

BETWEEN

Charles Bingley

Claimant

- and -

Netherfield House Leasing Pty Ltd (ACN 127 123 288)

Respondent

JOINT REFERRAL TO ARBITRATION

- 1 By written agreement dated 28 March 2023, the Claimant (**Mr Bingley**) and the Respondent (**Netherfield Leasing**) contracted for Netherfield Leasing to lease to Mr Bingley a property owned by Netherfield Leasing in exchange for payment (the **Agreement**).
- 2 The Agreement is governed by Victorian law.
- 3 By clause 21 of the Agreement, the parties agreed:
 - 3.1 to refer any dispute arising from or in connection with the Agreement to expert determination; and
 - 3.2 that, if either party was dissatisfied with the expert determination, it would have the right to apply to an arbitral tribunal to be dealt with *de novo*.
- 4 A dispute in relation to the Agreement was referred to an expert for determination in accordance with clause 21 of the Agreement. A copy of the expert's determination dated 5 May 2024 is at Annexure A (the **Determination**).

5 Both parties to the Agreement are dissatisfied with the conclusions reached in the Determination and hereby refer the dispute to arbitration by the Tribunal as now constituted.

6 The Determination correctly recites the facts and the parties' respective claims. The parties agree that they are not bound by the arguments put to the expert prior to making the Determination.

7 Neither party seeks to adduce any further evidence.

8 Neither party relies on any State or Commonwealth legislation.

9 No procedural issue arises in respect of the Determination and both parties accept the Tribunal's jurisdiction to hear and determine the dispute.

10 The issues are:

10.1 Was it a term of the Agreement that a large ballroom in the leased property be available for use by Mr Bingley?

10.2 Was Mr Bingley entitled to terminate the Agreement by reason of the unavailability of the ballroom and sue for damages?

10.3 If either party's claims succeed, to what measure of damages is the party entitled?

Charles Bingley
Claimant

Netherfield House Leasing Pty Ltd
Respondent

ANNEXURE A

EXPERT DETERMINATION

5 MAY 2024

IN RESPECT OF THE DISPUTE ARISING BETWEEN

Charles Bingley

and

Netherfield House Leasing Pty Ltd

The Hon. Elizabeth Darcy AC KC

FACTS

- 1 The Claimant (**Mr Bingley**) is a citizen of the United Kingdom who ordinarily resides in London and Hertfordshire, in the United Kingdom.
- 2 The Respondent (**Netherfield Leasing**) is a company forming part of the Austen Group, a multinational organisation headquartered in Sydney. One branch of the Austen Group's business concerns the acquisition, restoration and leasing of grand houses around the world. In respect of each grand house ultimately owned by the Austen Group, a special purpose company is incorporated for the purpose of owning the property and leasing it. Other such companies in the Austen Group include Longbourn Leasing Pty Ltd, Pemberley Leasing Pty Ltd, and Rosings Park Holdings Pty Ltd. For tax reasons, each such company is domiciled in Australia.
- 3 Netherfield Leasing owns and leases out a property located in Hertfordshire called "Netherfield" (**Netherfield**).
- 4 Netherfield was constructed in the late-16th Century and was expanded and renovated over the following centuries. Netherfield sits on an estate of approximately 10,000 acres, comprising a mixture of farmland, woodland and manicured gardens, the latter being predominantly located near to the house. Netherfield has dozens of rooms for various purposes, including bedrooms, libraries, salons, bathrooms, and servants' quarters.
- 5 Relevantly for the purposes of this dispute, Netherfield has two ballrooms in which balls may be hosted by lessees of the property. There is a smaller ballroom that accommodates 200 people, and a larger ballroom that overlooks the lake beside Netherfield and accommodates 750 people.

- 6 Like other properties owned by the Austen Group, Netherfield is classed as a “Historically Significant Structure – Class 1” by the British government. Class 1 is the highest grade pertaining to historically significant privately owned properties. The owner of any Class 1 property is obliged by United Kingdom legislation (the to maintain the property in perfect condition.
- 7 Under the SPS Act, authorised inspectors may enter a Class 1 property at any time, without warning, for the purpose of inspecting the property to determine it is being maintained in accordance with the standards under the SPS Act. If an authorised inspector considers it necessary, he or she may issue a maintenance notice (a **Notice**) to the owner of a Class 1 property specifying works required to be done to ensure the property is in perfect condition. A Notice may impose numerous conditions on the property to which it relates, including restricting rights of access to all or part of the property, unless and until the required works are completed. The SPS Act provides that a Notice takes effect from the moment it is affixed to part of the property to which it relates. It is an offence under English law to breach the conditions of a notice issued under the SPS Act.
- 8 On 28 March 2023, Mr Bingley went to Netherfield to look at the property. He was considering renting a grand house for a month during the English summer. When Mr Bingley arrived at Netherfield, he was met by Ms Charlotte Collins, an employee of the Austen Group and the letting agent responsible for Netherfield.
- 9 After a brief tour of parts of Netherfield, Mr Bingley said to Ms Collins that he had decided to rent Netherfield for four weeks in July 2023. Mr Bingley said to Ms Collins that what he had seen was sufficient to persuade him to rent the property. At that moment, Mr Bingley and Ms Collins were standing in the small ballroom at Netherfield.

Ms Collins then said to Mr Bingley “well, in that case, let’s review the paperwork in the breakfast room – there is a fine portrait of the Austen Group’s chairman, Lady Catherine De Bourgh, that I would like to show you”.

10 Mr Bingley and Ms Collins walked towards the breakfast room. On their way, they passed a large double doorway with tape across it, which read, repeatedly along the tape, “BUILDING SITE – KEEP OUT”. Mr Bingley asked Ms Collins what was behind the doors. Ms Collins told him it was Netherfield’s famous large ballroom and that it was currently being renovated after Netherfield Leasing received a Notice from an inspector. Ms Collins also said that “the works in the large ballroom should be finished before your stay in July”. Mr Bingley replied by saying “that’s good. But I will just be here with my two sisters, so we won’t be needing it”. Ms Collins said “understood.”

11 In the breakfast room at Netherfield, Ms Collins gave Mr Bingley a number of documents relating to his stay at Netherfield, including information about the property and a lease agreement (the **Agreement**). After quickly perusing the Agreement, Mr Bingley signed it.

12 The Agreement contained various terms relating to the lease of Netherfield.

13 Clause 4.1 of the Agreement provided that the Lessee (Mr Bingley, in this instance) was required to pay a deposit equal to 25% of the total lease price to secure the booking.

14 Clause 4.2 of the Agreement provided that Mr Bingley was required to pay the 75% balance of the total lease price when checking out of the property.

15 Clause 5.2 of the Agreement stated that “from the Check-In Date until the Check-Out Date, the Lessee may have exclusive use of the Property, including all interior, garden, and woodland areas”.

- 16 The total lease price for Mr Bingley to lease Netherfield for 1 July 2023 (the “Check-In Date” to 28 July 2023 (the “Check-Out Date”) was \$80,000.
- 17 After Mr Bingley signed the Agreement and in the presence of Ms Collins, he paid \$20,000 by bank transfer to the account nominated in the Agreement. Ms Collins verbally confirmed receipt of the deposit.
- 18 Ms Collins then said to Mr Bingley “I think you have made an excellent choice, Mr Bingley”. Mr Bingley replied: “yes, I am very happy with what I have seen and look forward to a relaxing summer break here”.
- 19 Mr Bingley arrived at Netherfield on 1 July 2023, together with his two sisters Caroline and Louisa. They spent the day unpacking and touring Netherfield. During their tour, the Bingleys walked past the large ballroom. The builders’ tape had been removed and the ballroom appeared to be pristine.
- 20 At dinner that night, Caroline said to Mr Bingley and Louisa that she would be bored without a proper social occasion to look forward to until August. She suggested that they host a ball for the locals. They all agreed to host a ball on 22 July 2023, at the beginning of the final week of their stay.
- 21 During their first week, the Bingley siblings sent out invitations to 600 guests. Nearly all invitees replied within 24 hours to say they would attend. During the second and third weeks, Mr Bingley arranged for catering, decorations, staff, drinks, and musical performances. By 19 July 2023, Mr Bingley had spent \$50,000 on expenses for the ball.
- 22 Early in the morning of 21 July 2023, an inspector authorised under the SPS Act – a Mr William Wickham – came to Netherfield. Mr Wickham told Mr Bingley he was there to inspect the works done to the large ballroom and to ensure it was in a satisfactory form,

in accordance with the SPS Act. Although Mr Bingley said that contractors had already begun setting up the large ballroom for the ball the next day, Mr Wickham told Mr Bingley that he would need to inspect it immediately.

- 23 A short while later, Mr Wickham completed his inspection and went to speak with the Bingley siblings in the breakfast room, where they were eating.
- 24 Mr Wickham told the Bingleys that the large ballroom had not been restored in accordance with the precise requirements applicable to Netherfield. In particular, the original parquet floor had not been sealed. Mr Wickham said that if anybody walked on the floor, it could be irreparably damaged.
- 25 Because of that risk, Mr Wickham issued a Notice in respect of Netherfield and attached it to one of the front doors. The Notice provided that the large ballroom at Netherfield was an “Excluded Area” until the works specified in the Notice were completed. The Notice stated that there was a penalty of 6 months’ imprisonment or a fine of up to \$50,000 for entering or permitting another person to enter an Excluded Area.
- 26 Mr Bingley was deeply distressed. The Notice meant he could not host the ball the following day. With over 600 guests coming, he could not host it in Netherfield’s smaller ballroom. Caroline Bingley suggested her brother should just host the ball and pay the fine. But Mr Bingley was not prepared to disobey the Notice and risk going to prison.
- 27 That morning, the Bingley siblings decided to cancel their event. It was impossible to host the ball at another venue at short notice. Mr Bingley had already paid in full each of the various contractors engaged to put on the ball. Despite his best efforts, those contractors refused to refund him any of the \$50,000 he had paid out.

- 28 The Bingley siblings were incensed by their inability to use the ballroom or to host the ball, so they decided to pack up and leave Netherfield immediately. Mr Bingley and his sisters left Netherfield a few hours after Mr Wickham issued the Notice.
- 29 On the way to a friend's nearby property, Mr Bingley sent an email to Ms Collins stating that he had left Netherfield, he considered that Netherfield Leasing had breached the Agreement because he was unable to use the ballroom, and that he would not be paying any more money to Netherfield Leasing. He demanded a refund of the \$20,000 he had already paid to Netherfield Leasing.
- 30 Ms Collins replied to say Netherfield Leasing disagreed with Mr Bingley's contentions and invoked the dispute resolution clause of the Agreement.

CLAIM

Claim 1: Agreement terms

- 31 Mr Bingley claims that clause 5.2 of the Agreement entitled him to have, and Netherfield Leasing to give, exclusive access to the whole of Netherfield during the lease period, including the large ballroom.
- 32 In response, Netherfield Leasing claims that, by reason of the discussion between Ms Collins and Mr Bingley, clause 5.2 of the Agreement was subject to an oral or implied limitation to the effect that Mr Bingley did not have a right to use the large ballroom.

Claim 2: Breach

- 33 Mr Bingley claims that, because he was prohibited from using the large ballroom, Netherfield Leasing breached the Agreement.
- 34 In response, Netherfield Leasing gives three answers:
- 34.1 first, it repeats its answer to Claim 1;

34.2 secondly and alternatively, it says that, even if clause 5.2 of the Agreement entitled Mr Bingley to use the ballroom, the issuance of the Notice was a frustrating event, such that the Agreement was discharged from that time;

34.3 thirdly and alternatively, it contends that even if it breached clause 5.2, the breach did not entitle Mr Bingley to terminate the Agreement and sue for damages.

Claim 3: Damages

35 Mr Bingley seeks two heads of damages in respect of Netherfield Leasing's failure to make the large ballroom at Netherfield available to him:

35.1 first, in respect of the \$20,000 deposit; and

35.2 secondly, in respect of the \$50,000 spent on the ball to be held on 21 July 2023.

36 Mr Bingley contends that it was reasonably foreseeable to Netherfield Leasing that he would host a ball at Netherfield, given it possesses two ballrooms, and that he would incur the expenses of doing so. Netherfield Leasing rejects that contention.

COUNTERCLAIM

37 Netherfield Leasing seeks damages against Mr Bingley upon the basis of his repudiation of the Agreement and failure to pay the balance owing under the Agreement. Netherfield Leasing puts its claim for damages two ways:

37.1 first, it contends that it is entitled to \$60,000 – the balance of the lease price due under the Agreement;

37.2 secondly and alternatively, it contends that it is entitled to damages equal to \$60,000 in respect of the three weeks during which Mr Bingley had the use of

Netherfield before the issuance of the Notice, minus \$20,000, which he had already paid in the form of the deposit.

38 In response, Mr Bingley relies upon the breach the subject of Claim 2. Bingley concedes that, if he fails on Claim 2, he wrongly repudiated the Agreement and Netherfield Leasing was entitled to terminate the Agreement. Accordingly, the only issue on the counterclaim is the proper measure of Netherfield Leasing's damages in the event (1) Mr Bingley repudiated the Agreement or (2) the Agreement was discharged by frustration.

CONSIDERATION

Claim 1

39 Clause 5.2 of the Agreement provided that Mr Bingley had the right to the exclusive use of Netherfield, which expressly included "all interior ... areas".

40 Netherfield Leasing argued before me that Ms Collins' statements to Mr Bingley, made prior to the execution of the Agreement, were sufficient to incorporate an amendment to the written terms of the Agreement to the effect that "all interior ... areas" did not include the large ballroom.

41 I am not persuaded by that argument. Among other things, Ms Collins intimated that the large ballroom *would* be accessible. It was Mr Bingley who disavowed an interest in using it. Netherfield Leasing's contention is also inconsistent with the parol evidence rule.

42 Accordingly, I uphold Claim 1.

Claim 2

43 Mr Bingley contends that, if he succeeds on Claim 1, Netherfield Leasing breached clause 5.2 of the Agreement on 21 July 2023, when Mr Wickham issued the Notice,

rendering the large ballroom inaccessible. Mr Bingley contends that clause 5.2 is an essential term of the Agreement, the breach of which entitled him to terminate and sue for damages.

44 Netherfield Leasing contends that clause 5.2 is not an essential term or, alternatively, that Mr Wickham issuing the Notice frustrated the Agreement.

45 Clause 5.2 is plainly an essential term of the Agreement; it is a contract for the lease of certain property for a fixed period. It goes to the heart of the bargain. Breach of such a term entitles the promisee to terminate the contract.

46 However, I am persuaded that the issuance of the Notice frustrated so much of the Agreement as remained executory at the date of issue.

47 Netherfield's large ballroom was accessible to Mr Bingley before the Notice was issued. Thereafter, the Agreement was discharged by frustration.

48 Accordingly, Netherfield Leasing did not breach the Agreement and Mr Bingley fails on Claim 2.

Claim 3

49 Given my conclusion on Claim 2, Mr Bingley is not entitled to damages in respect of the deposit he paid or for the costs associated with the ball.

50 Had I concluded in Mr Bingley's favour on Claim 2, I would have held Netherfield Leasing liable to pay him damages on both counts. As to the cost of the ball, given the fact that Netherfield has two magnificent ballrooms, it must have been in the parties'

contemplation¹ that Mr Bingley would host, and incur the costs of, at least one ball at Netherfield.

51 Accordingly, I find that Mr Bingley fails on Claim 3.

COUNTERCLAIM

52 On Netherfield Leasing's counterclaim, its damages claims arise in two ways: first, on the basis that Mr Bingley wrongly repudiated the Agreement; and secondly, on the basis that the Agreement was discharged by partial frustration.

53 Given what I have found in respect of Claim 2, Netherfield Leasing is not entitled to its full measure of damages. Accordingly, the first of Netherfield Leasing's damages claims does not arise.

54 However, by its second alternative counterclaim, Netherfield Leasing seeks damages for the period in which Mr Bingley had access to Netherfield up to and immediately before the issuance of the Notice.

55 Mr Bingley contends that the ordinary rule that frustration discharges the whole contract applies, such that no damages are payable by him².

56 I disagree. The facts clearly indicate this is a case of partial frustration, leaving unaffected such rights and liabilities in existence up to the frustrating event³. Accordingly, Mr Bingley must pay to Netherfield Leasing \$40,000, being the cost of leasing Netherfield for three weeks (\$60,000) minus the amount already paid (\$20,000).

¹ See *Hadley v Baxendale* [1854] 156 ER 145.

² See *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202.

³ See, eg, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 244.

CONCLUSION

57 In view of my findings, I determine that Netherfield Leasing is entitled to damages in the amount of \$40,000 from Mr Bingley.

The Hon. Elizabeth Darcy AC KC

Meryton Chambers