she might not be able to return to the ACT. Further, at this point in time, Ms Vallis did not take any steps to enquire with ACT Health how she might return to the ACT. She did not take any steps to facilitate her return to the ACT until she applied for an exemption on 8 July 2021. This was after she found herself in an area subject to NSW lockdown.

245. Ms Vallis returned to B&G on 8 November 2021 after the travel restrictions were lifted and moved her belongings from her room. The Tribunal is satisfied she occupied her room, albeit not always physically, for the duration of the Occupancy Period. The Tribunal is further satisfied the Respondent performed its obligations under the Occupancy Agreement by making the room available, exclusively to Ms Vallis, for her use and enjoyment. The circumstances in which she found herself unable to enter the ACT between 9 July 2021 and 1 November 2021 were of her own making.

246. Ms Aston left the ACT voluntarily on 22 June 2021, and travelled to her parents' home in East Lindfield. By the time she made this decision, the COVID-19 situation in relation to the Delta variant had already begun to escalate. She too agreed she took a risk that she may not be able to return to the ACT. She too left her possessions in her room at B&G and continued to occupy the room albeit not physically. Her intention was a temporary absence for the semester break. The day after her departure, the Second Greater Sydney Order came into effect at which point Ms Aston could have returned to the ACT as she was not in an affected area. She too received the Mosley Email but did not take any steps to return to the ACT or make enquiries with ACT Health about her ability to return. She relied upon information from others including Ms Vallis.

247. The Tribunal does not accept the effect of the Mosley Email was a direction to Ms Aston to remain where she was for the reasons provided above. Further, it was possible for Ms Aston immediately to return to the ACT until 4:00pm on 25 June 2021 by completing a self-declaration form and monitoring for symptoms for 14 days.[263] Again, faced with a quickly changing situation, the Tribunal is satisfied Ms Aston elected to remain in East Lindfield and take the risk that she may not be able to return to her accommodation in the ACT. She did not avail herself of the opportunity to return.

248. Like Ms Vallis, Ms Aston returned to B&G after the restrictions were lifted and moved her belongings from her room. The Tribunal is satisfied she occupied the room, albeit not always physically, for the duration of the Occupancy Period. The Tribunal is further satisfied the Respondent performed its obligations under the Occupancy Agreement by making the room available, exclusively to Ms Aston, for her use and enjoyment throughout the Occupancy Period. Like Ms Vallis, the circumstances in which she found herself unable to enter the ACT until 1 November 2021 were of her own making.

249. We accept the Respondent offered the Occupancy Agreements to the Applicants on a ‘take it or leave it’ basis. That is clear from the automated ‘portal’ system for expressing an interest in accommodation at an ANU residential hall, the manner in which a place was offered, and Mr Walker’s acceptance that there was no scope for negotiation regarding the terms of the Occupancy Agreements offered to students. If either Applicant sought to terminate the Occupancy Agreement on or after 9 July 2021, clause 12(a) entitled the Respondent to recover all losses and costs whatsoever arising from the termination including an obligation on the Applicants to pay the Occupancy Fee until the earlier of the Termination Date or the date the Respondent enters into a replacement Occupancy Agreement. In the circumstances of this case, after 9 July 2021, the Respondent was unlikely, if not at all, able to enter into a replacement occupancy agreement upon termination by the Applicants due to the COVID-19 restrictions in place.

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[263] Cf Public Health (COVID-19 Areas of Concern) Notice 2021 (No 118) dated 23 June 2021 and Public Health (COVID-19 Areas of Concern) Notice 2021 (No 123) dated 25 June 2021

250. In this respect, the Applicants appropriately accepted they understood the risk of COVID-19 travel restrictions and lockdowns being imposed during the term of the Occupancy Agreements consequent on events in 2020 and that the risks posed by COVID-19 remained at the time they entered into the 2021 Occupancy Agreements. In other words, they knew or should have known, at that time that further travel restrictions and lockdowns might occur.

251. The Applicants properly accepted that the risks of restrictions on travel arising from COVID-19 were widely if not universally known at the time the Applicants entered into their respective Occupancy Agreements.

252. The terms of the Occupancy Agreements clearly set out the Applicants' obligations and clause 10 identified the terms upon which the Occupancy Agreement may be terminated by the Applicants. The consequences of termination initiated by the Applicants were also clearly set out in clause 12 of the Occupancy Agreements. The Applicants' circumstances as of 9 July 2021 did not enliven termination of the Occupancy Agreements without consequence pursuant to Clause 12.

Did a supervening event confound an assumption essential to the performance of the Occupancy Agreements?

253. We do not accept the Applicants' claim that the "common assumption that some particular thing or state of affairs" which did not transpire, namely that they would be able to use their rooms, was essential to the continued performance of the Occupancy Agreement. Nothing in the Occupancy Agreements obliged the Applicants to use their rooms. All that can be said is that a benefit the Applicants hoped and expected to enjoy consequent upon entering into the Occupancy Agreements could not be enjoyed while they were in NSW and unable to return.

254. The circumstances of the Applicants are materially similar to those considered by the High Court, per Latham CJ, in *Scanlan's* where His Honour observed:

> *When a man agrees to buy a pair of boots for himself, both parties expect that he will be able to wear them. If he has an accident, so that he can no longer wear boots, he nevertheless still has to pay for them. If a man buys or hires a motor car, both parties know that he expects to be able to drive it. The stoppage of the sale of petrol, which would make it impossible for*

> *him to drive it, does not excuse him from his obligation to pay the purchase money or the hire for the agreed period.* [264]

255. In *Roberts*, the Court said in considering frustration of contract by reason of COVID-19 in the context of leased taxi plates:

> *However, the basis of the Agreement has not been destroyed either by the lockdown and other steps taken for public health measures or COVID-19 itself. The Agreement has still been able to be performed, although not as profitably. There has been no total of failure of consideration. Applying the test proposed by Carter, there may have been commercial impracticality, but there was no commercial impossibility.*[265]

256. B&G continued to operate in all respects. The Applicants' rooms were available to them for their exclusive use. Their belongings were in their rooms. In other words, the Occupancy Agreements continued to be performed on and after 9 July 2021 when the Applicants assert frustration, although not entirely in the manner the Applicants expected. There was no total failure of consideration or impossibility. There was opportunity in the case of both Applicants not to leave the ACT and not 'take the risk' of being unable to return. Further, having left at the time they did, there was opportunity for them to return to the ACT before the border was closed, but neither did so. By 23 June 2021 the 'writing was on the wall' and still they did not return. Further, there was no inability on the Respondent's part to continue performing its obligations under the Occupancy Agreements notwithstanding the closure of the border on 9 July 2021 or at any time.

"Without default of the parties"

257. We are not satisfied that the Applicants' inability to access their rooms subsequent to 9 July 2021 was "without default" on their part.

258. Of note is that the Applicants' circumstances are materially different from those considered in *Gem Ezy* and *Snowtime Tours* on which the Applicants relied.

259. In *Gem Ezy*, the school trip was cancelled before it began consequent upon a Commonwealth determination that prohibited the applicant from leaving the country. In this case, the service to be provided by the Respondent, namely

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[264] *Scanlan's*, 191

[265] *Roberts* at [63]

accommodation, was not cancelled; was available at all material times; was used for Semester 1 until the Applicants chose to leave the ACT; and remained available for the Applicants at all times. But for their decisions midway through the Occupancy Period to place themselves in a position where they were unable to continue doing so, the Applicants would have been able to reside at B&G throughout the Occupancy Period.

260. In *Snowtime Tours*, consequent upon government travel restrictions, the appellants were never able to travel to Thredbo to utilise the accommodation and the period of accommodation (7 nights) expired before they were able to. The fact the accommodation was available was irrelevant because they could never get there. NCAT was not dealing with the situation in this case where the Applicants were at their accommodation, utilising their accommodation; chose to leave midway through the accommodation period; and then, because of subsequent government restrictions, were unable to return until a later date during the Occupancy Period.

261. In *Snowtime Tours*, the applicants were in no way responsible for their inability to utilise the booked accommodation: the applicants were unable even to arrive.

262. The Tribunal is satisfied it was the act and election of the Applicants which prevented them from physically occupying their rooms for the duration of the ACT/NSW lockdown until 1 November 2021.[266] As the Court said in *Maritime National Fish*:

> *The essence of "frustration" is that it should not be due to the act or election of the party.*
>
> …
>
> *I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration; indeed, such conduct might give the other party the option to treat the contract as repudiated.*[267]

263. In our view, for the purposes of the law of frustration, it is not necessary to address the difficult questions that sometimes arise in tort law, especially the law of

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[266] See *Maritime National Fish* at [529], [530]

[267] *Maritime National Fish* at [530]

negligence, regarding causation and whether the alleged negligence was the material cause of the loss. Frustration is a doctrine arising under the law of contract. The question is whether the alleged frustration has arisen "without default" of either party. In other words, there needs to be this aspect of blamelessness. Accordingly, it is not necessary to consider whether the real or material cause of the alleged frustration was the border closure or the Applicants' election to leave the ACT on 31 May and 22 June 2021, respectively, and then being unable to return. It is enough to say their decisions to leave and then not to return when they had an opportunity to do so before the border closed had a material bearing on the alleged frustration with the result that it cannot be said the frustration occurred "without default" on their part.

264. In particular, they knew or should have known that of the risk of becoming unable to travel from B&G, or return to B&G, by reason of government regulation. In this respect, they were in materially the same position as people all over Australia who knew or should have known that government regulation might require them at short or no notice to 'stay home' or preclude them from travelling.

Were the Occupancy Agreements incapable of being performed from 9 July 2021?

265. With reference to the first circumstance in *oOh Media!*, we are not satisfied there is a "contractual obligation" that became incapable of being performed because of the circumstances on which the Applicants relied, or at all. In this respect, we draw on the circumstances in *Scanlan's case* on which the High Court relied to find the contract had not been frustrated. In our view, those circumstances are similar in principle to the circumstances in this case.

(a) All the terms of the contract could be performed. There was no impossibility of performance in any sense. In particular, nothing in the Occupancy Agreements required the Applicants to use their rooms. They were free to come and go from their rooms as they chose. The Respondent, meanwhile, kept B&G open and their rooms available to the Applicants at all times.

(b) There was no suggestion of any breach of contract by the Respondent.

(c) Just as Tooheys had the full benefit of the sign, illuminated, for a substantial period of the contract and continued to receive some benefit of the sign by day, so the Applicants had the full benefit of the Occupancy Agreements from their commencement until, say, 9 July 2021 when AAO10 prevented them from returning to the ACT and partial benefit subsequent to that date by having exclusive right to their respective rooms which they did not relinquish and continued to use for the purpose of storing their personal possessions.

(d) Just as the Premier's ban on external lighting did not make performance of any part of the contract illegal, so too the ACT Government travel restrictions, and AAO10 in particular, did not prevent the Respondent from continuing to provide the Applicants with residential accommodation at B&G in the same way it continued to provide accommodation to many students at B&G throughout 2021. The travel restrictions prevented the Applicants from obtaining the full benefit they expected under the Occupancy Agreements but did not prevent the Respondent or them from fully performing their obligations under the Occupancy Agreements.

266. That is what occurred at B&G. Throughout the term of the Occupancy Agreements, the Respondent was ready, willing and able to provide accommodation at B&G to the Applicants and to everyone else who had entered into an Occupancy Agreement and to whom a room had been allocated at B&G.

267. Approximately half of the students at B&G were able to utilise their accommodation at B&G throughout the 2021 year until the Termination Date regardless of COVID-19 restrictions. For others including the Applicants, that was not so consequent on their decision to leave the ACT and to remain outside the ACT until a point in time when the government border closure prevented them from returning.

Foreseeability of the event

268. We are satisfied that the prospect of a border closure was foreseeable at the time the Applicants entered into their respective Occupancy Agreements.

269. The prospect of restrictions on interstate travel was particularly well understood. The prospect of 'border closures', often with no or little notice, caused people all over Australia to decide not to travel (even for important events) rather than risk not being legally able to return or having to undertake immediate and lengthy travel in order to 'get across the border' before the border closed. Some people chose to take the risk, and some did not.

270. Knowledge of risk arising from COVID-19 travel restrictions as at the date when the Applicants entered into their respective Occupancy Agreements is a factor to be taken into account. In this respect, we accept that when assessing whether a contract has been frustrated, foreseeability is not "the relevant test"[268], but it is a factor to take into account. The decisions cited above all make clear that whether a contract has been frustrated needs to be assessed by reference to the facts and circumstances that were or should have been understood at the time the contract was entered into.

271. The prospect of restrictions on interstate travel was particularly well understood when the Applicants entered their Occupancy Agreements.

272. Of course, what was also, or could reasonably have been, understood was that the Respondent could and would provide residential accommodation at B&G within the context of those COVID-19 restrictions which is precisely what occurred.

273. Objectively judged, anyone including the Applicants entering an Occupancy Agreement with the Respondent for accommodation at B&G knew or should have known that by living at B&G they would be subject to the same COVID-19 restrictions as anyone else living in the ACT. That entailed, in particular, possible restrictions or prohibitions on their departure from the ACT or restrictions or prohibitions from returning to the ACT.

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[268] *Snowtime Tours* at [23]

274. In *Roberts*, in relation to foreseeability, the Court held:

> [A]*n accepted restriction on the doctrine of frustration is that the frustrating event must not be an event that was foreseeable and foreseen at the time of the entry into of the contract. Insofar as Toor Bros seeks to rely on COVID-19 itself as the frustrating event, that was an event that was foreseeable and foreseen at the time of the entry into of the Agreement. That was a risk that Toor Bros was prepared to accept under the terms of the Agreement.*[269]

275. Insofar as the Applicants in this case seek to rely upon the closure of the ACT/NSW border on 9 July 2021, the Tribunal is satisfied that was foreseeable at the time the Occupancy Agreements were executed. At best, all that can be said is that the length of time the border would remain closed was not foreseeable, just as the scale of the bushfires on 18 January 2003 was not foreseeable, but we do not accept that circumstance caused the Occupancy Agreements to be frustrated. No one knew on 9 July 2021 that the border would remain closed until 1 November 2021. At that time, no one knew for how long the border would remain closed. As discussed below, frustration cannot be assessed by facts learned after the event.

Temporary frustration

276. The law does not recognise the concept of temporary frustration.

277. As the Applicants properly acknowledged by reference to *Codelfa*, the law of frustration requires a supervening event that makes a contractual obligation incapable of being performed. That incapacity must be permanent by reference to the contract, not just by reference to a period of time while a certain circumstance exists. That is made clear by the High Court's decision in *Scanlan's*, the House of Lords' decision in *National Carriers* and the UK High Court of Justice's decision in *Bank of New York* discussed above.

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[269] *Roberts* at [65]

278. The Applicants properly accepted that the law does not recognise "temporary" frustration. We see no answer to that difficulty for the Applicants. Counsel for the Applicants properly acknowledged this difficulty as the "Achilles heel"[270] in his argument.

279. To explain, as the facts described above demonstrate, COVID-19 lockdowns and travel restrictions were constantly changing to address changing circumstances. Indeed, the Applicants relied on those changing circumstances and that nobody could reasonably have foreseen that when the ACT Government 'closed the border' on 9 July 2021 it would remain closed until 1 November 2021.

280. Implicit in the Applicants' case is that 'frustration' was occurring only whilst the border was closed or government travel restrictions otherwise prevented them from returning, but no one knew for how long that circumstance would exist. Had, the travel restriction changed within say a week or two weeks from when the Applicants were unable to return to B&G in a way that enabled them to return, then it could not have been sensibly suggested the Occupancy Agreements were frustrated from 9 July 2021.

281. As the Respondent noted, Ms Vallis did not intend to return to B&G until 26 July and Ms Aston was "more vague" about when she intended to return.[271] In other words, as at either date when the Applicants contended at hearing the Occupancy Agreements were frustrated, meaning brought to an end, neither Applicant considered the Occupancy Agreements had been brought to an end or regarded the border closure as having consequence for their immediate plans. Indeed, as at 26 June 2021 or 9 July 2021, the Applicants regarded their accommodation at B&G still to be theirs, and questions about when and how they would return to B&G would be considered in due course. That is inconsistent with the proposition that the Occupancy Agreements ended on 26 June or 9 July 2021.

282. This circumstance highlights the flaw in the Applicants' case, namely it is built not upon circumstances as at 9 July 2021 but upon what subsequently occurred. As the High Court pointed out in *Scanlan's case*, whether a contract has been

[270] Transcript of proceedings dated 11 November 2022, page 352 lines 16-18
[271] Transcript of proceedings dated 11 November 2022, page 314, lines 38-48

frustrated cannot be assessed by reference to "a certainty arrived at after the event".[272]

283. Had the border closure lasted only a matter of a few weeks, following which the Applicants could have returned, no one would have suggested the Occupancy Agreements were frustrated. Yet there is no difference in principle between a temporary frustration for a week or a month, and the period of approximately four months from 9 July to 1 November 2021, following which the Applicants were able to return to B&G and did so.

Force majeure

284. We turn last to the Applicants' submission drawn from the absence of a *force majeure* clause, meaning a clause stating the ongoing status of the Occupancy Agreements should a stated event or events occur. *Force majeure* clauses are often used to set out parties' respective obligations and liabilities should performance of the contract not be possible by reason of a stated event such as fire, flood, storm or war.

285. We accept the Applicants' submission that the absence of a *force majeure* clause, contractually stating how loss would be borne in the event of COVID-19 restrictions, left it "open"[273] for the Tribunal to find the Occupancy Agreements were frustrated but the submission did not advance the Applicants' claim. It only removed a possible basis for why they were not. That however became irrelevant because the Respondent accepted, and indeed submitted, that the Occupancy Agreements "do not contain a force majeure clause".[274]

286. The Respondent's position also answered the Applicants' submission that the Respondent (at paragraph (e) of its "amended response to claim") "invites the Tribunal to radically interpret a termination clause [meaning clause 12] as a *force majeure* clause".[275] We disagree. The substance of the Respondent's submission at paragraph (e) was that clause 12 required the Applicants to "bear the risk of

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[272] *Scanlan's*, 184
[273] Applicants' submissions dated 7 July 2022, page 10
[274] Respondent's submissions dated 15 July 2022, at [71]
[275] Applicants' submissions dated 7 July 2022, page 13

COVID-19 related lockdowns and travel restrictions”,[276] not by interpreting clause 12 as a *force majeure* clause but as a matter of construction of the Occupancy Agreements.

Conclusion

287. In our view, for these reasons the Applicants’ claims fail. Accordingly, we will order the application in each proceeding be dismissed.

Order

288. In matter XD1099/2021, the application is dismissed.

289. In matter XD18/2022, the application is dismissed.

…………………………………
Presidential Member G McCarthy
For and on behalf of the Tribunal

Date(s) of hearing:	9-11 November 2022
Counsel for the Applicants:	S Whybrow SC
Solicitors for the Applicants:	ANU Students’ Association
Counsel for the Respondent:	P Bindon
Solicitors for the Respondent:	King & Wood Mallesons

[276] Respondent’s amended response to claim filed 1 July 2022 at (e)