Judicial College of Victoria

# Schedule A – introductory overview of complex case[1]

**Prepared by the Honourable Kim Hargrave.**

1 The plaintiff, Fenridge Pty Ltd, is a company owned and controlled by Dr Mark Santini, a general medical practitioner and businessman. In 1991, Fenridge purchased [land in] Preston ('the premises'), subject to an existing lease dated 3 December 1990…

2 The improvements on the land included a purpose built nursing home building known as 'Preston & Districts Nursing Home'….

3 During the term of the lease, following assignments with Fenridge's consent, [the lease was assigned] to the first defendant, Retirement Care Australia (Preston) Pty Ltd ('RCA')….RCA was the lessee of the premises when the lease ended ….

4 By the terms of the lease, the lessee covenanted: (1) to keep the premises continuously open for business as a private nursing home during the currency of the lease (the 'continuous business obligation'); and (2) to deliver up the premises to the lessor at the end of the lease in as good repair, order and condition as they were at the commencement of the lease, 'fair wear and tear' excepted (the 'make good obligation').

5 Fenridge claims that RCA breached these covenants by ceasing its nursing home business about four months before the lease ended, and by failing to make good the premises at the end of the lease. Further, Fenridge claims that the breach of the continuous business obligation was intentionally induced by the fifth defendant, Regis Group Pty Ltd, with knowledge of the terms of the lease. Regis had by then merged with RCA.

6 Fenridge also contends that there were implied terms of the lease, to the effect that: (1) during the term of the lease, the lessee was required to do all things necessary to maintain and preserve 'the approval of the premises' as a nursing home under applicable legislation; (2) at the end of the lease, the lessee was required to do all things necessary to enable the lessor or its nominee to continue the nursing home business at the premises; and (3) at the end of the lease, the lessee was required to do all things necessary to transfer its 'allocated places' at the premises to Fenridge at the end of the lease. Fenridge claims that RCA breached those implied terms.

7 Next, Fenridge claims that RCA engaged in misleading or deceptive conduct in contravention of s 52 of the Trade Practices Act 1974 (Cth), by misleading it

about RCA's intention to close the nursing home prior to the end of the lease; and that both RCA and Regis misled the residents and staff of the nursing home, by failing to disclose that Fenridge intended to continue operating the nursing home after the lease ended.

8 Fenridge claims damages for breach of the continuous business obligation, for breach of the implied terms, and by reason of the alleged misleading conduct. Damages are claimed on the basis of diminution in value of the premises and, further, for loss of the opportunity to continue operating the nursing home profitably after the lease ended. Further, Fenridge claims exemplary damages from Regis. The defendants deny the claims. They contend that: (1) there were no implied terms; (2) RCA was not in breach of the continuous business obligation, because the lease should be 'construed on the footing that' its obligations to the residents of the nursing home were paramount - and an orderly cessation of business over a six month period was accordingly permitted under the lease notwithstanding the express words of the continuous business obligation; (3) the alleged opportunity had no value; or (4) if the opportunity had some value, Fenridge's claim is exaggerated and Fenridge must, in any event, bring to account any profit which it has made from re-developing the premises as apartments.

9 Fenridge also claims damages for breach of the make good obligation, equal to the amount required to reinstate the premises to the state in which RCA was required to deliver up the premises at the end of the lease. The defendants contend that the make good claim should fail because: (1) Fenridge has not undertaken any of the claimed make good works, as it has redeveloped the premises as an apartment complex; and (2) the make good claim is in any event grossly exaggerated for a number of reasons, including that Fenridge has failed to make proper allowance for the condition of the premises at the commencement of the lease and for fair wear and tear.

10 Based on the above summary, the issues for determination in the proceeding are:

(1) Was RCA entitled to cease operating the nursing home before the end of the lease?

(2) Were there implied terms of the lease?

(3) Did Regis induce RCA's breaches of the lease?

(4) Did RCA mislead Fenridge?

(5) Did RCA and Regis mislead residents and staff?

(6) Has Fenridge lost a valuable opportunity?

(7) If Fenridge has lost a valuable opportunity, what was the opportunity worth?

(8) In calculating damages, must Fenridge give credit for any profit from the apartment development?

(9) Has Fenridge suffered recoverable loss for breach of the make good obligation? If so, in what amount?

11 As there is some overlap between the issues for determination, it is convenient to set out the factual narrative in more detail before considering each issue separately.

**Factual Narrative**

## SCHEDULE B – STRUCTURE AND REASONING[1]

### Was RCA entitled to cease operating the nursing home before the end of the lease?

129 The first issue for determination is whether RCA was entitled to cease operating the nursing home before the end of the lease. On its face, the continuous business obligation in cl 2.16 of the lease states plainly that RCA had no such entitlement:

> 2.16 [The Lessee covenants] to keep the demised premises continuously open for business during lawful business hours and conduct the Lessee's business therein in good faith and in accordance with the best methods and in a reputable manner.

130 The lease must be construed in accordance with ordinary principles of contractual interpretation, by asking: What would reasonable persons in the position of the parties have understood the words to mean by reference to the text of the lease, the admissible surrounding circumstances known to the parties and the purpose or object of the transaction?[2] Further, the provisions of the lease must be construed in a harmonious manner, and so as to ensure the congruent operation of the various components of the lease as a whole.[3]

133 Against that background, I proceed to consider the relevant terms of the lease as a whole:

(1) Clause 2.14 of the lease requires the lessee to use the premises for the purpose of conducting a nursing home business and no other purpose.

(2) [Other relevant terms set out]...

135 In my opinion, these extra requirements reinforce the fundamental nature of the continuous business obligation in cl 2.16. Putting to one side standard lease provisions, the most important provisions in the lease are directed towards this very issue – the continued operation of the nursing home business in accordance with the highest standards for the whole of the term of the lease.

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[1] A selection of the issues in the case are set out in this schedule.
[2] *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, [22]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, [40].
[3] *ABC v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522, [16].

136 The only answer which RCA and Regis mount to justify their conduct in closing the nursing home prior to the end of the lease is that …[138].… it was not possible for RCA to both comply with its legislative obligations and to continue the nursing home business until the end of the lease. Counsel contended …

…

139 I reject RCA and Regis's submissions in this regard. In my opinion, clause 2.16 of the lease means what it plainly says …

[ Submissions rejected]

145 I conclude that RCA was not entitled to close the nursing home when it did. Closure of the nursing home more than four months before the end of the lease was a clear breach of the continuous business obligation. …

…

**Were there implied terms of the lease?**

147 In summary, Fenridge contends that [a term] should be implied in the lease, to the effect that: … ('the allocated places term').

148 The test for implication of a term in a contract is not in doubt. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*,[4] the Privy Council said that the following conditions (which may overlap) must be satisfied before a term will be implied in a particular contract: '(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract'.[5]

149 In considering whether a term should be implied into an agreement, the Court should consider the terms of the agreement as a whole in the context of admissible evidence of background facts known to the parties at or before the date of the contract, including evidence of the genesis and objective aim of the contract.[6]

[4] (1977) 180 CLR 266.
[5] Ibid 283.
[6] *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 348, 353.

171 RCA contends…

173 The issue for determination is whether a term should be implied in circumstances where the legislative changes have raised a number of hurdles in the way of Fenridge obtaining the benefits intended by the continuing business obligation and related terms. In my opinion, it is necessary to imply a term to the effect of the allocated places term in order to deal with this eventuality. Such a term meets the requirements of the test stated in *BP Refinery*. [ Reasons given]

174 I conclude that it was an implied term of the lease that, at the end of the lease, the lessee must transfer its allocated places at the premises to Fenridge. The precise content of that implied term is as follows: …

**Did RCA mislead Fenridge?**

200 Fenridge alleges that Mr Stephenson's email dated 6 September 2007 to Dr Santini was misleading and deceptive, because….

202 … RCA contends that Mr Stephenson's statements in the 6 September email were true, because…

203 I do not accept RCA's contentions. In my opinion [the email was false and misleading, for the following reasons].

204 First, … [reasons given]

**Has Fenridge lost a valuable opportunity?**

214 The legal principles to be applied in determining whether a loss of commercial opportunity is compensable were stated by the High Court in *Sellars v Adelaide Petroleum NL & Ors*.[7] Mason CJ, Dawson, Toohey and Gaudron JJ distinguished between proof of causation and proof of damages, stating that proof of causation is to be determined on the balance of probabilities as to whether a plaintiff has sustained *some* loss or damage,[8] and, if that hurdle is crossed, that the amount of that loss or damage is to be ascertained by reference to the Court's assessment of the degree of probabilities or possibilities.[9]

[7] (1994) 179 CLR 332.
[8] Ibid 355.
[9] Ibid.

217 I will deal first with the claim for breach of contract.

218 Applying these principles to this case, Fenridge was required to prove two elements on the balance of probabilities. First, that *if the opportunity had been offered* (ie, if RCA had complied with the continuing business obligation and the implied terms, in particular the allocated places term) it would have acted to secure the benefit of the opportunity. Second, that the opportunity had *some value*, as distinct from a negligible prospect of value.

219 As to the first element, Dr Santini's clear evidence was that he intended to cause Fenridge to exploit any realistic opportunity available to it to conduct a profitable nursing home business at the premises after the lease ended. His evidence was supported by…

220 [Evidence reviewed and conclusion reached that, if the express and implied terms had been complied with, Fenridge would doubtless have exploited the additional opportunities they provided.]

221 I turn to consider whether it has been established on the balance of probabilities that the opportunity had some value.

222 It was contended on behalf of RCA and Regis that the opportunity had no value, … [submissions set out].

[RCA and Regis submissions dealt with in turn and rejected. Conclusion reached that the lost opportunity was of some value.]

271 I turn to consider the value of that opportunity.

**If Fenridge has lost a valuable opportunity, what was the opportunity worth?**

272 In my opinion, the opportunity had significant value. My reasons follow…

278 A lost opportunity may be so certain that it should be valued at 100 per cent of its full value.[10] Fenridge contends that the opportunity was such an opportunity. RCA and Regis contend that there were so many contingencies in Fenridge's way that the opportunity was valueless, and the claim therefore falls at the first hurdle.

279 In order to determine the rival submissions, it is necessary to again consider the

[10] *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 350.

various hurdles which Fenridge had to cross in order to avail itself of the opportunity:

[Various hurdles listed.]

[Facts reviewed and RCA contentions on first hurdle stated and rejected.]

284 For the above reasons, I reject RCA and Regis's contention that the opportunity would have failed at the first hurdle. I accept that Fenridge would have faced some risks in dealing with the Department, but do not think that they were significant risks in all the circumstances. ...

285 The second and third aspects of the opportunity would have presented challenges for Fenridge, but I see no significant risk that they could not have been achieved. [Reasons given]

287 I turn to consider the full value of that opportunity…[Evidence reviewed and a conclusion reached that further evidence required to finalise valuation].

**In calculating damages, must Fenridge give credit for any profit from the apartment development?**

305 RCA and Regis contend that any award of damages which the Court might otherwise have made in Fenridge's favour for breach of the continuous business obligation should take account of Fenridge's profit from the apartment development. …

307 In general terms, RCA and Regis contend …. that the apartment development was undertaken by Fenridge as part of its duty to mitigate its loss arising from any damage which it may establish, and that the apartment development formed part of a continuous process of evaluation of commercial opportunities for dealing with the premises after Fenridge found itself in the position that it was not economically viable for a nursing home business to be conducted at the premises.

308 I turn to consider the relevant authorities concerning this issue. The starting point is the statement of the plurality judgment of the High Court in *Haines v*

*Bendall*,[11] that: …

[Relevant law and rival contentions of law reviewed.]

320 The … central plank in Fenridge's submissions on this issue … was that its actions in undertaking the apartment development were not taken with the object of avoiding its loss arising from RCA's breaches of the lease and were not part of a continuous dealing with the situation caused by RCA's breach, but should be characterised as involving 'an independent or disconnected transaction'. I do not accept those submissions, , which take no account of the other emphasised words in the above quotations. In my opinion, the apartment development arose directly from and was necessitated by RCA's breaches of the lease, involved conduct designed to avoid Fenridge's losses flowing from those breaches, was the natural response of a property owner such as Fenridge to the circumstances in which it found itself, and formed part of a continuous dealing with the premises which were the subject of the lease. The apartment development was not an independent or disconnected transaction.

335 In my opinion, the Court in this case should simply assess the loss flowing directly from the breaches of contract in accordance with the overriding compensatory rule. This involves valuing Fenridge's lost opportunity and taking account of the net benefits which it received from the apartment development; a development which was 'a reasonable and prudent course quite naturally arising out of the circumstances in which [Fenridge] was placed by [RCA's] breach'.[12] In these circumstances, it is in my opinion just for the Court to 'look at what actually happened, and to balance loss and gain'.[13] It is only by that method that over-compensation can be avoided and a fair and reasonable result achieved.

[11] (1991) 172 CLR 60 per Mason CJ, Dawson, Toohey and Gaudron JJ (with the agreement of Brennan J).
[12] *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 691.
[13] Ibid.

## SCHEDULE C – EXAMPLE CONCLUSION

### Conclusion

389 For the above reasons, Fenridge has established its case in the following respects.

390 First, that RCA breached the continuous business obligation and the implied terms, and that Regis wrongfully induced those breaches. RCA and Regis are jointly and severally liable to Fenridge for damages to be finally assessed by reference to the following components:

(1) 75 per cent of the value of Fenridge's lost opportunity to earn income in the period 29 February 2008 to 31 December 2009 from a nursing home business at the premises;

(2) 80 per cent of the value of Fenridge's lost opportunity to own the premises on 1 January 2010, together with the attached right to operate, lease or sell the redeveloped nursing home with 60 allocated places. I have assessed this aspect of Fenridge's loss, subject to adjustment for the profits of the apartment development, at $3,956,000;

(3) interest under the express terms of the lease; and

(4) an adjustment for the net profit of the apartment development.

391 The final calculation of the damages which both RCA and Regis must pay in accordance with sub-paragraphs (1) to (4) above will involve consideration of issues which have not yet been argued, or fully argued. For example:

(1) For what period should interest run?

(2) How should the net profit of the apartment development be adjusted? … I will hear submissions on that issue.

(3) When should the net profit of the apartment development be brought to account?

392 Second, that RCA engaged in misleading conduct. Fenridge has not, however, established any loss caused by that conduct.

393 Third, that Regis's conduct is sufficiently reprehensible to justify an award of exemplary damages. The amount of the award will be fixed once Fenridge's compensatory damages for breach of the continuous business obligation are finally assessed.

394 Fourth, that RCA breached the make good obligation and that it has suffered loss as a result. The amount of that loss will be referred to an expert or special referee for assessment.

395 When the above assessments have been concluded, I will hear the parties as to interest and costs.

## SCHEDULE D — OVERUSE OF DEFINITIONS AND REWRITE

### OVERUSE

This case concerns the construction and validity of pre-emptive rights clauses ('PERs') in three joint venture agreements for the operation of mines in Western Australia. The mines are the Mount Redon Gold Mine near Derby (the 'MRG Mine'), the Lucky Strike Iron Ore Mine near Esperance (the 'LSIO Mine') and the Bright Sparkles Diamond Mine near Karratha (the 'BSD Mine').

The first defendant, Penny Dreadful Mining Group NL ('PDMG') is the owner of the MRG Mine, the LSIO Mine and the BSD Mine. It arranged for the mines to be developed and exploited by wholly-owned subsidiaries: the second defendant ('PD (MR)'), the third defendant ('PD (LS)') and the fourth defendant ('BS (No.2) PL'). On 26 January 2000, the subsidiaries entered into joint venture arrangements to conduct mining operations with the second, third and fourth plaintiffs (respectively, 'MRP', 'EIOM' and 'BS(K) PL'). Each of the second, third and fourth plaintiffs is a wholly-owned subsidiary of the first plaintiff, Filthy Rich Prospecting Group Ltd ('FRPG').

Each of the joint venture agreements is in identical terms ('JVA1', 'JVA2' and 'JVA3' respectively: collectively the 'JVAs'). …

### REWRITE

This case concerns the construction and validity of pre-emptive rights clauses in three joint venture agreements for the operation of mines in Western Australia. The mines are the Mount Redon Gold Mine near Derby, the Lucky Strike Iron Ore Mine near Esperance and the Bright Sparkles Diamond Mine near Karratha.

The first defendant, Penny Dreadful Mining Group NL owns the three mines. It arranged for the mines to be developed and exploited by wholly-owned subsidiaries, who are also defendants. On 26 January 2000, the subsidiaries entered into joint venture arrangements to conduct mining operations with wholly-owned subsidiaries of the first plaintiff, Filthy Rich Prospecting Group Ltd.

Each of the joint venture agreements is in identical terms.