

FRUSTRATION AND CORONAVIRUS

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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. I dealt with the issue of frustration of leases and contracts in a paper on 18 March 2020. However, such is the speed with which things move in this environment that the issue of whether leases can be terminated for frustration by reason of coronavirus has taken a dramatic turn. The various Australian governments banning (until at least 13 April 2020), the following:
 - a. Pubs (although not bottle shops)
 - b. Clubs
 - c. Cinemas
 - d. Casinos
 - e. Places of worship
 - f. Nightclubs
 - g. Entertainment venues
 - h. Gyms and indoor sporting venues
 - i. Cafes and restaurants will be restricted to takeaway only
 - j. Funeral homes will have to enforce strict social distancing of four-square metres
2. Some of these establishments will be permitted to keep operating although in a very different way. For example, as noted, cafes and restaurants can continue to operate but only for takeaway and deliveries. However, for other establishments (eg gyms), they have been told that they must cease operating entirely.
3. How does this affect whether the leases have been frustrated?

Legislation

4. The first point to note is that the Prime Minister has announced that one of the key issues facing the national cabinet (ie the Prime Minister and the premiers of the various states and territories) is "tenancy legislation"¹. The Prime Minister acknowledged that the relief given to tenants will

¹ The legislation is to be aimed at residential tenants as well as retail and commercial tenants but how it will apply in different contexts is not known.

cause pain for landlords but noted that all will be feeling pain as a result of this crisis and this is a pain landlord must bear.

5. The work on the tenancy legislation is being led by Western Australia with input from the other states and territories.
6. When completed this should provide some certainty as to effect of that the restrictions put in place by coronavirus on commercial and retail (as well as residential) leases. There is no indication as yet what the changes might be although the possibilities include:
 - a. Although unlikely given the Prime Minister's comments about the pain to be felt by landlords, clarifying or codifying the common law rules on frustration without seeking to change them;
 - b. Providing a "suspension" of the lease – or the obligation to pay rent – while a tenant is preventing from using the premises for its permitted use (although the issue of what to do for tenants who can only use the premises in a different way – eg takeaway for restaurants – is even more complicated);
 - c. Providing that tenants who are unable to conduct their permitted use can terminate the lease.
7. Other issues that need to be considered are whether it will apply to all commercial and retail tenants or will it be limited. Will it, for example, apply to tenants who are listed companies or subsidiaries of listed companies²?
8. Obviously, there is a need for some clarity as people need to make decisions as to what to do? For example, does the owner of the local café (run through a company but guaranteed by the director) walk away from the lease and stop paying rent? Or would they be better off running as a takeaway store only even if that means their revenue is reduced by (say) 80%? Without knowing what the new rules are likely to be, these are difficult decisions for the small business owner to make.

The Common Law

9. Under the common law, can the local gym or café owner now terminate their lease on the basis that it has been frustrated?
10. In short, in most cases – probably not yet.
11. As noted in my previous paper, frustration of leases is difficult to achieve. However, if that restriction goes on long enough, it may be possible where government restrictions prevent the tenant from conducting the only activity on the premises that the lease permits. Hence, one needs to consider:
 - a. What activities the lease allows;
 - b. What activities are prohibited;
 - c. The likely duration of the restriction;

² Note, for example, that the *Victorian Retail Leases Act 2003* does not apply in a number of circumstances including where the premises are above a certain size and where the tenants are listed corporations or subsidiaries of listed corporations – see s 4.

- d. The remaining term of the lease.
12. The café owner and the gym owner may well be in different circumstances here. The café owner may be able to continue to provide take away food and therefore, while their capacity to use the premises for all uses is restricted, they are not prevented entirely from using it for its permitted use (or there may be difficult questions of construction as to whether what the landlord is now offering is radically different from what was initially promised) . The gym owner, on the other hand, is entirely prevented from operating.
 13. However, that is not the end of the analysis. No-one knows how long these restrictions will be in place. At present, they are in place until 13 April 2020 although it is difficult to imagine the restrictions not being extended for longer. A short term restriction will not frustrate a contract but a long term restriction of indefinite duration will³. Some of the older authorities suggest that if a tenant goes into possession at all, then the lease cannot be frustrated at all⁴ but the more recent authorities – which treat leases as a contract albeit with some special features – would appear to permit frustration if there is a supervening event which prevents the lease being used for the its permitted use for an indefinite period into the future⁵.
 14. As noted, restrictions of indefinite duration can result in frustration of an agreement. However, the expected duration of the restriction must be sufficient to make performance radically different from that which was undertaken to be performed under the lease. An expected restriction for a few weeks - where there is five years left to run on the lease – will not be not radically different from that which was promised under the lease. However, if these restrictions run for 6 months and there is still no end in sight then that may be a different thing, particularly if the remaining term in the lease is, say, less than 12 months. There is no bright line that delineates what duration amounts to frustration.
 15. Further, one looks at the effect on the lease or contract at the date that it is sought to be determined, not with hindsight⁶. So, in *Court Line v Dant & Russell Inc*⁷ a ship on a time charter (ie a charter for a specified period of time) was prevented from leaving its Chinese port by having a boom placed across the river by the Chinese military. The probability was that the ship would be detained for an indefinite period and the effect was to frustrate the contract. This was not affected by the fact that Japanese forces unexpectedly arrived and broke through the boom, allowing the ship to leave, only a few days later.
 16. So what is the position in the case of coronavirus? With the restrictions currently in place for only a few weeks, it is too early to say that many leases will be frustrated. That may change if the weeks turn to months and there is no end in site to the restrictions. The capacity to argue frustration will also depend on the length of time left on the lease and the level of restriction imposed on the particular business, as well as the permitted uses under the lease.
 17. At present, and until legislation is passed (and, perhaps, even if it is passed), there are no clear answers to the question of whether a particular lease has been frustrated. The issue is always

³ *Emaas Pty Ltd v Mobil Oil Australia Ltd* [2003] QCA 232 at [20]; *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 229-230 per Williams J

⁴ *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169 at 228 per Williams J

⁵ See, for example, *oOh! Media Roadside Pty Ltd v Diamond Wheels Pty Ltd* (2001) 32 VR 255 at [70]; *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* (2010) 14 BPR 98414 where the stop work order was issued after the lease was entered into but that was never considered a basis for holding that frustration does not apply;

⁶ *Emaas Pty Ltd v Mobil Oil Australia Ltd* [2003] QCA 232 at [20];

⁷ [1939] 3 All ER 314

FOLEY'S | LIST

(and assuming that leases can be frustrated) whether, taking all the circumstances into account, the performance that has been promised under the lease is now radically different from the performance that is being provided.

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