JPC

Frustrating times: “Force Majeure” & COVID-19

Businesses and individuals enter into contracts every day. When they think about what could go wrong, and what terms they need in their contracts to deal with such eventualities, it is easy to focus on how the other party to the contract could default. However, what are the parties’ rights if something happens which neither party perhaps anticipated and which either makes performing the contract uneconomical for one party or else prevents them from performing it properly or at all?

It is not too difficult to think of examples and here is a brief selection:

a. Failed harvests;

b. Flooding;

c. Earthquakes;

d. War;

e. Strikes;

f. Political disturbances; and (more topically)

g. Viral pandemics.

To deal with the risk of such occurrences, a properly drafted contract ought to include a “force majeure clause”. A brief example, published in Butterworths’ *Encyclopaedia of Forms and Precedents*, is as follows:

> “*Neither party shall be liable for any default due to any act of God, war, strike, lockout, industrial action, fire, flood, drought, tempest or other event beyond the reasonable control of either party*”.

BUT WHAT ABOUT LEASES?

One type of contract in which it is unusual to find a *force majeure* clause is leases of property. Leases usually include provisions:

a. requiring one party to insure the property in question;

b. allowing the insuring party to terminate the lease if reinstatement of the property is impossible;

c. where the landlord is to insure, entitling the tenant to terminate the lease if the premises are destroyed by a risk which the landlord is obliged to insure, but the landlord has failed to reinstate the property within, say, 3 years of the date of destruction or damage.

It is now also common to have clauses in leases entitling the tenant to terminate the lease where damage has been caused by a risk which the landlord is normally obliged to insure against, but cannot do so, for example because the landlord is unable to find insurance on reasonable times to cover that risk, but the landlord has not elected to repair the damage at its own expense within, say, 12 months of the date on which the damage occurred.

However, it is pretty much unheard of for leases to require landlords to insure against viral outbreaks, so the provisions outlined above will not help.

If there are no force majeure provisions in a contract, then this could cause difficulties, as there is no concept of *force majeure* in English law.

Instead, if a party wants to extricate itself from liability under the contract following a force majeure type event, if there are no force majeure provisions in the contract, then the party will need to consider whether the contract has been "frustrated".

"Frustration" was defined by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] UKHL 3 as follows:

> "…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."

The first case in which the doctrine of frustration was applied was *Taylor v Caldwell* [1863] EWHC QB J1, where the Court held that a contract to hire a music hall for 4 nights of performances was frustrated, because the music hall was destroyed by fire after the contract had been entered into but before the first performance night.

The Courts have held that declarations of frustration will only be granted sparingly. For example, in *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema* [1982] AC 724, Lord Roskill stated that frustration was "*not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains*".

The European Medicines Agency ("EMA") discovered this in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch), when the Court held that the EMA's 25 year lease of premises in London was not frustrated by the UK's departure from the EU.

SO HOW DOES FORCE MAJEURE OPERATE IN CIRCUMSTANCES SUCH AS COVID-19?

So how could the Covid-19 viral outbreak result in contracts being frustrated? It will not if there is an effective *force majeure* clause or a clause dealing with the risk of such an occurrence. Subject to that, examples could include the non-availability of goods, labour or transport due to quarantining and travel bans. There are also bound to be lots of "grey areas", for example (in the case of business travel) when the Government has informally advised against non-essential travel or business meetings, but stopped short of a ban and "grey areas" are the areas which are less likely to be covered by insurance and more likely to be litigated.

HEALTH WARNING: Whenever an event occurs that could potentially frustrate a
contract, as a first step, the key would be to check whether the risk is covered by your

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