

Contracts and Coronavirus Part 1: principles of frustration

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In the first of two articles considering the legal effect of the Coronavirus pandemic on contracts in Scots and English law, particularly leases, the author describes the general principles of frustration.

Introduction

The global Covid-19 pandemic of 2020 is having a huge impact on the lives and businesses of millions of people around the world. The purpose of this article is to consider the legal effect of the pandemic on contracts in Scots and English law, especially leases. Frustration is an area where the law is very similar in the two jurisdictions except in the area of leases.

There are two contract law concepts relevant to coping with unforeseen events:

1. the *common law* doctrine of frustration; and
2. the common commercial contractual practice of including a *force majeure* within the *express terms of a contract*.

Many commercial contracts will include a *force majeure* clause which specify the effect of contractually specified unexpected events upon the performance of the contract (usually to permit delayed performance and suspend any delay liquidate damages which would otherwise be due). The terms of any force majeure will be the starting point of assessing the impact of Covid-19 on a contract containing such a clause but in the absence of a *force majeure* clause, or if for some reason it does not apply, then the common law doctrine of frustration will apply.

In the first part of this article the author will concentrate on frustration by outlining general principles of frustration, and in the second part will focus on the specific issue of the impact of supervening illegality on commercial leases.

Frustration: how the common law copes with the impact of unexpected changes of circumstances on contracts

Certainty of contractual performance

The law governing frustration of contract may be summarised as a battle between the principles expressed in the two Latin maxims, *pacta sunt servanda* and *non haec in foderam veni*: the former is the general rule of contract, the latter is the exception to that rule which is frustration.

The most fundamental principles of contract law are party autonomy, that is freedom of contract, and certainty of performance of which Lord Hope DPSC said in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3; [2013] 1 W.L.R. 366; 2013 S.C.L.R. 569 at p.382 (p.581) para.47: "... the maxim *pacta sunt servanda* which lies at the root of the whole of the law of contract."

Indeed, so important is this principle that it is often referred to, even in this secular age, as the "sanctity of contract," meaning that contractual agreements are so important they must not be interfered with except in exceptional circumstances, see quotation given below from *Printing and Numerical Registering Co v Sampson* (1874-75) L.R. 19 Eq. 462. Accordingly, once the parties have

made an agreement in the form of a legally binding contract then their liability to perform their contractually agreed duties is *strict*. In principle no excuses are allowed for non-performance and should there be any non-performance of any of the contractually agreed duties this will be treated as a *breach of contract* which will allow the innocent counter party to sue for damages or for performance of the contract (specific implement).

History of frustration

The modern law of frustration is the common law's response to unforeseen events which drastically affect the performance of a contract. The first case where frustration was allowed arose out of litigation over a music hall that burned down, *Taylor v Caldwell*, 122 E.R. 309; (1863) 3 B. & S. 826; (1863) 2 New Rep. 198. This doctrinal seed grew into a sapling at the beginning of the 20th century in the well known trio of "Coronation cases" (which arose out of the postponement of the coronation of Edward VII caused by the king's appendicitis) *Krell v Henry* [1903] 2 K.B. 740, *Chandler v Webster* [1904] 1 K.B. 493 and *Herne Bay Steamboat Co v Hutton* [1903] 2 K.B. 683, and put down even deeper roots in response to the commercial disruption caused by the First World War, in several cases including *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119, *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] A.C. 497, and *Cantiere San Rocco SA (Shipbuilding Co) v Clyde Shipbuilding & Engineering Co Ltd*, 1922 S.C. 723; 1922 S.L.T. 477, while the doctrinal tree grew still further in the Second World War in cases such as *Constantine (Joseph) Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] A.C. 154, *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 and *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265; 1944 S.C. (H.L.) 35; 1945 S.L.T. 2. The doctrine reached full maturity in the post war case of *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696; [1956] 3 W.L.R. 37; [1956] 2 All E.R. 145 with a useful gloss arising out of the Suez Crisis in *Tsakiroglou & Co v Noble Thorl GmbH* [1962] A.C. 93; [1961] 2 W.L.R. 633; [1961] 2 All E.R. 179.

Grounds of frustration

The essence of frustration is that in certain extreme circumstances, the strict obligation to perform a contractual obligation is excused by the occurrence of an unexpected event. The key criteria for the successful invocation of the doctrine of frustration is that *a radical change in circumstances, unforeseen in the contract and independent of the actions of the contract parties makes it impossible for the contract to be performed as agreed by the parties*. If a frustrating event is deemed to have occurred, then the contractual obligations of all the parties to the contract are terminated and discharged from the point of the frustrating event. Originally frustration was justified by the courts as the implementation of an implied term, see e.g. *Chandler v Webster and FA Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd* [1916] 2 A.C. 397, but this theory was unconvincing for many reasons not least that memorably given in the Outer House by Lord Sands in 1922 and expressly approved in the House of Lords by Lord Reid in *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C., p.720:

"I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott & Sons Ltd v Del Sel* : 'A tiger has escaped from a travelling menagerie. The milkmaid fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that "tiger days excepted" must be held as if written into the milk contract.'

...

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the

nature of the contract and of the relevant surrounding circumstances when the contract was made.”

In the same case Lord Radcliffe at pp.728-729 gave what has become recognised as the authoritative modern definition of frustration:

“So perhaps it would be simpler to say at the outset that frustration 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.”¹

Lord Reid at p.721 expressed the test for frustration in a similar way:

“The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.”

¹ This memorable Latin phrase was taken by Lord Radcliffe from the Aeneid, Book 4, pp.338-339, and are the words spoken by Aeneas to Dido when he tells the Queen of Carthage that he does not consider himself married and he is deserting her!

This definition has been repeatedly approved by subsequent courts see e.g. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675; [1981] 2 W.L.R. 45; [1981] 1 All E.R. 161 at p.701; *Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep. 1; and most recently in *Canary Wharf Management Limited v European Medicines Agency* [2019] EWHC 335 (Ch); [2019] L. & T.R. 14.

This test for frustration is described in *Chitty on Contracts* at 23-012 as the “radical change in obligation” approach, but it would be more accurate to describe it as the “change of context changes the contract” test. The approach is well explained by Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* at p.701:

“Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.”

This highlights the fact that frustration is one of the few doctrines in contract law which does not assess the meaning of a contract by the context at the time the contract was made; see for example some of the leading contract interpretation cases such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28; 1 W.L.R. 896; 1 All E.R. 98, *Rainy Sky SA v Kookin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900; [2012] 1 All E.R. 1137, *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619; [2015] 2 W.L.R. 1593 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] A.C. 1173; [2017] 2 W.L.R. 1095, but rather focuses on the circumstances pertaining at the time of contractual performance. Most contract law focuses on the on the context existing at the time the contract is formed and ignores the effects of subsequent events. This approach was criticised by the late American contract theorist (and Chief of his clan) Ian Macneil as “presentiation” in his article, “Restatement (Second) of Contracts and Presentiation” (1974) 60 *Virginia Law Review* 589–

704 at 593: “The aim was to establish, in so far as the law could, the entire relation at the time of the expressions of mutual assent. Total presentation through 100% predictability was sought as of the time of something called ‘acceptance of the offer.’” Macneil sees presentation as an unrealistic aspect of orthodox contract law with its focus on the time of contractual formation but, whatever the strictures of contract theorists, it remains the orthodox common law approach. For example, the importance of the context at time of contractual creation in ordinary circumstances was forcefully reasserted in *Arnold v Britton* where the ruinous increase in the charges paid by the tenants caused by a compound interest of 10% were dismissed as irrelevant by Lord Neuberger PSC at p.1628 (p.1600) para.19:

“The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, *as at the date that the contract was made*. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] A.C. 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] A.C. 191, 201, quoted by Lord Carnwath at para.110, have to be read and applied bearing that important point in mind.” [italics added for emphasis]

Later in his opinion Lord Neuberger comments at p.1632 (p.1604), paras 36–37 on the unpredictability of the rate of inflation by describing it as a “gamble”:

“If inflation is running at, say 10% per annum, it is, of course, very risky for both the payer and the payee, under a contract which is to last around 90 years, to agree that a fixed annual sum would increase automatically by 10% a year. They are taking a gamble on inflation, but at least it is a bilateral gamble: if inflation is higher than 10% per annum, the lessee benefits; if it is lower, the lessor benefits. On the interpretation offered by the appellants, it is a one way gamble: the lessee cannot lose because, at worst, he will pay the cost of the services, but, if inflation runs at more than 10% per annum, the lessor loses out. The fact that a court may regard it ‘unreasonable to suppose that any economist will be able to predict with accuracy the nature and extent of changes in the purchasing power of money’ over many decades (to quote Gibbs J in *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* [1981] H.C.A. 3; (1981) 145 C.L.R. 625, 639) is nothing to the point. People enter into all sorts of contracts on the basis of hopes, expectations and assessments which no professional expert would consider prudent, let alone feel able to ‘predict with accuracy’. I have little doubt that many fortunes have been both made and lost (and sometimes both) by someone entering into such a contract.”

So it would not be unfair to extrapolate Lord Neuberger’s position as holding that in a sense all contracts of any significant future duration are “gamble” on what subsequent events may unfold: and the longer the duration of the contract the greater the gamble and some parties win and some parties lose. However, even if this characterisation of long term contracts as gambles is ordinarily correct, what happens to the contractual “bets” when the “economic casino” underlying the bet burns down? This is the situation where contract law reaches for the “emergency equipment” of the doctrine of frustration. It is submitted that the Covid-19 is just such an emergency event, one which has had both an immediate and catastrophic effect on lives and businesses across the globe and which will result in a permanent transformation in the economic context in which business will operate post 2020.

So frustration is a very unusual part of contract law; as it is a doctrine which requires the court to consider the circumstances pertaining at the time of contractual *performance* as well as those obtaining at the time of contractual formation. Frustration adopts this exceptional approach to give

2 *Cavendish Square Holding BV (Appellant) v Talal El Makdessi* [2015] PSC at p.1196 (p.1384) para.13

contract law the ability to cope with catastrophic and unexpected events, and to avoid the injustice that would otherwise arise from holding a contracting party liable for breach of contract, when he cannot perform his contractual obligation for unforeseen external reasons. In a political context Donald Rumsfeld, US Secretary of Defense 2001–2006, once famously remarked:

“There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don’t know. But there are also unknown unknowns. There are things we do not know we don’t know.”

The doctrine of frustration is the common law’s way of attempting to avoid an injustice to a contracting party when “unknown unknowns”, not provided for in the contract have occurred by excusing the parties from the obligation to perform and therefore also from any liability for damages or any other remedy.

The justice justification

Frustration is also unusual in that it is one of the few doctrines of contract law willing to apply criteria of *justice* to the terms of a *concluded* contract, as opposed to the *pre contractual* circumstances surrounding the formation of the contract; where fairness is always recognised as a potential factor, see e.g. undue influence, facility and circumvention and force and fear. The courts have long stressed that certainty of contract terms and performance, *pacta sunt servanda*, is the primary value of contract law with justice or fairness of contract generally considered as unimportant by comparison:

“Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men’s bargains either at law or in equity.”²

As stated at the beginning of this article, the liability to perform a contract is *strict*. Contract law is paradoxical in that “freedom of contract” when exercised results in the “loss of freedom” of both parties: as they are both now bound to perform as *Cavendish Square Holding BV (Appellant) v Talal El Makdessi* UKSC 67; [2016] A.C. 1172; [2015] 3 W.L.R. 1373 per Lord Neuberger PSC

agreed under the terms of the contract. This is a point well expressed in some of the most famous words ever said by a judge on contract law:

“If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.”³

Frustration is the major exception to contract law's usual indifference to fairness in the interpretation and performance of contracts, indeed on the contrary, justice is invoked as the policy justification for frustration allowing the parties to escape from their contractual obligations:

"The doctrine of frustration has been developed as a judicial device to relieve a contracting party in certain limited circumstances where it would be harsh to hold him to the apparent terms of the contract. It applies when circumstances have so radically altered from the state of things when the contract was made that the court can say that the parties cannot have intended their contractual obligations to apply in such altered circumstances. In all the cases to which the doctrine has been applied it is possible to point to some supervening event which has had a catastrophic effect on the contract and has occurred without the fault of the parties ... they include the outbreak of war, the cancellation of an expected event, the destruction of the object that was the subject matter of the contract, seizure of a ship by a foreign government, an explosion and so forth. Reference is also made to extraordinary delay sufficiently long to frustrate the commercial adventure of the parties. But in every case the delay has been due to some unexpected external cause beyond the control of the parties."⁴

Frustration was also justified on grounds of providing justice between the contractual parties by Bingham LJ in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep.1.

3 *Printing and Numerical Registering Co v Sampson* (1874-75) L.R. 19 Eq. 462 at p.465 per Jessel MR.
4 *The Hannah Blumenthal* [1983] 1 A.C. 854 at p.881 per Griffiths LJ.

"The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] A.C. 497 at p.510; *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265 at p.275; *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] A.C. 154 at 171). *The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances* (*Hirji Mulji*, supra, at 510; *Joseph Constantine Steamship Line Ltd* (supra), at pp.183, 193; *National Carriers Ltd v Panalpina (Northern) Ltd.* [1981] A.C. 675 at 701." [italics added for emphasis]

It follows from this that the judicial assessment of whether a contract has been frustrated is made by the application of what one might call the "double context" test. The court firstly considers the meaning and purpose of the contract at the time it was made, then it considers the meaning and purpose of the contract within the context of the new unexpected circumstances and if, and only if, the meaning and performance of the contract has been fundamentally altered by the new context will the court apply Aeneas' words *non haec in foderis veni* to the supervening changed circumstances thus displacing the *pacta sunt servanda* principle.

Effects of frustration

As can be seen from the above discussion the four factual requirements for frustration of contract are that the supervening event must be unexpected, have occurred without the fault of the parties and have a catastrophic effect on the performance of the contract, *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8 or to express the effect more fully:

“What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force.”⁵

Effect of frustration in English law on parties’ remedies

Originally, the English courts in *Chandler v Webster* [1904] 1 K.B. 493 held that on frustration of a contract the loss would “lie where it falls”, a rule which can be very unfair in its effect. For example, if A has paid B in advance for a service or goods but that performance is now impossible, B could retain the payment, so getting their money for free. This very harsh rule was mitigated first by the courts and then by parliament. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32; [1942] 2 All E.R. 122; (1942) 73 Ll. L. Rep. 45 the House of Lords allowed restoration of monies paid in advance where there had been a total failure of consideration. This did not solve the problem of the situation where there was only a partial failure of consideration and so this issue was addressed by Parliament in the Law Reform (Frustrated Contracts) Act 1943 which provided that the sums paid in advance would become either partially or fully recoverable, if a contract was impossible to perform. The main provisions of the Act are:

- 1(1) — Any monies paid before the frustrating event can be recovered and that sums due before the frustrating event, but not in fact paid, cease to be payable;
- 1(2) — A party who has incurred expenses is permitted, if the court thinks fit, to retain an amount up to the value of the expenses out of any money they have been paid by the other party before frustration; or where money was due and payable at the time of frustration, recover a sum not exceeding that amount for expenses;
- 1(3) — The court may require a party who has gained a valuable benefit under the contract before the frustrating event occurred, to pay a “just” sum for it. This is so whether or not anything was paid or payable before the frustrating event.

Note that s.1(2) and (3) confer a wide discretion on the courts to give what that consider a fair remedy. There is remarkably little case law on the 1943 Act. In *BP Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783 the future law lord Goff J said at p.799 “the fundamental principle underlying the Act itself, is prevention of the unjust enrichment of either party to the contract at the other’s expense,” but that approach was rejected in the Court of Appeal by Lawton LJ. In the most recent case on the 1943 Act, *Gamerco S.A. v I.C.M./Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226; [1995] C.L.C. 536; [1995] E.M.L.R. 263, Garland J, following the views of Prof Treitel in *Frustration and Force Majeure*, argued at p.1237 (p.547; p.279) that the Act should be interpreted as conferring a broad discretion on the court:

“It is self evident that any rigid rule is liable to produce injustice. The [statutory] words, ‘if it considers it just to do so having regard to all the circumstances of the case,’ clearly confer a very broad discretion. Obviously the court must not take into account anything which is not ‘a circumstance of the case’ or fail to take into account anything that is and then exercise its discretion rationally. I see no indication in the Act, the authorities or the relevant literature that the court is obliged to incline towards either total retention or equal division. Its task is to do justice in a situation which the parties had neither contemplated nor provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen.”

Effect of frustration in Scots Law on parties’ remedies

Due to the grounding of Scots Law in Roman Law, the Scottish Courts from the very beginning declined to follow *Chandler*. Instead in *Cantiere San Rocco SA (Shipbuilding Co) v Clyde Shipbuilding & Engineering Co Ltd*, 1922 S.C. 723; 1922 S.L.T. 477; [1924] A.C. 226 the Scots courts held that the principle of unjust enrichment applied to frustrated contracts where money was paid in

5 *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd*, 1944 S.C. (HL) 35, per Lord Wright.

advance for goods which could not be delivered because performance subsequently became illegal because of the outbreak of the First World War, then the money had to be repaid after the war ended. As Lord Hope DPSC said in *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3; 2013 S.C. (U.K.S.C.) 169; 2013 S.C.L.R. 569 at p.181 (p.579), para.39:

“The rule in Scots law is that the loss does not lie where it falls on the frustration of a contract. There must be, as McBryde, *The Law of Contract in Scotland*, 3rd edn (2007), para 21-47 puts it, an equitable adjustment. That was what was done in *Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* [1924] A.C. 226, where it was held that the buyer was entitled to repetition of the instalment of the price that was paid on signature of the contract as, owing to the war, further performance of the contract had become impossible.

The effect of the decision in *Cantiere* is to leave a wide discretion in the hands of the Scots courts to decide what will happen to any monies already paid, but the scope of that discretion to award remedies on frustration is not entirely clear. It certainly includes the ability to restore to the payer sums which has unjustly enriched the payee prior to the frustration event (*Cantiere*) but its scope is otherwise rather uncertain.”

Assessing frustrating circumstances is a multifactorial task

The assessment of frustration was always contextual and contract law interpretation over the last 20 years has placed great emphasis on context (see *Investors Compensation Scheme Ltd v West Bromwich Building Society*, *Rainy Sky SA v Kookin Bank*, *Arnold v Britton* and *Wood v Capita Insurance Services Ltd*), and this emphasis is also found in the law of frustration. The width of factors that a court must consider when deciding if a contract has been frustrated is very wide, as was stated in a recent case on the possible frustration of a commercial lease arising out of Brexit: *Canary Wharf (BP4) T1 Limited, Canary Wharf v European Medicines Agency* [2019] EWHC 335 (Ch), in which Marcus Smith J expressly approved of the multi factorial approach taken in *The Sea Angel*:

“These factors were identified (with emphasis added) by Rix LJ in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at para.111:

In my judgment, the doctrine of frustration requires a *multi-factorial approach*. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.” [italics added]

This breadth of factors is inevitable, even if it does mean that it can be difficult to predict which way a court will decide individual cases. Frustration, as a doctrine designed to assess the impact of an infinite variety of “unknown unknowns” and unforeseen events on the infinite variety of contracts, can only be expressed in very general terms “No detailed absolute rules can be stated. A certain elasticity is essential;” see *Denny Mott & Dickson Ltd, supra*, per Lord Wright.

There is no doubt that the Covid-19 pandemic was unexpected and beyond the control of anyone and that it is having a catastrophic effect on very many but not all contracts.

Although every case is considered on its merits in a multifactorial analysis, there are three broad categories of frustrating event: illegality, impossibility and frustration of purpose all of which are potentially relevant to the impact of Covid-19 on contracts. Part 2 of this article looks in detail at one narrow but very important aspect of Covid-19 frustration: the frustration of leases for illegality, so this Part 1 will conclude with a brief discussion of impossibility and frustration of purpose.

Impossibility

The law recognises three main forms of physical impossibility: destruction of subject matter, unavailability of subject, and, for personal contracts, the death or illness of the party. Although frustration by physical impossibility in the form of destruction of the subject matter, such as occurred in the leading case of *Taylor v Caldwell*, 122 E.R. 309; (1863) 3 B&S 826, where the subject matter of music hall premises were destroyed by fire shortly before they were contracted to be used, remains possible in connection with Covid-19 it is more likely that the frustration will involve the unavailability of the subject matter such as happened in *Gamerco S.A. v I.C.M./Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226; [1995] C.L.C. 536; [1995] E.M.L.R. 263, where a contract between the rock group Guns N Roses and the promoter was held to be frustrated by the refusal of a stadium safety certificate on 1 July for the concert scheduled on 4 July. Even when the ban on using various business premises is eventually lifted, ie when their use is no longer illegal, it may well be that the condition of the premises is such as to make their contracted use impossible because they need maintenance or refitting or upgrading to be used.

In the current Coronavirus crisis death and illness are very likely to be common forms of impossibility, given the high numbers of people who are falling ill or tragically even dying. Obviously, this is only potentially an issue if the business of the employer in question has not already been frustrated, so here we are concerned with frustration by the employee or an independent contractor. If a person has agreed to provide a service and they are unable to do so because of death or illness that would afford grounds for frustration. The rule regarding the effect of the death of a person contracted to perform a personal service was stated by Pollock CB in *Hall v Wright* (1858) EB & E 746, at p.793:

“All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.”

So, for example, when the pop star Michael Jackson died in 2009 shortly after announcing a series of farewell concerts in the O2 Arena in London that contract was clearly frustrated: only Michael Jackson could perform his unique show. In *Robinson v Davison* (1870–71) L.R. 6 Ex. 269, Mrs Davison was contracted to play the piano at a concert to be given by the plaintiff on a specified day. The contract was held to be frustrated because on the day in question she was unable to perform through illness. On the other hand, the court in *Condor v The Barron Knights Ltd* [1966] 1 W.L.R. 87 held that a long term contract of employment was not frustrated by illness but that the employee had been fairly dismissed for breach of contract in refusing to perform. This decision possibly seems overly harsh, and the modern tendency is not to apply frustration to contracts of employment but it can be done. The leading modern case is *Marshall v Harland & Wolff Ltd* [1972] I.C.R. 10 which held that the test of whether a contract of employment has been frustrated by the employee’s illness/incapacity depends on whether the illness or incapacity was of such a nature, or

likely to continue for such a period, that future performance of his contractual duties would be either impossible or radically different from that undertaken by him and agreed to be accepted by the employer by the agreed terms of his employment. So the court will consider the nature of the illness, the period of time involved and what performance of the contract would look like in the future.

The *Marshall* test was further developed in *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] I.C.R. 260 by Phillips J where he said at pp.264-265 of the Marshall test:

“That is helpful, but one needs to know in what kind of circumstances can it be said that further performance of his obligations in the future will be possible? It seems to us that an important question to be asked in cases such as the present — we are not suggesting that it is the only question — is: ‘has the time arrived when the employer can no longer reasonably be expected to keep the absent employee’s post open for him?’

...

Among the matters to be taken into account in such a case in reaching a decision are these: (1) the length of the previous employment; (2) how long it had been expected that the employment would continue; (3) the nature of the job; (4) the nature, length and effect of the illness or disabling event; (5) the need of the employer for the work to be done, and the need for a replacement to do it; (6) the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the employee; (7) whether wages have continued to be paid; (8) the acts including the dismissal of, or failure to dismiss, the employee; and (9) whether in all the circumstances a reasonable employer could be expected to wait any longer.”

The health impact of infection with the Coronavirus for most people who survive it appears to be fairly short term and so it is unlikely that frustration would be allowed in these circumstances. If, however, the illness has caused permanent long term physical impairment, say by causing severe lung damage for an employee with a physical job, it is certainly possible for the contract to be frustrated, see by analogy *Warner v Armfield Retail & Leisure Ltd* UKEAT/0376/12/SM, EAT, 8 October 2013, unreported, where impairment of abilities caused by a stroke resulted in frustration of the employment.

Turning from contracts of service to contracts for the delivery of goods, there is also scope for the application of frustration by impossibility but everything depends on the precise terms of the contract. As discussed above the courts apply a “double context” test to decide if a particular contract has been frustrated. For example, the case of *Tsakiroglou & Co v Noble Thorl GmbH* [1962] A.C. 93 concerned a contract for the delivery of a quantity of Sudanese groundnuts at a price of £50 per ton carriage insurance freight from Port Sudan to Hamburg. However, after the conclusion of the contract, the Suez Canal was blocked owing to the Suez Crisis, with the result that the next shortest route to Hamburg from Port Sudan was via the Cape of Good Hope, an increase from 4,386 miles to 11,137 miles, which meant the contract would be performed by the carrier at a loss. The court held that as the contract contained no provision as to the route then it had not been frustrated but had the contract specified transit via the Suez Canal it would have been frustrated; which highlights the importance of interpreting the contract in its new context. In the current coronavirus context for example, a contract for the supply of apples by a farmer might perhaps be deemed frustrated if there are no employees available because of illness. However many such commercial contracts will contain a *force majeure* clause and so that will be the starting point for any issues of performance and remedies.

Performance has become radically different

This is the most uncertain of the three grounds of frustration. Its core idea is set out in the extract from the opinion of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* quoted above:

“... 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.”

Given that frustration on this ground is uncertain in scope, and is an exception to the usual position that contracts must be performed even if they have not worked out to the satisfaction of one or other of the parties, the courts have been careful to “fence” the doctrine. As Lord Radcliffe said in *Davis* at p.727, “frustration is not to be lightly invoked as the dissolvent of a contract,” and this is a point that has been repeatedly made by subsequent courts. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] A.C. 724 at p.752, it was stressed that frustration is “not likely to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.”

Contracts whose performance, although not illegal, has been prevented for some other significant unexpected reason beyond the control of the parties can also be frustrated. One possible example might be where an employee or contractor is unable to perform their contractual duties because of their childcare responsibilities. Children must be looked after by adults and given that all schools, nurseries and childcare facilities have been closed by the government then it can be impossible for parents to find alternative arrangements, especially when combined with the obligation for households to socially isolate, and so it may be impossible for the employee to go to work. Another example might be where goods have not been delivered because the manufacturer is in lockdown.

The frustration of purpose ground may also become important once some of the current legislation banning the operation of many businesses is lifted; consider for example restaurants, cafes or bars. At the moment, in May 2020, their operation is illegal and so may well be frustrated on grounds of illegality, which is the subject of the author’s second article, but even when the ban is lifted it may well be that the social distancing conditions imposed by the government mandating a certain minimum distance between diners, or restricting the number of persons who may be admitted to premises in proportion to their size, may well be such as to make the operation of many restaurants, cafes and pubs economically unviable. Arguably, this would constitute impossibility of operation notwithstanding the courts long standing reluctance to allow economic factors to constitute grounds of frustration (see *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm); [2010] 2 Lloyd’s Rep. 668) and the courts may well think *non haec in foedera veni* applies.