

One way and another, now seems like it might be a timely moment to refresh the memory on the doctrine of frustration; one rather suspects that in coming days and weeks it may become a more common feature of commercial life. Certainly, the situation that is unfolding with COVID-19 is frustrating, but when does frustration impact on a contract. Obviously, this note is far from exhaustive, and each case turns on its own merit.

Before we think about practical questions, let us remind ourselves briefly how the common law developed in this area. Historically, before frustration, *Paradine v Jane (1)* was regarded as authority for what has become known as the doctrine of absolute contracts. That was a case of a tenant farmer dispossessed of his land by “*Prince Rupert, an alien born, enemy to the King and kingdom ... with an hostile army of men*” who notwithstanding that he had been prevented from taking the profits of the land, was nevertheless held liable for the rent during the period which he was dispossessed. The case was frequently cited in later decisions in which the court held that supervening events had not discharged a party from contractual obligation and continued to be cited even after *Taylor v Caldwell (2)*.

Then came *Taylor v Caldwell* which was a turning point and is generally considered to have established the doctrine of discharge by supervening events; the doctrine which in English law has become known as the doctrine of frustration. In that case Blackburn J considered three mitigations of the doctrine of absolute contracts: cases in which death or permanent incapacity prevent performance of a contract for personal services, cases in which goods are sold and perish after the property in them has passed to the buyer, and cases in which the subject-matter of a bailment was destroyed without any default on the part of the bailee. Considering the examples, he held that “*from the nature of the contract, it appears that the parties must ... have known that it could not be fulfilled unless ... some particular specified thing continued to exist*”(3).

The “*frustration of contract*” refers to the doctrine of discharge by supervening events. A contract is said to be “*frustrated*” whether discharge occurs by supervening destruction of the subject-matter, or by its temporary unavailability, or by frustration of purpose or by supervening illegality.

The effect of frustration is that it discharges both parties of their contractual duties insofar as they

1.(1647) *Aleyn 26*

2.(1863) 3 B. & S. 826

3.(1863) 3 B. & S. 826 at 833.

remain unperformed at the time of discharge. Once the requirements of frustration are satisfied, the effect of the doctrine (in English law) is to discharge the contract “*forthwith, without more and automatically*” (4). The contract is void, not voidable.

But what then of partial or temporary impossibility: the contract in *Taylor v Caldwell* related to “*the Surrey Gardens and Music Hall*” and was discharged by the destruction of the Hall even though the Gardens (with their many attractions) survived and remained in operation, and even though reduced facilities for theatrical and musical performances in an adjoining building remained available. The contract was discharged because its *main purpose* (the giving of four grand concerts) was defeated (i.e. it was not necessary for the claim to succeed, for the Claimant to have to show that performance was wholly impossible).

Temporary impossibility arises where the thing or person essential for the performance of a contract becomes temporarily unavailable, or when a state of things essential for such performance ceases temporarily to exist. In coming weeks coronavirus may make performance of some contracts temporarily impossible.

However, temporary impossibility does not of itself discharge the contract; it is not of itself a ground of frustration. However, there are situations in which it can have the effect of discharging the contract. A contract will be discharged by temporary impossibility where it is one which can be performed only on the day or days over which the temporary impossibility extends. For example, in *Robinson v Davison* (5), a pianist was to give a concert on a specified day was held to have been discharged from the contract by his illness on that day. That said, whilst a claim for loss of profits was dismissed, a small additional claim for expenses arising as a result of the Defendant’s failure to notify the Claimant promptly (by letter rather than telegram) survived. If you or your client cannot perform their duties under the contract whether because of a state imposed lock-down, or because of illness (and the need to then self-isolate), make sure you communicate that effectively and in a timely manner.

Thinking very practicality though, if there is only a temporary impossibility, the first consideration should probably be whether the contract we are considering has a force majeure (or similar) clause dealing with

4. *Hirji Mulji v Cheong Yue SS Co* [1926] A.C. 497 at 505

5. (1871) L.R. 6 Ex. 269.

how parties obligations are affected by an event that affects one party's ability to perform it. If so, does Covid-19 event fall within the ambit of the clause wording? Can causation be established in relation to the force majeure clause; is it the Covid-19 event causing the impossibility? If we are relying on a force majeure clause, is there a duty to mitigate (often there will be)?

On the other hand, the contract may be frustrated. Frustration operates, not only automatically (i.e. without the choice or election of either party) but also totally. What this means is that the obligations of both parties are wholly discharged in so far as performance of them had not fallen due when the contract was frustrated. Whilst the circumstances in which frustration can be invoked are narrow, we live in unprecedented times and where the contract requires performance in, say for example a region that is subject to a state-imposed lockdown, frustration might well be said to have occurred.

But what then, of money paid before discharge of obligations occurs, Law Reform (Frustrated Contracts) Act 1943, s.1(2) provides that sums paid in pursuance of the contract before the time of discharge shall be recoverable from the payee "as money received by him for the use of the payor". Section 1(2) also provides that sums payable in pursuance of the contract before the time of discharge shall cease to be payable. The Act goes onto deal with any valuable benefit that is obtained under a frustrated contract. In short it might be said sums paid can be partially or fully recoverable if the contract is frustrated; recovery is akin, in some ways, to an action for unjust enrichment.

The answer is, as ever though, almost always more complex than can be easily summarised. Each situation will turn on its own circumstances and merits. A key consideration though, which we will all be more cognisant of in coming days, is have the obligations of the contract become impossible; has the contract become frustrated?

Martin Langston
St Ives Chambers
17 March 2020

