

**BETWEEN**

**Tanya Coolidge**

Claimant

- and -

**Black and White Lotus Resorts Pty Ltd (ACN 987 123 288)**

Respondent

**JOINT REFERRAL TO ARBITRATION**

- 1 By written agreement dated 28 March 2022, the Claimant (**Coolidge**) and the Respondent (**B&W Lotus**) contracted for B&W Lotus to provide Coolidge with hotel accommodation and related services 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 2023 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 Did the terms of the Agreement apply to a complimentary vessel transfer provided by B&W Lotus to Coolidge?
- 10.2 Did B&W Lotus breach the Agreement?
- 10.3 If Coolidge was entitled to terminate the Agreement, to what measure of damages is she entitled?
- 10.4 If B&W Lotus breached the Agreement, did Coolidge elect to affirm the Agreement?

**Tanya Coolidge**  
Claimant

**Black and White Lotus Resorts Pty Ltd**  
Respondent

**ANNEXURE A**

**EXPERT DETERMINATION**

**5 MAY 2023**

IN RESPECT OF THE DISPUTE ARISING BETWEEN

**Tanya Coolidge**

and

**Black and White Lotus Resorts Pty Ltd**

The Hon. Eleanor Plantagenet AC KC

**FACTS**

- 1 The Claimant (**Coolidge**) is a citizen of the United States of America, whose fixed address is in San Francisco, California, but who resides in luxury hotels approximately eleven months a year.
- 2 The Respondent (**B&W Lotus**) is the Australian subsidiary of Black and White Lotus Group PLC, which is a company incorporated in the British Virgin Islands and the holding company of the Black and White Lotus Group (the **Group**). Each of the Group's hotels offers its guests luxury accommodation of a "seven star" pedigree, in a remote location. The Group has 18 hotels around the world, including three in Australia.
- 3 B&W Lotus operates the Group's three Australian hotels.
- 4 This dispute concerns events arising from Coolidge booking a two-night stay at the "Black and White Lotus – Tasman" (the **Hotel**).
- 5 The Hotel is located on an island three kilometres off the Tasmanian coast, near the Bay of Fires (the **Island**).
- 6 The Island is uninhabited, except for the staff and guests of the Hotel. Every morning, a fifteen metre launch, "The Palermo", travels from the Hotel's jetty to a pier near St Helens, on the Tasmanian mainland, to collect produce, beverages, and other supplies for the running of the Hotel. The Palermo is ordinarily used exclusively to transport staff and goods to the Hotel. It is not a guest transport.

- 7 The Hotel charges AU\$8,000 per night for each guest. Each guest is entitled to identical amenities and services. The Hotel has fifteen palatial rooms that look East over the ocean. The Hotel's marketing material promises prospective guests "the most spectacular sunrise you will ever see, from the comfort of your room". The Hotel hosts celebrity chefs, who each complete a "stage" at the Hotel, and prepare the dishes for which their respective world-famous restaurants are known.
- 8 The Hotel has a spa, library, and yoga studio. All of those amenities are included in the nightly charge. In its marketing material, the Hotel describes its facilities as "a guaranteed way to relax, unwind, and get away from it all".
- 9 On the Group's Australian website, it says that the only way to travel to the Hotel is by an early-morning helicopter, which departs from Launceston at 5am. The website says that "leaving at this time allows our guests to appreciate the beauty of the Island, just as the sun is rising". The website says that guests usually arrive in their rooms by 6am, in time for breakfast.
- 10 The Group offers a "Solstice Package" around the time of each summer and winter solstice. The winter solstice in Tasmania in 2022 occurred on 21 June. The Hotel's Solstice Package for 2022 was available between 18 and 24 June 2022. The "2022 Winter Solstice Package" was a new concept developed by the Group's Chief Experience Officer, Lucia Di Grasso. The Group markets the 2022 Winter Solstice Package on its website and social media as "an opportunity to gain perspective".

- 11 The marketing material said, in the 2022 Winter Solstice Package:

“We give you the chance to gain perspective. We do this by placing you in a luxury environment, but denying you the ability to enjoy it.

You will be presented with comfort and opulence, but you will be denied access to it.

Guest rooms will be stripped back to include only a thin foam mattress. The taps will run cold. Guests will serve the staff elaborate meals comprised of the finest food, prepared by the world’s best chefs.

Guests will be given the leftovers.”

- 12 In March 2022, by her personal assistant, Portia, Coolidge made a booking with B&W Lotus to stay for two nights at the Hotel on 20 and 21 June 2022. Without paying attention, Portia checked the box on the website which said:

“Check this box if you want to participate in the 2022 Winter Solstice Package.

We urge you to read and understand that the offering is unusual, but rewarding.”

- 13 Portia booked Coolidge’s stay on the Group’s Australian website. The payment page of the website stated that:

“By completing this Booking, you are entering into a contract with Black and White Lotus Resorts Pty Ltd, a subsidiary of Black and White Lotus Group PLC, and you agree to the Terms and Conditions applicable to your Booking.”

- 14 Portia used Coolidge’s credit card to pay, and completed the booking on the website. Shortly afterwards, Portia received an email from B&W Lotus confirming that Coolidge’s booking had been made for 20 and 21 June 2022, and that the booking was subject to B&W Lotus’s Terms and Conditions (the **Terms and Conditions**) (the **Agreement**).
- 15 The Terms and Conditions included provisions in clause 14 concerning the helicopter transfer to the Island. The Terms and Conditions also included clause 29A. Clause 29A simply stated:
- “If you have booked a Solstice Package, it will be tough, but rewarding!”
- 16 Portia did not see the terms about the helicopter transfer or the Solstice Package before completing the booking.
- 17 Clause 14 of the Terms and Conditions is entitled “Transfers to the Island”. Among other things, clause 14.1 provides that “if the Guest is not present at the Helipad at the Departure Time, the Guest will not be able to travel to the Hotel until the next Helicopter Journey”. Clause 14.2 relevantly provides that “any Guest who does not arrive at the Hotel because of matters referred to in clause 14.1 is not entitled to any refund for any period during which that Guest does not in fact stay at the Hotel”.
- 18 Clause 14.3 provides that “when transporting a Guest to the Island, our pilot and staff will exercise due care and skill”.
- 19 Clause 14 contains no other sub-clauses.
- 20 After reading the Terms and Conditions, Portia saw clause 14 of the Terms and Conditions. Portia never saw clause 29A.

- 21 Upon reading about the helicopter transfer referred to in clause 14, Portia wrote an email to B&W Lotus's "Experience Curator", Daphne. That email relevantly said:

"I have made this booking for my boss. She cannot get up early enough to get to the helicopter. Is there another way she can get to the hotel? If the helicopter is the only way to get there then we will have to cancel the booking."

- 22 Daphne replied to Portia's email, saying:

"We understand and we do not want to see Ms Coolidge cancelling her booking.

There are a couple of options.

The first option is that Ms Coolidge charters a private boat from one of the charterers in St Helens. They are familiar with our jetty and can deliver Ms Coolidge to our island.

The second option is that Ms Coolidge can, as a complimentary arrangement, get a lift with our staff on 'The Palermo'. It is a charming 15m timber boat that we use to transport our staff and important goodies for the guests to enjoy. It travels from the island to St Helens and back again every day.

We do not usually offer a ride on The Palermo to guests. But we know Ms Coolidge is an important member of the Platinum Lotus Club and we always endeavour to look after members.

I note that the check-in time remains 6am (which is designed to allow guests to enjoy the sunrise ☺). Luckily for Ms Coolidge, The Palermo won't leave St Helens until 10am on 20 June 2022. It should arrive by 10.30am.



Please let me know if Ms Coolidge would like the second option and I will let the skipper know.”

- 23 Portia replied and said that Coolidge would like to travel to the Island on The Palermo.
- 24 By further reply, Daphne wrote to Portia and said “I will let the skipper know. Please be there by no later than 9.45am. The Palermo will leave at 10am to transport some extra-special produce! 😊).”
- 25 As arranged between Portia and Daphne, Coolidge arrived at the St Helens pier at 9.30am on 20 June 2022.
- 26 Coolidge brought six pieces of hard-case, leather Louis Vuitton luggage. The Hotel’s staff traveling on The Palermo that morning assisted Coolidge by placing her luggage onboard, near the stern.
- 27 That morning, The Palermo was transporting the produce for a special banquet to be held that night. The head chef of Noma, a Danish restaurant, was preparing a dinner to “celebrate our shared seas”. The dinner included rock oysters. An oddity of the banquet was that the chef wanted to serve the oysters on the rocks on which those oysters had grown. Accordingly, The Palermo had been loaded with fourteen large boulders (one for each occupied room that night), each bearing numerous oysters to be served at dinner.
- 28 According to the conception of the 2022 Winter Solstice Package, the Hotel’s staff would eat those oysters in front of the guests that night.
- 29 Coolidge’s luggage was placed next to the boulders onboard The Palermo.

- 30 At 10.05am, The Palermo departed the St Helens pier. As it entered open water and motored East, towards the Island, The Palermo encountered a strong, but not unusual, southerly wind. About ten minutes after leaving the pier, and about twenty minutes from the Island, the prevailing swell was such that water began to wash over the starboard side of The Palermo.
- 31 The weight of the boulders, combined with the weight of the water washing onto the aft deck, caused the stern of The Palermo to sit low in the water. The skipper told those aboard, including Coolidge, that he was increasing The Palermo's speed to try to get her to sit higher in the water.
- 32 At about this time, a wave broke over the starboard side of The Palermo. The seawater inundated the aft deck area and caused The Palermo's engines to stop. Once the vessel stopped moving, the effect of the boulders and seawater became more acute. The Palermo's stern began to sink rapidly.
- 33 The Palermo's crew, who were employees of the Hotel, had been trained for scenarios such as this. At the skipper's direction, the crew unclashed the two lifeboats, which were pushed off the sides of The Palermo and immediately inflated once they made contact with the sea. The lifeboats were fitted with oars; they had no motors.
- 34 The crew helped Coolidge into one of the lifeboats. The skipper was in the same lifeboat. All of Coolidge's luggage remained on The Palermo. About 15 minutes after its engines had stopped, The Palermo sank.

- 35 Once all crew members and Coolidge were in the lifeboats, the skipper said to Coolidge “we are about halfway between St Helens and the Island, I think we should go to St Helens”. In response, Coolidge said “no – I have nothing in St Helens, I want to get to the Island and call my husband so he can arrange for me to get some clothes to wear at the spa.”
- 36 The skipper reluctantly agreed. The Palermo crew members rowed each of the lifeboats to the Island. The weather shifted as they began to do so, and the wind swung into an Easterly. The journey took much longer as a result. The lifeboats arrived at the Island at about 3pm on 20 June 2022.
- 37 After she arrived, Coolidge went to her room and did not leave until the helicopter flight off the Island on 22 June 2022, which took her to Launceston. Coolidge had intended to use the Hotel spa, but felt too anxious and distressed to visit the dining room or the spa following her experience on The Palermo.
- 38 As soon as Coolidge arrived in her room, she telephoned Portia and asked her to arrange for the payment to B&W Lotus to be reversed. Portia spoke with Coolidge’s banker, who then reversed the payment. As at the date of this determination, B&W Lotus holds no money from Coolidge.
- 39 During Coolidge’s stay, a Tasmanian Marine Safety Vessel recovered her six pieces of luggage, which had washed into the Bay of Fires. The exterior of the luggage was damaged, but, because the trunks were waterproof, none of their contents were damaged. B&W Lotus arranged for the luggage to be delivered to the heliport in Launceston. Coolidge collected the luggage when she arrived there on 22 June 2022.

**CLAIM**Claim 1: Breach of duty of care and skill

40 Coolidge claims that B&W Lotus breached an obligation to ensure that its employees exercised due care and skill in transporting her to the Island aboard The Palermo.

41 The claim is made on two bases. The first is a claim that clause 14.3 applied to her transfer from St Helens to the Island and that, by permitting The Palermo to be loaded with heavy boulders and to travel to the Island in the extant weather conditions, the skipper failed to exercise due care and skill.

42 The second basis is that it was an implied term of the Agreement that the transfer would be effected with due care and skill.

43 In response, B&W Lotus contends that clause 14.3 does not apply to Coolidge's passage on The Palermo. It says that the terms of clause 14.3 expressly contemplate helicopter journeys only. Further, it says that the passage on The Palermo was a one-off, complimentary arrangement for Coolidge's benefit, and did not form part of B&W Lotus's contractual arrangements with Coolidge, whether expressly or impliedly.

44 The parties agree that, if the obligation to exercise due care and skill applies to the journey on The Palermo, then that obligation was breached in the circumstances.

Claim 2: Breach

45 Coolidge claims that B&W Lotus breached the Agreement by delivering her to the Island at 3pm, in circumstances where B&W Lotus, through Daphne, promised that Coolidge would be delivered at 10.30am on 20 June 2022.

46 In response, B&W Lotus repeats its answer to Claim 1, and says further that, even if the Agreement applied to the journey on The Palermo:

46.1 the Agreement did not include a promise to deliver Coolidge to the Island by 10.30am on 20 June 2022; and

46.2 alternatively, even if the Agreement did include a promise to deliver Coolidge by 10.30am on 20 June 2022, delivering her to the Island at 3pm did not entitle Coolidge to terminate the Agreement and sue for damages.

### Claim 3: Quantum of damages

47 Coolidge claims that she is entitled to damages for distress and disappointment in connection with the sinking of The Palermo.

48 In response, B&W Lotus contends that Coolidge contracted for the “2022 Winter Solstice Package”, which is not designed to provide relaxation, enjoyment, or pleasure, and accordingly no damages of that kind are available.

49 Coolidge and B&W Lotus have agreed that, if Coolidge succeeds on this Claim, the amount of damages will be equal to the cost of one week’s accommodation costs at the B&W Lotus Hotel Hawaii – at which Coolidge may obtain recuperative treatment at the spa. The parties agree that the cost of that accommodation is AU\$70,000.

### **COUNTERCLAIM**

50 B&W Lotus claims that it is entitled to \$16,000 from Coolidge, comprising two nights’ accommodation at the Hotel, at a rate of \$8,000 per night.

51 In further response to Claim 2, and in addition to denying that it breached the Agreement, B&W Lotus contends that Coolidge elected to affirm the Agreement when she told the skipper to paddle to the Island, instead of returning to St Helens.

52 In response to the counterclaim, Coolidge:

52.1 contends that no money is owing because of the breaches the subject of Claim 1 and Claim 2;

52.2 denies that her request to go to the Island and not St Helens constituted an election to affirm the Agreement.

53 Coolidge otherwise agrees that, if she fails on Claims 1 and 2, then she is obliged to pay B&W Lotus \$16,000.

## CONSIDERATION

### Claim 1

54 Clause 14 of the Terms pertains to the helicopter journey which the Hotel provides to its guests as part of its services. The language of the provision is at odds with an interpretation to the effect that “other staff” in clause 14.3 encompasses the skipper of The Palermo.

55 However, the email correspondence between Daphne, representing B&W Lotus, and Coolidge’s assistant had the effect of amending the terms of the Agreement such that clause 14.3 would apply to the journey on The Palermo.

56 Further, I am persuaded in the circumstances that it was an implied term of the Agreement, because it “goes without saying”<sup>1</sup>, that B&W Lotus’s staff should exercise due care and skill in delivering a guest to the Island on its vessel.

57 B&W Lotus breached its obligation under the Agreement to exercise due care and skill.

### Claim 2

58 Coolidge contends that her timely delivery to the Island was an essential term of the Agreement. Coolidge argues that she had agreed to pay a substantial sum for a short period at the Hotel. Coolidge refers to the fact that a member of B&W Lotus’s staff, Daphne, had said The Palermo would arrive at the Island by 10.30am. It did not.

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<sup>1</sup> *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 283.

59 B&W Lotus contends that, assuming it had an obligation to deliver Coolidge to the Island on The Palermo (which I have decided under Claim 1 that it did), then there was no precise time for performance. It refers to the fact that The Palermo was used to transport various provisions to the Island and that it was impossible to say with certainty when the vessel could be ready to depart on any given day. Further, it is inherent in the nature of travel by sea that weather conditions may prevent departures according to a strict schedule.

60 I am persuaded that, having regard to the ad hoc nature of Coolidge's journey, and the susceptibility of watercraft to the perils of the sea (which the skipper of The Palermo did not heed in this instance), the Agreement did not stipulate a precise time for delivering Coolidge to the Island.

61 As such, Coolidge fails on Claim 2.

### Claim 3

62 Coolidge contends that, if she succeeds on Claim 1 (which she has), she is entitled to damages for distress and disappointment, of the kind considered in *Baltic Shipping Co v Dillon*<sup>2</sup>.

63 B&W Lotus contends that, in circumstances where Coolidge selected the 2022 Winter Solstice Package, damages of this kind are unavailable. The purpose of that package, it submits, is to make guests uncomfortable and to deprive them of the luxuries which one would ordinarily expect of a hotel which charges \$8,000 per night.

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<sup>2</sup> (1993) 176 CLR 344.



64 And so, B&W Lotus submits, the object of the Agreement with Coolidge was not “to provide a service or facility conducive to peace of mind, tranquillity of environment or ease of living”<sup>3</sup>.

65 I am satisfied that, although the 2022 Winter Solstice Package sounds altogether unpleasant, and because reasonable minds may differ as to what constitutes leisure, relaxation, peace of mind, or tranquillity, the Agreement is nevertheless of a class of contracts in respect of which damages are awarded for distress and disappointment.

66 Accordingly, I find that Coolidge succeeds on Claim 3.

### COUNTERCLAIM

67 B&W Lotus contends that, if Coolidge succeeds in Claim 1 or Claim 2, that Coolidge elected to affirm the Agreement in spite of those breaches. It is said that the election occurred when Coolidge told the skipper of The Palermo to paddle to the Island and not to return to St Helens.

68 B&W Lotus contends that Coolidge’s conduct on the lifeboat, and her decision to remain in her room at the Hotel, was conduct only consistent with the continued existence of the Agreement<sup>4</sup>. It says that the direction to go to the Island was a demand for performance of the Agreement<sup>5</sup>.

69 Coolidge claims that, in the circumstances, her conduct was equivocal.

70 I am persuaded that Coolidge’s conduct should be understood to be an affirmation of the Agreement. Coolidge had the option to return to St Helens but did not do so.

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<sup>3</sup> *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 370.

<sup>4</sup> See *Carr v J A Berriman Pty Ltd* (1953) 89 CLR 327 at 349.

<sup>5</sup> See *Turner v Labafox International Pty Ltd* (1974) 131 CLR 660.

71 Coolidge must pay to B&W Lotus \$16,000.

**CONCLUSION**

72 In view of my findings, I determine that Coolidge is entitled to recover from B&W Lotus an amount equal to the cost of one week's accommodation at the B&W Lotus Hotel Hawaii<sup>6</sup>, minus the \$16,000 which Coolidge owes to B&W Lotus as a result of my finding on the counterclaim.

73 Accordingly, B&W Lotus must pay to Coolidge an amount equal to \$54,000.

**The Hon. Eleanor Plantagenet AC KC**

Angevin Chambers

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<sup>6</sup> See paragraph 49 above.