



Discharge of Contractual Obligations by Prospective Frustration: When is a Frustrating Event Triggered by COVID-19?

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The effects of a global pandemic, and governmental restrictions imposed as a result of it, may clearly give grounds for contracting parties to claim discharge of their agreements relying on the doctrine of frustration (even in the absence of a relevant *force majeure* clause). The pandemic may render performance of the contract impossible – for example where governmental controls apply to international trade or travel restrictions; impracticable – in the case of a severe shortage of supplies; or strike at the purpose of a contract so that its performance is fundamentally different from what the parties envisaged – a conference without delegates, a sporting fixture without spectators, a charter flight without passengers. There are manifold other scenarios where a pandemic may trigger a frustrating event justifying the discharge of contractual obligations.

However, the full-effects of COVID-19 have yet to unfold, and governmental response to it remains fluid and uncertain. In particular in the UK, the government has yet to follow the lead of other countries by closing schools and work-places, or imposing wide-spread travel bans. In some other jurisdictions, governments have issued advice rather than imposed prohibitions. That may pose difficult questions for businesses where the effects of the pandemic are prospective – and in fact may never transpire. That uncertainty may be more acute when the time for contractual performance is still some time in the future. While the hope would be for counter-parties to engage constructively and consensually in difficult and uncertain times, in the absence of agreement (or an insurance-based solution) executives' decision making processes become more vexed.

Fortunately, English Courts have been sympathetic to the plight of commercial parties. In the leading English case *Scrutton J* stated: "*Commercial men must not be asked to wait till the end of a long delay to find out from what in fact happens whether they are bound by the contract or not; they must be entitled to act on reasonable commercial probabilities at the time when they are called upon to make up their minds.*"¹ That judgment stemmed from a case involving the outbreak of war between Greece and Turkey. In the face of the seizure of Greek ships passing through the Dardanelles by the Turkish authorities, the charterers of the *Andriana* refused to continue to load, claiming the charter-party had been frustrated. Unexpectedly, the Turkish authorities announced a two-week escape period for Greek ships: had the charterers continued to load they could have taken advantage of the escape period and have accomplished the contracted voyage, but as it was the *Andriana* was stuck in the Black Sea for nearly a year. It was held that the contract has been discharged since the charterers had been justified, *at the time they made the decision*, in believing that performance would be impossible.

In a later case, Lord Sumner also said that the question of frustration, "*must be considered at the trial as it had to be considered by the parties [at the time] they came to know of the cause and probabilities of the delay and had to decide what to do ... Rights ought not to be left in suspense or to hang on the chances of subsequent events.*"²

¹ *Embiricos v Sydney Reid & Co* [1914] 3 KB 45

² *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435



The general rules that emerge from those and subsequent cases are:

- The relevant time for determining discharge of a contract is the time of the occurrence of the allegedly frustrating event.
- If at that time a reasonable person would take the view that the event would lead to a sufficiently serious interference with performance, the contract will be discharged.
- It is not necessary to wait to see whether the interference in fact takes place.
- The contract will remain discharged even if subsequent events show that no such interference would have taken place. In other words the assessment need not prove to be correct, so long as it was based on reasonable grounds.

Each situation will turn on its own facts, but recognition by the courts of prospective frustration should give decision makers additional comfort to make proactive decisions in the face of COVID-19 threats, without having to wait for events to fully unfold. What will be key is an objective assessment of the likelihood of those threats emerging, coupled with the likely level of interference with contractual performance. Decision makers do not need a crystal-ball and to be subsequently proved right.

For more information related to the matters discussed in this *Locke Lord QuickStudy*, please contact the author.

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