



IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST – LYONS J

Case: S ECI 2022 02457

S ECI 2022 02457 Filed 02/05/2023 03:58 PM

BETWEEN:

VASCO TRUSTEES LIMITED (ACN 138 715 009) (as
responsible entity for the Heritage Lodge Scheme)

Plaintiff

-and-

AUSTRALIAN AND PACIFIC INVESTMENT
CORPORATION PTY LTD (ACN 005 445 107) IN ITS
OWN CAPACITY AND IN ITS CAPACITY AS
REPRESENTATIVE OF THE MEMBERS OF THE
HERITAGE LODGE SCHEME (ARSN 089 099 249) & Ors
(according to the attached schedule of parties)

Defendants

FIRST DEFENDANT'S AMENDED POINTS OF ISSUE

1. The issues identified in paragraphs ~~2 to 22~~ 23 below arise out of the uncontroversial facts and circumstances described in paragraphs ~~23~~ 2-22 below.

Background

Heritage Lodge Scheme

2. The plaintiff (**Vasco**) is the responsible entity of the registered managed investment scheme known as the “Heritage Lodge Scheme” (**Scheme**) which operates the Heritage Golf and Country Club at Chirnside Park, Victoria, on behalf of members of the Scheme pursuant to a Constitution Deed Poll dated 13 August 1999.¹
3. The Club comprises a golf course, a clubhouse, a Management Lot, recreational facilities and a hotel (**Hotel**), which includes 96 bedrooms and 6 suites, which facilities were developed in the late 1990s by Yarra Valley Golf Pty Ltd (**Developer**).
4. Each of the members of the Scheme, including the first defendant (**APIC**), owns one or more rooms or suites in the Hotel.

¹ Item 2 of the Plaintiff's Affidavit of Documents dated 22 December 2022

Original HMA

5. Initially, the management of the Hotel was governed by a Hotel Management Agreement between the Developer and Mirvac Hotels Pty Limited (**Original HMA**).²
6. By clauses 2.4 and 2.5 of the Original HMA, subject to earlier termination in accordance with its terms, the Original HMA commenced on the “Opening Date” and was to terminate on the tenth anniversary thereof, which term was capable of two successive 5-year extensions at the option of the Hotel manager.³
7. “Opening Date” in the Original HMA was defined as the last of the following three dates:
 - (a) the date of satisfaction of all of the following conditions:
 - (i) YVG Golf having complied with all of its obligations set out in schedule 2 [to the Original HMA];
 - (ii) completion of the Golf Course to a standard ready for playing golf and commencement of operation of the Golf Course;
 - (iii) completion of construction and fitout of the Clubhouse; and
 - (iv) the [Scheme] Prospectus being lodged with and registered by ASIC and the minimum number of investors (if any) having applied for the purchase of Interests;
 - (b) the date the Hotel is ready for occupation and use as a hotel as agreed by Mirvac and YVG; and
 - (c) the date of settlement of the Contract of Sale [for Mirvac’s purchase of the Management Lot].
8. For the purposes of identifying the “Opening Date”, the obligations of YVG Golf contained in schedule 2 to the Original HMA comprised:

² Affidavit of Lyn Ridley, 26 September 2022, exhibit LR-1, pp 298-366.

³ LR-1, p 314.

- (a) arranging and procuring registration of the Plan [of subdivision] relating to the Property;
- (b) completing design and construction of the Hotel to a high standard and furnishing and fitout of the Hotel to a 4.5 star standard equivalent to the Chatsworth Plaza as at the date of [the Original HMA];
- (c) procuring completion and execution of all documents required to give effect to the “Transaction Documents” including:
 - (i) contracts of sale in respect of the sale of rooms and suites of the Hotel to the Owners;
 - (ii) the Contract of Sale;
 - (iii) the Lot Leases;
 - (iv) arrangements with the Golf Club; and
 - (v) execution of a Lot Lease in relation to each room and suite of the Hotel which remains unsold prior to the date of registration of the Plan.
- (d) obtaining the prior approval of Mirvac in respect of those parts of the Prospectus which relate to Mirvac and the operation of the Hotel by Mirvac;
- (e) lodging and registering the Prospectus (including a relevant regarding Mirvac’s responsibility for its contents);
- (f) completing construction of the Golf Course and the Clubhouse;
- (g) executing all “Transaction Documents” to which it is a party; and
- (h) procuring any mortgagee of the Property to enter into a deed of consent in respect of [the Original HMA] and other Transaction Documents to which Mirvac is a party containing such terms as Mirvac, acting reasonably, may require.

28 June 2002 HMA

9. The Original HMA was superseded by a new Hotel Management Agreement dated 28

June 2002 (HMA).⁴ Clauses 2.3 and 2.4 of the HMA essentially reproduce clauses 2.4 and 2.5 of the Original HMA in that they provide that, subject to earlier termination in accordance with its terms, the HMA is taken to have commenced on the “Opening Date” and was to terminate on the tenth anniversary thereof, subject to options for two successive 5-year extensions at the election of the Hotel manager. The term “Opening Date” in the HMA has much the same meaning as it had in the Original HMA, save that:

- (a) paragraph (c) of the definition (see paragraph 7(c) above) was omitted; and
- (b) as to Schedule 2 (see paragraph 8 above):
 - (i) paragraph (c) was recast, including by making express reference to “Room Management Agreements” (RMAs) rather than Lot Leases; and
 - (ii) paragraphs (d) and (e) were omitted.

Extension of the HMA

10. Exercise by the Hotel Manager of its successive rights to extend the HMA by a further five years required 6 months’ notice before the expiration of the prior term. APIC does not know whether this requirement was observed.

10A. Vasco has not produced any evidence that:

- (a) Mirvac extended the term of the HMA during the period it was the Hotel Manager (i.e. the supposed first extension); or
- (b) YVL gave notice to Austpac Properties Pty Ltd, the Management Lot Proprietor, when it purported to extend the term of the HMA for a further period of 5 years on or around 23 February 2015.⁵

Termination of the HMA

10B. The HMA was a tripartite agreement between the responsible entity for the Scheme,

⁴ Affidavit of Lyn Ridley, 26 September 2022, exhibit LR-1, pp 12-121

⁵ Exhibit LR-1, p 706.

the Hotel Manager and the Management Lot Proprietor.

10C. On or around 2 February 2014, the responsible entity for the Scheme, who at that time was Austpac Funds Management Limited (AFML), and the Hotel Manager, Yarra Valley Lodge Pty Ltd (YVL), issued a notice of termination of the HMA pursuant to clause 20.4 of the HMA. The notice was presumably served on the Management Lot Proprietor, who at that time was Golden Heritage Golf Pty Ltd (GHG) (termination notice).

10D. The termination notice stated that:

(a) the HMA was being terminated because GHG was in default of the HMA pursuant to clause 20.2(v) of the HMA by reason of the appointment of both receivers and managers and voluntary administrators over the assets of GHG on 31 January 2014; and

(b) the termination of the HMA would be effective from the date on which completion of the sale of the Management Lot, pursuant to the attached Exercise Notice, occurs.

10E. On or around 2 February 2014, AFML issued another notice to GHG pursuant to clause 21.2(a) of the HMA by which it gave notice to GHG that it required GHG to sell the Management Lot in the Scheme to AFML or such other entity as it directed (Exercise Notice).

10F. On a date presently unknown by APIC, the Management Lot was sold by GHG to Austpac Properties Pty Ltd, an entity in the Austpac group of companies.

Opening date of HMA

11. According to a notice by Vasco to members dated 18 May 2017,⁶ the Hotel was formally opened on 16 April 2002, which marked the Opening Date. If that is correct, and ~~assuming~~ the Hotel Manager validly exercised its 5 year options, and the HMA wasn't otherwise terminated in accordance with its terms, the HMA expired on 16 April 2022.

⁶ First Defendant's Bundle of Documents, item 1.

RMA's

12. Members of the Scheme licensed the occupation of their rooms or suites in the Hotel to the responsible entity of the Scheme for the purposes of letting the rooms and suites to Hotel guests. In each case, the licensing of the responsible entity's occupation and letting of a room or suite was to be governed by an RMA between the room or suite owner, the responsible entity and the manager of the Hotel and by the HMA.
13. Prior to 2015, the terms of the RMA's were contained in a form annexed to the contract of sale for the purchase of the room. The initial term of the RMA was 10 years from the "Commencement Date", defined as the "Opening Date" within the meaning of the HMA, which term was capable of two successive 5-year extensions at the option of the responsible entity. Thus, the terms of the RMA's were tied to the term of the HMA.
14. Clause 6.2 of the RMA's required the responsible entity to give at least 4 months' notice of its intention to extend an RMA.
15. APIC and Vasco are in dispute over the date of the Opening Date and the expiry of the RMA's. By its Amended Origination Motion dated 9 September 2022, Vasco seeks (inter alia) a declaration that the "Opening Date" is one of three possible dates, or some other date for which a party might contend, and a consequential declaration as to the date of expiry of the HMA. APIC's view is that the HMA ~~and the RMA's~~ was not validly extended or was validly terminated before 16 April 2022. Alternatively, the HMA expired no later than 16 April 2022. This last alternative view is based on written advice received from Vasco dated 18 May 2017 to the effect that it had "*confirmed with the Hotel Operator that the hotel was formally opened on 16 April 2002*".⁷

The move from RMA's to Evergreen RMA's

16. In 2015, the responsible entity of the Scheme, who at that time was an entity in the Austpac group of companies, wrote to Scheme members advising that, due to legislative changes, the RMA's needed to be updated.⁸ In the proposed new room management agreements (**Evergreen RMA's**), the 10 year term and 5 year extensions were removed

⁷ First Defendant's Bundle of Documents, item 1.

⁸ First Defendant's Bundle of Documents, item 11.

and replaced with a new clause 3 in the following terms:

The term of the agreement is from the date of execution until the Scheme is wound up or upon termination by the Responsible Entity in accordance with this Agreement or the constitution of the Scheme.

APIC's acquisition of Room 131

17. On or about 19 January 2011, APIC entered into a contract for the purchase of Room 131 in the Hotel (**Room 131 Contract of Sale**).⁹ By clause 15 of the special conditions of the Room 131 Contract of Sale, APIC's acquisition of Room 131 was subject to an RMA in the form of Annexure B to the Room 131 Contract of Sale. By clause 16 of the special conditions, APIC's acquisition of Room 131 was subject to the HMA.
18. The Room 131 RMA was consistent with other RMAs at the time. Clause 6 provided for an initial term of 10 years from the "Commencement Date" (defined as the "Opening Date" within the meaning of the HMA), which term was capable of two successive 5-year extensions at the option of the responsible entity.

APIC's acquisition of Room 112

19. On or about 6 December 2019, APIC entered into a contract for the purchase of Room 112 in the Hotel (**Room 112 Contract of Sale**).¹⁰ By clauses 2.1(c) and 3.1 of the prescribed special conditions of the Room 112 Contract of Sale, APIC's purchase of Room 112 was conditional upon APIC's entering into a Room Management Agreement with respect to Room 112 substantially in the form of the Room Management Agreement attached to the Room 112 Contract of Sale (or in such other form as provided by the responsible entity). Further, by clause 3.1 of the prescribed special conditions of the Room 112 Contract of Sale, APIC's acquisition of Room 112 was subject to the Room 112 RMA and the HMA.

APIC's Evergreen RMAs

20. It appears that in or around February 2020, APIC executed an Evergreen RMA with respect to each of Room 131 and Room 112,¹¹ the effect of which was *prima facie* to

⁹ First Defendant's Bundle of Documents, item 2.

¹⁰ First Defendant's Bundle of Documents, item 3.

¹¹ LR-1, pp 720-759

extend the term of Vasco's licence to occupy the rooms until the Scheme is wound up or upon termination by the responsible entity in accordance with the agreement or the Scheme constitution.

21. APIC does not accept the validity of its Evergreen RMAs. More particularly, it says that they are inconsistent with Clause 13 of the Scheme constitution.
22. On 27 April 2022, APIC gave notice to Vasco of termination of the Room 131 RMA and the Room 112 RMA. Vasco does not accept that its licences to occupy Room 131 and Room 112 have expired.

The issues for preliminary determination

23. The above facts and circumstances give rise to the following issues for preliminary determination:
 - (a) By what date had the Developer complied with all its obligations contained in Schedule 2 to the HMA?
 - (b) On what date was the golf course completed to a standard ready for playing golf and commencement of operation of the golf course?
 - (c) On what date was construction and fitout of the club house completed?
 - (d) On what date was the Hotel ready for occupation and use as a hotel as agreed by the Developer and the Hotel manager?
 - (e) Of the above dates, which was the latest?
 - (f) Having regard to the answers to the above questions, what was the "Opening Date" within the meaning of the HMA and the Original RMAs?
 - (g) Was the term of the HMA validly extended beyond its initial term of 10 years?
 - (h) Has the term of the HMA expired and, if so, when did it expire?
 - (hh) Was the HMA terminated in accordance with its terms following the issuing of the termination notice on GHG on or around 2 February 2014?

- (i) Are the Evergreen RMAs valid, having regard to the above issues and clause 13 of the Scheme constitution?

SCHEDULE OF PARTIES

VASCO TRUSTEES LIMITED (ACN 138 715 009) (as responsible entity for the Heritage Lodge Scheme)

Plaintiff

- and -

AUSTRALIAN AND PACIFIC INVESTMENT CORPORATION PTY LTD (ACN 005 445 107) IN ITS OWN CAPACITY AND IN ITS CAPACITY AS REPRESENTATIVE OF THE MEMBERS OF THE HERITAGE LODGE SCHEME (ARSN 089 099 249)

First defendant

- and –

AUSTPAC PROPERTIES PTY LTD (ACN 140 675 216)

Second defendant

- and –

YARRA VALLEY LODGE PTY LTD (ACN 159 460 303)

Third defendant