FOLEY'S LIST

FRUSTRATED BY CORONAVIRUS - AREN'T WE ALL?

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When can a contract or lease be brought to an end by reason of the restrictions put in place by coronavirus?

1. The impact of coronavirus is being felt by all. Those impacts are fast moving and significant. In addition to the health implications, and the effect on every day life, there are serious economic implications. Businesses will fail as a result of the restrictions put in place by governments to stop the spread of coronavirus and the disease which it causes, COVID-19. As at 19 March 2020, federal and state governments in Australia have banned (amongst other things and subject to certain exemptions) non-essential gatherings of more than 100 people in a single enclosed area indoors and outdoor gatherings of more than 500 people. This is in addition to substantial travel restrictions and the requirement for any person coming into Australia from overseas must self quarantine for a period of at least 14 days.

2. While few query the necessity for these restrictions, those restrictions (and similar restrictions imposed by governments around the world) effectively ended international tourism for the time being. The restrictions will result in the closure and liquidation of many restaurants and cafes (although many were already struggling given the fear in the community over coronavirus and would have been delighted to have the problem of having to turn away their 101st customer). Major sporting events such as the Australian Grand Prix have been cancelled. AFL and NRL are being played - for the time being - but without spectators. Concerts and festivals have been cancelled. Most of the state and federal courts have ceased, or significantly limited, trials and in-person hearings.

3. To what extent are businesses affected by these events able to terminate the agreements which bind them (such as unprofitable leases)? Fundamentally, this comes down to whether a party is able to terminate the agreement by reason of it having been frustrated or due to a *force majeure* event.

Force Majeure

4. "*Force majeure*" does not have a standard meaning[2] and, for contracts with force majeure clauses, it is necessary to review those clauses carefully. Many agreements have (lengthy) *force majeure* clauses and definitions. Often those clauses will provide that parties can terminate or suspend a contract due to factors:

[1] It is intended to update this paper as events relating to the coronavirus develop. Please email mhoyne@vicbar.com.au if you wish to receive updates to this paper.

[2] *Navrom v Callitsis Ship Management SA (The Radauti)* [1987] 2 Lloyd's Rep 276 at 282 per Staughton J (affirmed [1988] 2 Lloyd's Rep 416, CA). On the meaning of 'Act of God' in the context of whether a plant disease (black spot) was an "Act of God" see *Sharp v Batt* (1930) 25 Tas LR 33 at 49–50 .

a. that are not the fault of any party; and

b. which are not able to be overcome by reasonable endeavours; and

c. are caused by an act of God such as, relevantly, an epidemic or quarantine.

5. If such a clause exists in an agreement, it is likely to be the best path home for the party wishing to avoid the agreement.

6. If there is no definition of force majeure, it may be that this clause will be determined to be void for uncertainty. While it depends on the nature of the agreement, it is unlikely that the whole agreement will be found to be void – the force majeure clause (particularly one where the parties have not even bothered to say what they mean by it) is likely to be severable.

Frustration

7. In the absence of a relevant *force majeure* clause, parties wishing to avoid a contract on the basis of coronavirus (or, more relevantly, the restrictions put in place as a result of coronavirus) must rely on the doctrine of frustration. "Frustration" has been defined in a number of different ways but the most oft quoted definition is that of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council*[3]*:*

> *[F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.* Non haec in foedera veni. *It was not this that I promised to do*.

8. So, for example, if a theatre company agrees to hire a theatre to put on a play but the theatre burns down then the contract with the theatre is likely to have been frustrated – it would be a radically different thing for the company to put the play on if it had to do so on the ashes of the previously existing building[4].

9. Other formulations of the concept of frustration have been events which:

a. makes further performance 'a thing different in substance' from that contracted for[5];

b. creates a 'fundamentally' different situation to that contracted for[6];

c. deprives a party with further obligations to perform of 'substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain'[7].

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[3] *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729 per Lord Radcliffe (approved *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 688 per Lord Hailsham. See also *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 751; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337; 41 ALR 367). *Simmons Ltd v Hay* (1964) 81 WN (Pt 1) (NSW) 358 at 360; *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at 159–63.

[4] *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309

[5] *Metropolitan Water Board v Dick Kerr & Co Ltd* [1917] 2 KB 1 at 30 per Scrutton LJ

[6] *British Movietonews Ltd v London and District Cinemas Ltd* [1952] AC 166 at 185;

[7] *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at 66

10. The primary Australian authorities on frustration are *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[8] and *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*[9].

11. However, frustration is not available whenever performance of a party's obligations under an agreement become different to what it contemplated at the time of entering into the agreement. A party is not able to terminate an agreement simply because events transpire against the party to mean that they are unable to carry out the contracted events profitably. Before frustration applies, the facts must involve the "*cessation or non-existence of an express condition or state of things going to the root of the contract, and essential to its performance*"[10].

12. For example, in *Scanlan's New Neon Ltd v Tooheys Ltd*[11], the High Court held that contracts for the hire of neon signs were not frustrated when governmental orders prohibited the signs being illuminated during World War II (and which orders were of indefinite duration). The owners did not guarantee that the signs could be illuminated and the governmental orders did not interfere with the performance of the contracts. The hirers were held to have agreed to bear the risk that the use of the signs might be affected.

13. As a general concept, it is the performance of the contract which must radically change – not the surrounding events which might have motivated one party to enter into the agreement. However, if the contract was for a specific purpose of objective that was known to both parties and that purpose is, without fault, unobtainable, then the agreement may be frustrated. There are, in this context, four questions that must be addressed[12]:
    a. What was the substance of the contract, being the assumption or condition or state of things which was necessary for the fulfilment of the contract?
    b. Was that condition or state of things prevented?
    c. Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties?
    d. Was the change so unexpected that, if performed, the contract would be radically different from that which was contracted?

14. Further, the question of frustration will depend on the terms of the contract because the parties may be taken have agreed to the risk of the event occurring even if the event means the benefit of the contract is entirely lost or performance becomes impossible. Whether a contract is absolute – and requires performance regardless – or conditional depends on the terms of the contract. Modern day contracts are not read literally to make them absolute but if, on its proper construction, the contract puts the risk of an event occurring on one party or the other, it is not the role of the doctrine of frustration to relieve from that outcome.

Leases

15. In Australia, there remains a doubt as to whether leases can ever be frustrated. The doubt arises because in *Firth v Halloran*[13], two judges of the High Court (Knox CJ and Gavan Duffy

[8] (1985) 157 CLR 17
[9] (1982) 149 CLR 337
[10] *Krell v Henry* [1903] 2 KB 740 at 748
[11] (1943) 67 CLR 169
[12] *Krell v Henry* [1903] 2 KB 740 as endorsed by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337
[13] (1926) 38 CLR 261

J) determined that, because leases included a demise by which an estate in land would pass, leases could never be frustrated. However, this was the decision of only 2 of the 5 sitting judges and subsequent decisions of the High Court have determined that issue has not been authoratively determined, referring to English authority which held that frustration was available for leases[14].

16. Although not finally determined the High Court, the general consensus of judicial opinion now appears to be that frustration is available for leases[15]. **However, it remains very difficult to argue that a lease has been frustrated.** This is because if the property is still available then the intervening event is not preventing the performance of the contract. One must look to the contract to see what it contemplates the property being used for and if it is possible to use the property for a permitted use (or to cease using the property) then the lease is unlikely to be frustrated[16].

17. Hence, at present, most tenants will not be able to rely upon coronavirus to justify frustration of their lease. The fact is that they can continue to occupy their premises and customers (albeit in limited numbers) can come - they may just be very unprofitable.

18. The situation may be different for, say, a convention centre or other venue where the very purpose is to provide a venue where more than 100 people can come together in a single enclosed space indoors. The situation may also be different if the government was to mandate the closure of restaurants, cafes and/or bars. This case for frustration would be clear if the prohibited use was the only permitted use under the lease and (as is often the case) the tenant was required to remain open (at least for certain periods). In such a case performance of the lease would be impossible and while impossibility is not a requirement for frustration, impossibility of performance is a sub-species of frustration. As a matter of general application, short term leases are more likely to be frustrated by the coronavirus than long term leases, and commercial leases are less likely to be frustrated than retail leases.

Other Agreements

19. It is not possible to usefully summarise the position that may arise in respect of other agreements given their wide and varied nature. It is intended, over the coming weeks, to provide summaries of some of the more common areas such as contracts with airlines or for holidays, building contracts (which may be considered less likely to be affected by coronavirus than other contracts) and contracts for sale of land and goods.

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[14] *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 98414 at [213] – [228]
[15] *Ibid*
[16] *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 98414 at [226] – [227]