APPLICANT'S SUMMARY OF ARGUMENT

as updated pursuant to orders made on 19 June 2023 for the provision of updated submissions[1]

COURT DETAILS	
Court	Supreme Court of NSW, Court of Appeal
Registry	Sydney
Case number	2022/00387563
TITLE OF PROCEEDINGS	
Appellant	**Horizon Hotels Pty Ltd**
First Respondent	**Australian Secured & Managed Mortgages Pty Ltd**
Second Respondent	**Craig Highmore**
PROCEEDINGS IN THE COURT BELOW	
Title below	Australian Secured & Managed Mortgages Pty Ltd v Horizon Hotels Pty Ltd
Court below	Supreme Court of NSW (Equity Division)
Case number below	2021/00369459
Date[s] of hearing	14 and 15 July 2022
Material date	6 December 2022
Decision of	Henry J

Introduction

1. The Appellant/ Applicant (**Applicant**) appeals or seeks leave to appeal, if necessary, from the orders of the Court below in *Australian Secured & Managed Mortgages Pty Ltd v Horizon Hotels Pty Ltd* [2022] NSWSC 1647 (**Reasons**)[2]. By orders made on 19 June 2023, the Court determined that the application for leave to appeal and the appeal be heard concurrently.

[1] The Applicant has had regard to UCPR 51.39A with respect to concurrent hearings under UCPR 51.14. The Summary of Argument does address the substantive arguments to be raised on the appeal, but these submissions have been supplemented modestly to abide by UCPR 51.39A (4).
[2] White Folder (**WF**) 6 - 54

2. The appeal was originally commenced by way of Notice of Appeal dated 7 March 2023. The Summons for leave is filed by the consent of the parties pursuant to orders made on 15 May 2023 in the event that the Appeal it is held to be incompetent.

3. The Notice of Appeal as filed is to be replaced by the form of *draft* Notice of Appeal appearing at Supplementary White Folder (**SWF**) 64 - 67.

4. The Court below determined the liability of the Applicant for the payment fees claimed to be payable to the Second and First Respondents, respectively pursuant to an Introducer Mandate Agreement dated 25 August 2021(**Introducer Mandate**)[3] and Letter of Offer for Second Mortgage dated 26 August 2021 (**Letter of Offer**)[4], which purportedly permitted the Respondents to place caveats on title of the Applicant's property (Folio Identifier 1/SP [redacted] (**Unit 1**) and land at Folio Identifier 2/SP [redacted] (**Unit 2**), the securities of the prospective loan.

5. Despite serious ambiguity in the complement of relief ultimately sought by the Respondents in their Amended Summons served on the final day of hearing[5], the Court below relevantly made final orders extending the operation of Caveat AR [redacted]491[6], AR [redacted]492[7], AR [redacted]493[8], and AR [redacted]494[9] lodged variously in respect of Unit 1 and 2 Unit 2 until payment of the amounts referred to in Orders 3 and 4, or until further order of the Court (whichever is earlier). In addition, by orders 5 and 6 the Court below ordered (by way of mandatory injunction in the form of a decree specific performance[10]) the Applicant to pay to the First Respondent the amount of $37,510 and the Second Respondent the amount of $18,150.[11]

---

[3] WF 418 - 421
[4] WF 441 – 445 and 446 - 450
[5] SWF 6 - 10
[6] WF 503 - 504
[7] WF 507 - 508
[8] WF 505 - 506
[9] WF 509 - 510
[10] Although specific performance was at no stage discussed in the context of the hearing nor in the reasons of the Court below, this appears to be the only way in which this order can properly be construed. The relief sought was understood to be a claim for liquidated damages. See also Respondent's Response dated 7 June 2023 at [9], also to this effect. Accordingly, no arguments as to the Court's jurisdiction to grant specific performance when damages were an adequate remedy, was never ventilated. See WF 395.
[11] WF 53 – 54

The requirement for leave and reasons why leave should be granted, if required

6. Ostensibly, the Applicant requires leave to appeal in respect of these orders under s101(2)(e), (m), and s 101(2)(r)(i) and/or (ii) of the *Supreme Court Act 1970* (NSW). However, the case law in relation to s 101(2)(r)(i) as reviewed by Bell P (as the Chief Justice then was, with the concurrence of Basten JA, as his Honour then was, and Leeming JA) in *Gaynor v Attorney General for New South Wales* [2020] NSWCA 48; 102 NSWLR 123 at [15]–[19] wherein the propositions stated in *Jabulani Pty Ltd v Walkabout II Pty Ltd* [2016] NSWCA 267 at [80] were approved supports the proposition that the appeal is as of right. That is, the phrase "at issue" "must be construed as meaning truly at issue or, inversely, not unrealistically at issue" and must involve "a realistic prospect that the appeal would change the wealth of the appealing party by more than $100,000".[12]

7. Consistent with these authorities, as the Court below determined finally the Respondents' substantive legal rights under both the relevant instruments (the Introducer Mandate and Letter of Offer) the corollary of which is that the complement of orders of the Court below involve an amount at issue or, indirectly, a property or a civil right otherwise accruing to the Applicant amounting to the value of $100,000 or more. That is, this Court would be satisfied on the balance of probabilities that following a successful outcome on the appeal, the Applicant has a civil right under s 74P of the *Real Property Act 1900* (NSW) that involves the requisite value or is capable of being so valued in excess of $100,000, and, accordingly, there is a realistic prospect that the Applicant would improve its financial position by $100,000 or more[13]. The evidence of Gregory Magree dated 17 May 2023[14] supports the conclusion that the continuing operation of the caveats is not only stymying refinance and/ or sale of Unit 1 and Unit 2 but continues to cause the Applicant loss and damage in excess of the statutory threshold.[15]

---

[12] See also *Kassam v Hazzard* [2021] NSWCA 299; 106 NSWLR 520 at [21]

[13] WF 393 – 394. In order to establish an absence of reasonable cause, it is necessary for a claimant for relief under s 74P(1)(a) to demonstrate that the caveator neither had a caveatable interest nor a reasonable belief based on reasonable grounds that he did have such an interest: *Beca Developments Proprietary Limited v Idameneo* (No 92) Pty Ltd (1990) 21 NSWLR 459 at 474. The removal of the caveats would satisfy the first limb. The second limb is a question of fact not the subject of evidence in the proceedings below, the cause of action not arising until in or about January 2023.

[14] WF 203 – 387

[15] See *Maynes v Casey* [2011] NSWCA 156 at [7], Basten JA (with whom Allsop P agreed) at [8]. See Affidavit of Gregory Magree at [18] – [22], [32] – [39] and [40] which set out the material facts, which may demonstrate the likely amount of damages on a cause of action under s 74P of the Real Property Act.

8. The Respondents have been invited to concede that the appeal is of right on this ground but have refused to make such a concession.[16]

9. Even if this prospective cause of action does not engage s 101(2)(r)(i), or, indeed, s 101(2)(r)(ii) of the Supreme Court Act, appellate review is warranted in this case as the appeal involves "error[s] of principle which, if uncorrected, will result in substantial injustice".[17] As the brief discussion below outlines, it is also reasonably clear that errors have been made, going beyond what is merely arguable, that occasions injustice.[18]

10. Not only is there is a real prospect that an order under s 74P of the *Real Property Act* may not be adequate to compensate the Applicant for the loss accruing, but, on the facts of this case, to have permitted the continuing operation of the caveats beyond judgment, was wrong as a matter of principle, discretion, and, arguably, jurisdiction.[19]

11. In fashioning the relief to grant declaratory relief, the ongoing operation of caveats and mandatory injunctions, the primary judge acted on an error of legal principle[20], going to either jurisdiction or discretion, for several reasons[21].

12. First, the relevant contract between the parties is not executory; it is executed. There is an adequate remedy at common law in damages[22] so there is either no jurisdiction to grant specific performance or specific performance should have been refused on discretionary grounds[23].

---

[16] WF 400 – 401

[17] *Collier v Lancer (No. 2)* [2013] NSWCA 186 at [1]. See the discussion at [9] – [17] herein.

[18] *Be Financial Pty Ltd as trustee for the Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[38]; *The Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]

[19] Spry ICF, *Equitable Remedies* (9th ed, 2014) pp. 61 - 64

[20] *House v The King* [1936] HCA 40; 55 CLR 499 at 504 – 505; and, see *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [148] (Edelman J)

[21] See proposed draft Ground of Appeal 7, SWF 65

[22] The claim is not one for debt (cf. Response dated 7 June 2023 at [9]) as the claim was not properly one for which the computation of the sum owed did not require any findings of fact in order to establish the amount lost by the breach. It was properly a claim for damages in a liquidated form. Cf. Amended Summons at Prayer 9A - 11A (SWF 7 – 8) was framed as a claim for specific performance for debts not readily established on the evidence.

[23] See eg. *Tony Khoa Tran v Michael Chau Trung Hoang (Who Is Sued in His Capacity as Executor of the Estate of Khiem Tran, Deceased)* [2022] VSCA 194; 67 VR 583 at [38]; and the discussion in *Siracusa v Siracusa* [2022] ACTSC 94 at [16], [30] and [33] (Kennett J) and see also *JC Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 (***JC Williamson***) at 297-299

13. Second, those discretionary grounds include that the consequences of the relief afforded were serious and ongoing, required continued supervision by the Court[24], and expose the Applicant to sanction for contempt.

14. Third, an award of damages is characterised by its finality and the fact that the enforcement costs are borne by the parties to the litigation is to be preferred to a grant specific performance of a contract for a small quantum of brokerage fees, which requires a court potentially to supervise its performance to remove caveats and discharge charges, which may impose pressures on, and consequently increase the expense of, the administration of civil justice.[25] Finality is both in the parties' interest and in the public interest.

15. Finally, this is a case, as referred to by Isaacs and Rich JJ in *Pakenham Upper Fruit Co Ltd v Crosby*[26], where the Court "could never be sure that it was in a position to enforce its order without injustice"[27].

16. Accordingly, as a matter of significant principle, in circumstances where the Respondents were seeking to enforce rights which were plainly of small liquidated monetary value, but whose enforcement had the propensity to cause great embarrassment to, and inflict considerable loss upon the Applicant, the question of whether damages was an adequate remedy required more than the negligible consideration it received. Cf. Reasons [161][28]. There was not before the Court below evidence of the Applicant's insolvency or the threat of its insolvency so as to imperil the Applicant's ability to pay a judgment debt. As such, as the legal right sought to be enforced is small, was quantified in a monetary sum, and could be easily compensated by the small payment of money, as a matter of principle, damages would have left the Respondents in the same position as relief in specie, in all material respects, and was, therefore, the appropriate remedy in contradistinction to the relief granted[29]. Had

---

[24] *J.C. Williamson* at 297-8; and *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [78] – [81], [192]

[25] Jones and Goodhart, *Specific Performance*, (2nd ed, 1996) p. 51

[26] (1924) 35 CLR 386 at 395

[27] There was ample evidence before the Court below that the Applicant's intention was to imminently sell the subject properties upon which it would have been apt to conclude this fact. See WF 423, 431 – 432, 483, 491 – 492, 516

[28] WF 49

[29] See eg. *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2]* [2017] WASCA 76; 55 WAR 36 at [132] – [137] in particular, and the cases there cited, and following; *Wight v Haberdan Pty Ltd* [1984] 2 NSWLR 280 at 290, See also the application of the 'good working rule' in respect of the invasion of a proprietary right

judgment on the covenant for the payment of the principal sum been obtained in the form of a liquidated debt, as opposed to an order to pay, the covenant would have merged in the judgment and been accompanied by a panoply of available remedies to enforce the judgment debt. This relief, however, would not have imperilled, in the manner it now does, the Applicant's ability to deal in Unit 1 and Unit 2[30].

The nature of the Applicant's case and brief outline of argument

17. On appeal, in addition to the arguments regarding relief outlined above, which go to proposed Ground 7, the Appellant advances two further species of argument, the first of which engages with a significant issue of principle.

18. The first proposed ground (Ground 1) pertains to the finding by the Court below (Reasons [92] – [102][31]) that the concessional rate was the relevant interest rate for the purposes of an interest rate of 24% per annum as stipulated in the Introducer Mandate, which established the Second Respondent's entitlement to be paid the Introducer Fees secured by the charges and caveats.

19. First, this finding is contrary to the clear language of text of the Letter of Offer adjacent to the term "Interest Payable".[32]

20. Second, this finding failed to take into account, as a matter of contractual construction decisions of various courts which recognise that considering the lower rate as the ordinary rate and setting the higher rate for late penalty is open to be construed as a penalty in equity, and unconscionable at statute, such that it would be unenforceable[33]. This rule which is described as "well settled if not… intelligible"[34] suggested, properly construed, the relevant "indicative interest rate" for the purposes of the clause 3.8 of the Introducer Mandate was the higher rate with a concession for timeous payment so

---

emerging from *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. See also *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; *Jaggard v Sawyer* [1995] 2 All ER 189 at 207 - 208; *Cowper v Laidler* [1903] 2 Ch 337, 341; *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] VSCA 311; 20 VR 311, 321 [46]–[48]

[30] There was also evidence that the property was earmarked for sale in March 2022 – see WF 473

[31] WF 32 - 35

[32] WF 446

[33] See e.g. the cases cited in *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371; [2013] 2 Qd R 233 (***Kellas-Sharpe***) at [32] – [47] and *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at [162]. See also Schedule 2 to the *Competition and Consumer Act 2010* (Cth, Australian Consumer Law s 21, *Australian Securities and Investments Commissions Act 2001* (Cth), s 12CB

[34] *Kellas-Sharpe* at [38], see also [40]

as to be consistent with commercial practice to avoid potential unenforceability. Otherwise, the Court would potentially be construing the clause to work as a penalty, because the higher rate would operate in terrorem to enforce punctual payment, which would render it void and unenforceable[35].

21. The Court below was required to approach the task of construction on the basis that the parties to that contract intended to produce a commercial result, and one which made commercial sense[36] so as to avoid it making commercial nonsense or working commercial inconvenience[37]. Thus, in construing the contract, the Court below was required to take into account established and settled rule, recognised by intermediate courts of appeal[38] as informing what a reasonable businessperson would assume the parties intended to achieve as a business like and commercial result, and seek to construe the contract in a manner which avoided a potential commercial inconvenience such as the unenforceability of interest rates as a penalty. That is, the reasonable businessperson would eschew a construction which may expose a contractual stipulation for the payment of money on breach of a contract as extravagant and unconscionable. The Court below was not being called upon to determine if the stipulation were penal per se. Similarly, the clear language attributed to the rates "Standard" versus "Concessional"[39] would be rendered nugatory by this construction.

22. The payment of interest in advance does not derogate from this proposition. Payment of interest in advance satisfies the concessional rate because the borrower is not in default, but it does not operate to elevate the constructional choice as to the relevant "indicative interest rate" for the purposes of the Introducer Mandate to one which not otherwise potentially marred by illegality. Cf. Reasons at [96] and [99][40].

23. The remaining proposed grounds (Grounds 2 – 6) go to the arguments advanced below concerning conventional estoppel: Reasons [121] - [149][41].

---

[35] Eg. *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33 at [94]; *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328; 93 NSWLR 231 at [74]; *Yango Pastoral Company Pty Ltd v First Chicago Australia Limited* (1978) 139 CLR 410 at 427 – 428, 429 – 420 and 432 - 433

[36] *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 (***Woodside Energy***) at [35]; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; 261 CLR 544 at [17]

[37] *Woodside Energy* at [35]; *Zhu v Treasurer (NSW)* [2004] HCA 56; 218 CLR 530 at [83]; *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313–314

[38] *Kellas-Sharpe* at [42]

[39] WF 446

[40] WF 33 - 34

[41] WF 40 - 47

24. The evidence demonstrated that the Applicant, through Mr Barkas clearly stipulated, and the Second Respondent (an agent of the First Respondent[42]) plainly accepted (Reasons at [37][43]), and the relevant protagonists at First Respondent acknowledged, that the prospective loan was to be secured by an unregistered second mortgage protected on title by caveat: Reasons at [126][44]. The parties had dealt with each other on this basis since the inception of the relevant transaction.[45].

25. There is a profound dissonance between the finding at Reasons [37][46] accepting that the Second Respondent acknowledged that a term, which enlivened the payment of his fees and those of the First Respondent under clauses 3.3 and 3.8 of the Introducer Mandate, and clause 11 of the Letter of Offer, was a "typo" and the finding at Reasons [140][47]. Nothing further needed to be put to the Second Respondent, as this concession captured neatly the acceptance of the Fee Assumption[48]. The Second Respondent was squarely on notice of the contentions contained in the Applicant's evidence. The importance of the question and the concession elicited were self-evident and did not require further cross examination: cf. Reasons [139] - [140][49].

26. Likewise, the Introducer Mandate is not inconsistent with the Fee Assumption cf. Reasons [141][50]. The Fee Assumption is captured in the terms of the front page of the Introducer Mandate[51] (Reasons [21][52]) and clauses 3.3 and 3.8[53] (Reasons [24][54]). This squarely accounts for the liability of the Applicant for the Second Respondent's fees

---

[42] Although the evidence was limited to the conversation having taking place, but not its truth, and that it was what Mr Barkas heard or otherwise perceived, that is, its lay opinion purpose, s 78 *Evidence Act 1995* (NSW) (WF 79 l. 25 – WF 80 l. 37), it is nonetheless evidence of a parole appointment of a principal. In determining whether an agency exists the court looks at what the parties said and did at the time of the agency. Acts and conduct of a party subsequent to the creation of the agency can establish the existence of an agency. In any event, in this case, agency is to be implied by the conduct of the parties - the two principal characteristics of agency being present - consent and authority to act of the principal's behalf. See eg. WF 423, 425, 451, 457, 470. See also G E Dal Point "Law of Agency" 4th ed. Lexis Nexis 2020 at [4.1], [4.5] and [4.15]; *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (in liq)* [2013] FCAFC 5; 209 FCR 368, 387-388 at [79]; *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 841.
[43] WF 18
[44] WF 41
[45] WF 473 - 474
[46] WF 18
[47] WF 44
[48] WF 93, ll. 27 - 47
[49] WF 44
[50] WF 45
[51] WF 418
[52] WF 13
[53] WF 419
[54] WF 14

when it is accepted that the "Indicative Interest Rate" cell, which captures the reference to "Unregistered 2nd Mortgage" co-opts it into the criteria stipulated in clauses 3.3 and 3.8 of the Introducer Mandate. The Letter of Offer did not include this term[55]. Nonetheless, despite it not being returned until 30 August 2022[56], caveats were lodged on Unit 1 and Unit 2 on 25 August 2022 and 26 August 2022, although they were subsequently withdrawn as bad in form[57]. The evidence supported that the Second Respondent was the First Respondent's agent[58], and the First Respondent was fixed with his understanding and acceptance of this term.

27. There is unequivocal and unchallenged evidence of Mr Barkas' basis for his understanding as to his agency for the Applicant.[59] Cf. Reasons at [145] – [146][60]. The execution of the Letter of Offer is explained[61] and was accompanied with a clear and unchallenged statement that is consistent with the Fee Assumption at point 3 of the 30 August 2022 to which the email therein referred[62]. It is also erroneous to have held as the Court below did at Reasons [145] - [146][63] that Mr Barkas did not discuss the Fee Assumption with the Applicant's Mr Magree, when it is plain that Mr Magree was copied to the very 30 August 2022 email which asserted it.[64] Therefore, the inferences said to have been drawn on the documents in the absence of affidavit evidence from Mr Magree could not properly, reasonably, or comfortably have been drawn in the absence of an attempt by the Court below to grapple with these incontrovertible and unchallenged facts[65].

28. The finding that the issue of the invoice by the First Respondent is inconsistent with its adoption of the Fee Assumption (Reasons [147][66]) is erroneous. Indeed, its issue is the very departure from the Fee Assumption complained of.

---

[55] WF 441
[56] WF 450
[57] See WF 483 and 484
[58] See eg. WF 423, 425, 451, 457, 470, 539 [2], [6], [10], [18], [19]
[59] WF 540 at [10] – [11]
[60] WF 46
[61] See WF 543 [19]
[62] WF 438
[63] WF 46
[64] WF 438 and see also WF 470
[65] WF 418, 419, 423, 424, 425, 430, 438, 452, 459, 470, 539 [2], 543 [19]
[66] WF 47

29. Finally, the findings with respect to disadvantage (Reasons [148][67]) are misplaced. Insofar as they rely upon the impugned findings at Reasons [145] – [146][68] they too are impugned. Further, they misapprehend the relevant detriment, being the entitlement to fees and the security of those fees by charges enforced through the effective statutory injunction of the caveats over Unit 1 and Unit 2.

Conclusion

30. Leave to appeal to the extent required should be granted. The appeal should be allowed. The Respondents should pay the Applicant/ Appellant's costs. Caveats AR[redacted]491, AR[redacted]492, AR[redacted]493 and AR[redacted]494 should be removed.

[redacted]

B.K. Nolan
Counsel for the Applicant/ Appellant
[redacted]
4 July 2023

[67] WF 47
[68] WF 46

UCPR 51.36(2) Statement

Findings challenged	**Judgment**	**Findings contended for**	**Transcript and other references to evidence below**
Mr Highmore and ASMM were not aware or adopted the Fee Assumption	[140]	Mr Highmore and ASMM were aware and adopted the Fee Assumption	Judgment [37] WF 93, Transcript 39 ll. 27 – 47 WF 418, 419, 423, 425, 473 - 474
The Introducer Mandate is inconsistent with the Fee Assumption	[141]	The Introducer Mandate is consistent with the Fee Assumption	WF 418, 419
Mr Barkas did not communicate his understanding about the payment of fees being conditioned on the offer of finance providing for an unregistered second mortgage	[142]	Mr Barkas did communicate his understanding about the payment of fees being conditioned on the offer of finance providing for an unregistered second mortgage	WF 418, 419, 423, 424, 425, 430, 438, 452, 459, 470
There was nothing in cll 2, 3.3 and 8 of the Introducer Mandate that would have led Mr Barkus to an understanding that fees would not be payable unless the loan offer was issued on terms wholly consistent with the schedule	[143]	The schedule on the front page of the Introducer Mandate was consistent with cl 3.3 of the Introducer Mandate the understanding that fees would not be payable unless the loan offer was issued on terms wholly consistent with the schedule on the front page	WF 418, 419

on the front page of the Introducer Mandate			
The assumption regarding an unregistered second mortgage as a precondition to payment was not included in the Introducer Mandate.	[143]	The assumption regarding an unregistered second mortgage as a precondition to payment was included in the Introducer Mandate.	WF 418, 419
Mr Magree was not fixed with the Fee Assumption as held by Mr Barkus	[145]	Mr Magree was fixed with the Fee Assumption as held by Mr Barkus	WF 418, 419, 423, 424, 425, 430, 438, 452, 459, 470, 539 [2], 543 [19]
Mr Magree and by extension Horizon Hotels did not have knowledge of or hold that the Fee Assumption at any relevant time.	[147]	Mr Magree and by extension Horizon Hotels did have knowledge of or hold that the Fee Assumption at all relevant times.	WF 418, 419, 423, 424, 425, 430, 438, 452, 459, 470, 539 [2]
ASMM's issuance of an invoice for fees cannot be considered referable to the Fee Assumption	[147]	ASMM's issuance of an invoice for fees constitutes a departure from the Fee Assumption	WF 418, 419, 446 - 450
Horizon Hotels has not shown that it would be placed in a position of significant disadvantage if departure from the Fee Assumption were permitted	[148]	Horizon Hotels would be placed in a significant position of disadvantage if departure from the Fee Assumption were permitted.	WF 423, 431 – 432, 483, 491 – 492, 516

List of relevant authorities and legislation

Legislation

1. *Australian Securities and Investments Commissions Act 2001* (Cth), s 12CB
2. *Competition and Consumer Act 2010* (Cth), Schedule 2, Australian Consumer Law, s 21
3. *Real Property Act 1900* (NSW), ss 74K and 74P
4. *Supreme Court Act 1970* (NSW), s101(2)(e), (m), (r)(i) and/or (ii)

Cases

5. *Arab Bank Australia Ltd v Sayde Developments Pty Ltd* [2016] NSWCA 328; 93 NSWLR 231 at [74]
6. *Be Financial Pty Ltd as trustee for the Financial Operations Trust v Das* [2012] NSWCA 164 at [32]-[38]
7. *Beca Developments Proprietary Limited v Idameneo* (No 92) Pty Ltd (1990) 21 NSWLR 459 at 474
8. *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* [2007] VSCA 311; 20 VR 311, 321 [46]–[48]
9. *Cowper v Laidler* [1903] 2 Ch 337 at 341
10. *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; 261 CLR 544 at [17]
11. *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at [35];
12. *Gaynor v Attorney General for New South Wales* [2020] NSWCA 48; 102 NSWLR 123 at [15]–[19]
13. *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 313–314
14. *House v The King* [1936] HCA 40; 55 CLR 499 at 504 – 505
15. *Jaggard v Sawyer* [1995] 2 All ER 189 at 207 – 208
16. *J.C. Williamson Limited v Lukey* (1931) 45 CLR 282 at 297-8
17. *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33 at [94];
18. *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371; [2013] 2 Qd R 233 at [32] – [47]
19. *Kowalczuk v Accom Finance Pty Ltd* [2008] NSWCA 343; 77 NSWLR 205 at [162]

20. *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490 at 496 – 497
21. *Maynes v Casey* [2011] NSWCA 156 at [7]
22. *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 at [148]
23. *Pakenham Upper Fruit Co Ltd v Crosby* (1924) 35 CLR 386 at 395
24. *Patrick Stevedores Operations No.2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [78] – [81], [192]
25. *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287
26. *Siracusa v Siracusa* [2022] ACTSC 94 at [16], [30] and [33]
27. *Sino Iron Pty Ltd v Mineralogy Pty Ltd [No 2]* [2017] WASCA 76; 55 WAR 36 at [132] – [137]
28. *The Age Co Ltd v Liu* (2013) 82 NSWLR 268; [2013] NSWCA 26 at [13]
29. *Tony Khoa Tran v Michael Chau Trung Hoang (Who Is Sued in His Capacity as Executor of the Estate of Khiem Tran, Deceased)* [2022] VSCA 194; 67 VR 583 at [38]
30. *Quikfund (Australia) Pty Ltd v Prosperity Group International Pty Ltd (in liq)* [2013] FCAFC 5; 209 FCR 368, 387-388 at [79]
31. *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815 at 841
32. *Yango Pastoral Company Pty Ltd v First Chicago Australia Limited* (1978) 139 CLR 410 at 427 – 428, 429 – 420 and 432 – 433
33. *Zhu v Treasurer (NSW)* [2004] HCA 56; 218 CLR 530 at [83]

Texts

34. Dal Point, G E “Law of Agency” 4th ed. Lexis Nexis 2020 at [4.1], [4.5] and [4.15]
35. Jones and Goodhart, *Specific Performance*, (2nd ed, 1996) p. 51
36. Spry, ICF, *Equitable Remedies* (9th ed, 2014) pp. 61 - 64