

Frustration of Contracts Resulting from COVID-19

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COVID-19 has already presented many frustrations for New Zealanders as we head into lockdown this week. The nationwide Civil Emergency is going to impact a large variety of contracts, with one or more parties unable to fulfil their obligations due to the outbreak of the virus or the associated government intervention. If a party is unable to carry out its contractual obligations, and their contract doesn't specifically provide for the current situation, they may have recourse to the common law doctrine of frustration to bring a contract to an end.

Frustration Explained

Frustration occurs where an unforeseen event makes the fulfillment of a contract impossible or radically alters a party's purpose for entering into it. In these circumstances, the contract ends and the parties are discharged from their respective obligations.

Frustration operates discretely from force majeure clauses, which generally will have a lower threshold to be triggered. Frustration may provide a remedy where a contract does not contain a force majeure clause, or if a force majeure clause is not triggered by a pandemic.

The doctrine of frustration was first recognised in a very old English case of *Taylor v Caldwell*.¹ In that case, the parties entered into a contract to lease out a music hall for a series of concerts. However, the hall burnt down before the first concert took place. The plaintiff sued the hall owner for failing to fulfill its obligation under the contract to provide the hall. The court held that the contract was frustrated, as performance had become impossible. The parties were discharged from their obligations to perform the contract.

The threshold to satisfy the test of legal frustration is high and the doctrine will not apply where compliance with the contract has simply become more difficult or expensive.

¹ [Taylor v Caldwell \[1863\] EWHC QB J1](#)

Statutory Remedies for Frustration

We now have statutory remedies that clarify when a contract is deemed to be frustrated. These provide that:

- Parties have the right to recover money paid prior to being discharged from their contractual obligations.
- Money owed to a party under the contract ceases to be owed.
- The court may allow a party who has incurred expenses to retain or recover money.
- A party who has acted to perform the contract prior to frustration is able to claim compensation for any benefit their performance has conferred upon the other party before frustration.²

Frustration in the Context of COVID-19

Due to COVID-19, frustration may apply where contracts relate to:

- Events that can no longer take place due to government imposed restrictions.
- Where illness as a result of COVID-19 means an individual has to self-isolate for 14 days and cannot fulfill their obligations e.g. where a contract requires a person to be physically present in order carry out the services under the contract.
- The inability of a supplier to fulfill its obligation to supply materials to a third party due to a quarantine ban preventing movement from place to place.
- A lease where the purpose of the lease is made impossible. Again, it would not be sufficient to constitute frustration if a lease simply becomes less beneficial to the lessee. For example, in one case a ten-year lease of a warehouse was impacted by an access road to this property being blocked off for over a year but the contract was not frustrated.³ In another case, a lessee rented a flat for the specific purpose of viewing a coronation procession (both parties knew this). The procession was cancelled and it was held that the contract was discharged by frustration as the substance of the contract had become impossible.⁴ In another case, the property in question burnt down and this was also found to constitute frustration.⁵

² Sections 60-79 Contract and Commercial Law Act 2017

³ [National Carriers Ltd v Panalpina \(Northern\) Ltd \[1981\] 1 All ER 161](#)

⁴ [Krell v Henry \[1903\] 2 KB 740](#)

⁵ [Planet Kids Ltd v Auckland Council \[2013\] 1 NZLR 485](#)

Take Care

While frustration may be an available remedy, we advise caution and recommend obtaining legal advice before taking action. A wrongful claim of frustration can be a breach of contract in itself and can lead to an award of damages to the other party or an order that all or part of the contract has to be performed.

We're here to help you address any concerns you may have and our firm has made arrangements to work remotely during this time. Please feel free to contact Jenna Riddle at jenna.riddle@gallawaycookallan.co.nz or 027 742 1032 or Sam Wells at sam.wells@gallawaycookallan.co.nz or 021 062 6219. We are also available to assist with any broader concerns regarding managing employment, disputes and debts during this time.

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