Force majeure, frustration and contracts

One of the many consequences of the coronavirus lockdown in 2020 has been felt by residential conveyancers where their clients had exchanged contracts and could not complete the transaction as originally agreed. Moving house where reasonably necessary was one of the reasonable excuses contained in the coronavirus regulations for someone being able to leave the place they were living.[1] The Ministry of Housing, Communities and Local Government issued advice on home moving during the coronavirus outbreak.[2] The overarching objective of the guidance was to protect public health and maintain social distancing measures by preventing people coming into contact with each other as much as possible. The stage of the transaction where this is most problematic is on completion, where people are physically moving around and, potentially, into premises that other people have been occupying.

The key points from the Government advice were that:

- There was no need or requirement to withdraw from a transaction, but parties must ensure that they followed Government measures to protect public health at all times.
- If the property was vacant, the transaction could continue.
- If the property was occupied, completion should only take place if absolutely necessary.

It was recommended that parties defer exchange and completion to a time when it was likely that social distancing measures would no longer be in place.

The Government advice was then followed by guidance from the Law Society which included the outline of a process for deferring a completion date which had been agreed by various trade and representative bodies including, the Law Society, Society of Licensed Conveyancers, Conveyancing Association, CILEx and Bold Legal Group.[3]

Where contracts had been exchanged, there was a risk that current or further Government measures or changes in parties' personal or financial circumstances could have made it impossible to complete on that date. Under the Standard Conditions of Sale (Fifth Edition – 2018 Revision), which govern most standard residential transactions, if a party is unable to complete on the completion date:

- they will be liable to pay interest for late completion for the period between the agreed completion date and actual completion; and
- if the other party is "ready, able and willing" to complete, they could serve a notice to complete. If completion does not take then place by the date specified in the notice, the contract can be terminated and the buyer, if they are at fault, will lose their deposit.

It may well have been possible for the difficulties which were encountered to have been relieved if the contract had contained provision governing what would happen when the contract could not be completed due to the stay-at-home measures to fight coronavirus. Such a

[1] Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (SI 2020/350) reg 6; Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020 (SI 2020/353) reg 8.
[2] *https://www.gov.uk/guidance/government-advice-on-home-moving-during-the-coronavirus-covid-19-outbreak* [Accessed 19 April 2020].
[3] *https://www.lawsociety.org.uk/support-services/advice/articles/guidance-to-conveyancers-advising-clients-on-house-moves* [Accessed 19 April 2020].

provision is more usually referred to as a force majeure clause.[4] The Standard Conditions of Sale (Fifth Edition – 2018 Revision) do not contain a force majeure clause and such clauses have been more commonly found in construction and shipping contracts. In the absence of a general doctrine of force majeure, no such provision will be implied into a contract. As the coronavirus may not be the last pandemic we see, it is possible that in the future the parties to a contract for the sale of land might wish to include a force majeure provision.

In the absence of a force majeure provision, the common law doctrine of frustration may assist. The main difference between frustration and force majeure are the consequences. Frustration will result in automatic termination of the contract. A force majeure clause usually only suspends performance temporarily – at least initially. The terms of each contract will differ and so it is always necessary to review the contractual terms in light of the current circumstances.

Force majeure

When considering force majeure, there must be:

- an event which will amount to a force majeure;
- a causal link between the force majeure event and non-performance of the contract;
- a requirement to mitigate the effect of the force majeure event; and
- a requirement to notify the other party of the force majeure event.

There is no established meaning in English law of the term 'force majeure' and so it must be defined in the contract by setting out the events which will be included. Although unusual, this may be by way of an exhaustive list so that only those specific events listed will amount to a force majeure event.

A mere reference to force majeure without it being further defined will render the clause unenforceable, as in *British Electrical and Associated Industries (Cardiff) Ltd v Patley Pressings Ltd*[5] where the words "subject to force majeure conditions" were held to be too obscure to be capable of any definite or precise meaning.

Events in force majeure clauses are often given a wider interpretation, for example "causes outside the control of a party, including" followed by an illustrative list and other events can be included in the definition if they are seen to be outside the control of a party. Examples of events which should be considered for inclusion include, without limitation:

- acts of God, flood, drought, earthquake or other natural disaster;
- epidemic or pandemic;
- terrorist attack, civil war, civil commotion or riots, war, threat of or preparation for war, armed conflict, imposition of sanctions, embargo, or breaking off of diplomatic relations;
- nuclear, chemical or biological contamination or sonic boom;

The question arises as to whether the inclusion of 'epidemic or pandemic' would cover the coronavirus outbreak? According to the Oxford English Dictionary, an epidemic is a widespread local outbreak of infectious disease; a pandemic is a disease prevalent over a whole country or the world. Given that the World Health Authority declared the outbreak to be a

[4] See, for example, *Peter Dixon & Sons Ltd v Henderson, Craig & Co Ltd* [1919] 2 K.B. 778.
[5] [1953] 1 W.L.R. 280.

pandemic on 11 March 2020, it is likely that it would constitute a force majeure under these terms.[6]

Even if a force majeure event exists, it must also be shown that it caused the non-performance of the contractual obligation. The party relying on the clause must show that the force majeure event is the only effective cause of non-performance. In *Classic Maritime Inc v Limbungan Makmur Sdn Bhd*[7] the Court of Appeal held that, where the force majeure event was one of two possible causes of the failure to perform the contract, a strict 'but for' test should be applied and as a result, on the facts of the case, force majeure did not apply. A clause may require that the force majeure event must 'prevent, hinder or delay' performance. To establish that an event 'prevents' performance, the affected party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable.[8] The use of the words 'hinder' and 'delay' widen the scope and will usually be satisfied if performance has been made substantially more onerous.

A force majeure clause should require an affected party to use reasonable endeavours to avoid or mitigate the effects of a force majeure event before it can rely on the force majeure clause. In any event, the obligation to mitigate may be implied. In *Channel Island Ferries Ltd v Sealink UK Ltd*[9] the Court of Appeal said that a force majeure clause which referred to events "beyond the control of the relevant party" could only be relied on if that party had taken all reasonable steps to avoid its operation or mitigate its results. Thus, for the avoidance of doubt, the clause should expressly require the affected party to mitigate the effects of the force majeure event.

A 'reasonable endeavours' obligation will require a party to take a reasonable course of action to achieve its aim, and it will not be required to sacrifice its own commercial interests in doing so.[10]

The force majeure clause should also impose notification requirements on an affected party. Some notification requirements may be more onerous than others. A clause may require the affected party to notify the other within a set period of time and to furnish that party with comprehensive details of the force majeure event, such as the duration of the force majeure event, the manner in which the event will affect performance of the contract, and an outline of the mitigation steps the affected party has undertaken or will undertake. The requirements may also impose an ongoing obligation on the affected party to notify the other at regular intervals throughout the course of the force majeure event. Careful consideration also needs to be given to the general notification provisions in the contract as these will specify the manner and format of any notification which is to be given.[11]

Where a party relies on a force majeure clause, the relief available will depend on the wording of the clause. Common examples of the relief which may be available include:

---

[6] *https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020* [Accessed 19 April 2020].
[7] [2019] EWCA Civ 1102. See also *Seadrill Ghana Operations Ltd v Tullow Ghana Ltd* [2018] EWHC 1640 (Comm).
[8] *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] A.C. 495; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm).
[9] [1988] 1 Lloyd's Rep. 323 per Parker LJ at 327.
[10] *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] EWHC 292 (Comm).
[11] See Condition 1.3 of the Standard Conditions of Sale (Fifth Edition – 2018 Revision).

- a temporary suspension of the contract during the period when the force majeure event persists;
- the extinguishment of any liability arising from the non-performance and/or delay;
- the right of either or both of the parties to terminate the contract; or
- the automatic discharge of the contract which brings to end the obligations of the parties.

A party who seeks to rely on force majeure bears the risk that they may be incorrect in believing that they have such a right. In such circumstances, they may be exposed to a claim for breach of contract. For example under the Standard Conditions of Sale (Fifth Edition – 2018 Revision) they may be subject to a claim for compensation under condition 7.2 for late completion or the service of a notice to complete under condition 6.8 with consequential remedies under either condition 7.4 or condition 7.5.

It should also be borne in mind that force majeure clauses in consumer contracts will be subject to the Consumer Rights Acts 2015, and where it is in a business to business contract, the Unfair Contract Terms Act 1977.[12]

Finally, it is useful to contrast the position in common law with the position in civil law jurisdictions. In some civil law jurisdictions force majeure will be defined and relief prescribed in the relevant civil code. In France the concept is defined within the French Civil Code in Article 1218 which states that:

"In contractual matters, there is "force majeure" where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor. If the prevention is temporary, performance of the obligation is suspended unless the delay which results justifies termination of the contract. If the prevention is permanent, the contract is terminated by operation of law and the parties are discharges from their obligations under the conditions provided by articles 1351 and 1351-1".

This means that, any event preventing a party to a contract from fulfilling its obligations under the contract can therefore be qualified as force majeure if it has the following cumulative three characteristics:

- the event must be beyond the control of the party who can no longer perform its obligations;
- the event must have been reasonable unforeseeable at the time of the conclusion of the contract;
- the event must be unavoidable at the time of the performance of the contract. The unavoidability must make the performance of the contract impossible and not only more expensive or more complicated.

Thus in France the combination of these three characteristics results in excusing both contracting parties from executing the contract under its terms, as well as from any liability regardless of whether the contract contains a specific *force majeure* clause.

Frustration

[12] See *Chitty on Contracts (Sweet & Maxwell, 33rd ed, 2018), Vol 1, Chapter 15: Exemption Clauses: 15-167, 15-168*).

In the absence of a force majeure clause in a contract, or if there is such a clause but it fails to deal with the consequences which a party is suffering, could the contract be frustrated?

A contract may be frustrated where an event occurs after the contract has been exchanged that makes it both physically or commercially impossible to complete the contract. Alternatively, the contract could be frustrated where the obligations become significantly different from the ones that were agreed when the contract was entered into. The doctrine of frustration was established in *Taylor v Caldwell*[13] as an exception to the general rule that if performance of a contract becomes more difficult or even impossible, the party who fails to perform the contract is liable to the other in damages.

Frustration is applied to avoid injustice where neither party has done anything wrong and it is not their fault that the contract is now impossible to carry out. In practice though, it is a very difficult to establish that a frustrating event has occurred.

Generally speaking, a frustrating event is one where:

- an event occurs after the contract has been formed;
- neither party is at fault;
- the event is beyond what was contemplated by the parties on entering into the contract and is so fundamental that it alters the contract; and
- the event renders performance of the contract impossible, illegal or radically different from that contemplated by the parties at the time of the contract.

Although these are general guidelines set out by the court, the specific circumstances of each situation must be taken into account. According to Chitty, the cases of frustration may be classified by reference either to the different types of frustrating events (for example a change in the law or subsequent illegality, outbreak of war, cancellation of an expected event or delay), or by reference to particular categories of contracts where frustration has been invoked (for example personal contracts, charter parties, sale and carriage of goods, building contracts, leases and contracts for the sale of land).[14]

Examples of frustrating events include:

- The subject matter of the contract being destroyed by fire.[15]
- The unavailability of the subject matter.[16]
- The cancellation of an expected event.[17]
- A subsequent change in the law or circumstances which makes performance of the contract illegal, for example, the outbreak of war.[18]

---

[13] (1863) 3 B&S 826.
[14] See *Chitty on Contracts (Sweet & Maxwell, 33rd ed, 2018), Vol 1, Chapter 23: Discharge by Frustration: Illustration of the Doctrine: General: 23-020*).
[15] *Taylor v Caldwell* (1863) 3 B&S 826.
[16] *In Re An Arbitration between Shipton, Anderson & Co and Harrison Brothers & Co* [1915] 3 K.B. 676*;Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435.
[17] *Krell v Henry* [1903] 2 K.B. 740.
[18] *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32.

- Where the performance of the contract would impose a burden on one party which is radically different from that contemplated at the time of entering into the contract, without rendering performance actually impossible.[19]
- Where there is an unexpected delay in the performance of the contract as a result of an unexpected event or change in circumstances and the delay is so abnormal that it falls outside what the parties could have contemplated at the time they entered into the contract.[20]

Examples of non-frustrating events include:

- Where the parties have made express provision in the contract for the consequences of the particular event which has occurred[21]. This would include where the parties have included a force majeure provision in the contract which covers the situation.
- Where the alleged frustrating event should have been foreseen by the parties.[22]
- The alleged frustrating event is due to the conduct of one of the parties.[23]
- It is merely more expensive to perform the contract.[24]
- An alternative method of performance is possible.[25]
- Changes in economic conditions.[26]
- The alleged frustrating event is already apparent when the contract is made and gets no worse during the term of the contract.[27]

There are a number of problems with frustration. It is doubtful whether it would apply to a contract for the sale of land.[28] A contract for sale was not frustrated in *Amalgamated Investment & Property Co v John Walker & Sons*[29] by the subsequent listing of the property under planning laws despite this greatly restricting the ability to develop the property, and in *Hillingdon Estates Co v Stonefield Estates Ltd*[30] the contract was not frustrated where a compulsory purchase order had been made before the land was conveyed to the buyer.

Frustration can also be difficult to prove. The party which claims frustration will have to show that there "must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".[31] Frustrating events are narrowly construed. The European Medicine Agency's 25 year lease of an office building at Canary Wharf was not frustrated as a consequence of the withdrawal of the United Kingdom from the European Union meaning that the Agency could no longer be based in the UK.[32] But what about a pandemic such as coronavirus? This is a far more extreme situation

[19] *Tsakiroglou & Co Ltd v Noblee Thorl G.m.b.H.* [1962] A.C. 93.
[20] *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No.2)* [1982] A.C. 724.
[21] *Jackson v Union Marine Insurance Co Ltd* (1874-75) L.R. 10 C.P. 125.
[22] *Armchair Answercall Ltd v People in Mind Ltd* [2016] EWCA Civ 1039.
[23] *Imperial Smelting Corp Ltd v Joseph Constantine Steamship Line Ltd* [1942] A.C. 154.
[24] *Tsakiroglou & Co Ltd v Noblee Thorl G.m.b.H.* [1962] A.C. 93.
[25] *Seabridge Shipping Ltd v Antco Shipping Co (The Furness Bridge)* [1977] 2 Lloyd's Rep 367.
[26] *Gold Group Properties Ltd v BDW Trading Ltd (formerly known as Barratt Homes Ltd)* [2010] EWHC 323 (TCC).
[27] *Flying Music Company Ltd v Theater Entertainment SA* [2017] EWHC 3192 (QB).
[28] However it has now generally accepted following *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 that frustration is, in principle, applicable to leases.
[29] [1977] 1 W.L.R. 164.
[30] [1952] Ch. 627.
[31] Per Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* [1956] A.C. 696.
[32] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch).

and would be a matter for a court to determine. Each contract and the circumstances surrounding it will be different. The key question will be whether coronavirus makes performing contractual obligations impossible. It will not be enough if the virus just makes it more difficult or expensive and, in that case, the contract is unlikely to be frustrated. If it is simply delaying performance of contractual obligations, perhaps because of current government guidelines, but those obligations can still be performed in the future, the virus will not be classed as a frustrating event.

Another problem is that frustration is absolute. At common law, frustration brings a contract to an end. However, whilst the Law Reform (Frustrated Contracts) Act 1943 allows a party to recover money paid under the contract before the frustrating event, it has limitations, for example, it only applies to contracts which have become 'impossible of performance or been otherwise frustrated'[33] and it does not apply where the contract has excluded its effect. Like the common law it does not keep the contract alive. This means that the parties will have to negotiate a new contract should they wish to continue the transaction again after the frustrating event.

Finally, frustration can be prevented by the actions or words of the parties. In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*[34] frustration could not be claimed where one party had agreed to transport an oil rig using one of two vessels but committed one of the vessels elsewhere only for the other to sink.

In the long term, it is unfortunately clear that outbreaks such as SARS and coronavirus are going to happen, and so consideration must be given to how contracts for the sale and purchase of land will deal with the potential legal consequences, perhaps by including express provision for viruses like coronavirus within a force majeure clause.

[33] Section 1(1).
[34] [1990] 1 Lloyd's Rep. 1.