STUDENT LETTINGS

Student lettings: Frustration and the pandemic

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In *National Carriers Ltd. v Panalpina (Northern) Ltd.* [1981], the House of Lords held that there was no theoretical reason why leases should be excepted from the doctrine of frustration of contract. On the question of whether the doctrine would ever actually be so applied, Lord Hailsham said:

> *I am struck by the fact that there appears to be no reported English case where a lease has ever been held to have been frustrated. I hope this fact will act as a deterrent to the litigious, eager to make legal history by being first in the field. But I am comforted by the implications of the well-known passage in the Compleat Angler (pt I, ch. 5) on the subject of strawberries: 'Doubtless God could have made a better berry, but doubtless God never did.' I only append to this observation of nature the comment that it does not follow from these premises that He never will, and if it does not follow, an assumption that He never will becomes exceedingly rash.*

This article will contend that lettings of student accommodation may sometimes be frustrated where Covid 19 has made in-person learning impossible for a large part of the term of the letting. In particular, where a suspension of in-person tuition has rendered the occupation of premises impossible or pointless for such a period, the frustration of *some* leases and other contracts for student lettings may then result, provided that the basis of the contract was to facilitate in-person attendance, rather than simply to provide accommodation.

Contractual frustration in general

The application of the doctrine of frustration requires 'a multi-factorial approach':

> *Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions*

> *and contemplations, in particular as to risk, as at the time of the contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.*

(from *Canary Wharf (BP4) T1 Ltd. v European Medicines Agency* [2019] at para 111, concerning an unsuccessful attempt by EMA to have its lease declared frustrated because of the need to leave its headquarters following the UK's departure from the European Union).

Turning to the details which govern the doctrine, there is now general acceptance of Lord Radcliffe's definition in *Davis Contractors Ltd. v Fareham Urban District Council* [1956]:

> *… 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.*

See also *National Carriers* at pages 686 (per Lord Hailsham) and 717 (per Lord Roskill), and more recently in *Canary Wharf* at para 22.

In *Canary Wharf*, the judge also observed (at para 23) that another formulation that has stood the test of time is that of Lord Simon in *National Carriers*:

> *Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision), which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case, the law declares both parties to be discharged from further performance.*

In combination, these dicta require the following before the doctrine can be invoked:

- A change in circumstances which was not adequately provided for in the contract and which the parties cannot be criticised for having failed to make provision.
- The change in circumstances being such as to transform the nature of the performance of the contract into something which is radically different from what the parties could reasonably have expected.
- The effect of that transformation being such as to render it unjust for the parties to be held to their bargain.

In *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] (cited in *Canary Wharf* at para 24), Bingham LJ set out the following further characteristics of the doctrine:

- The doctrine mitigates the rigour of the common law's insistence on literal performance of absolute promises to give effect to the demands of justice.
- It must not be lightly invoked.
- It brings the contract to an end forthwith, without more and automatically. It does not require an act by the parties to the contract.
- It is not due to the act or election of the party seeking to rely on it.

Four points should be made here:

1. One single event is not required

The fact that frustration brings the contract to an end forthwith cannot mean that there has to be one single event from which it is possible to conclude, immediately after it has taken place, that frustration has occurred. As in *National Carriers* itself, the question of whether a lease is frustrated will sometimes hinge on the length of the period during which the premises are rendered useless, in relation to the length of the term. In such a case, it may take some time before the length of the disruption becomes apparent.

2. Contract terms are not conclusive

Although the terms of the contract are important, they are not necessarily decisive. Generally, if the parties agreed (whether expressly or impliedly) on whom the risk should fall, the court would be unlikely to find frustration. However, if an event is so unforeseen and its effect on the performance of the contract is so radically different from what the parties might reasonably have expected, frustration can be found to have occurred, even if an event of the type which occurred falls within the risks which are allocated to one party or the other. See *Canary Wharf* para 26 (emphasis added):

> *The Lord Radcliffe theory – ie that frustration is a principle of law, not dependent upon the contract recognises the importance of the true construction of the contract, but also recognises that even construction has its limits when faced with extreme and unforeseeable supervening events.*

And at para 29:

> *In some cases… the construction of the contract will resolve the issue between the parties… [but] this is not so much the end of the doctrine of frustration, as its beginning. Fundamentally, when one seeks to describe what a party promised, one does not recite the individual terms and conditions, but has regard to something much more elemental, that cannot necessarily be captured in the precise terms used by the parties in their contract, but which requires reference to what I will term "the parties' common purpose".*

As to the meaning 'common purpose', the judge (paras 30 and 31) applied dicta of Rix LJ in *Edwinton Commercial Corp v Tsavliris Russ etc., (The Sea Angel)* [2007] at para 111,

referring to:

> *The parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, at any rate so far as these can be ascribed mutually and objectively.*

These factors go beyond matters relevant to the construction of the contract and evidence is admissible with regard to them which is inadmissible as regards construction – for example, pre-contractual negotiations.

3. Total failure of consideration is not a necessary element of frustration

As Lord Hailsham observed in *National Carriers* at page 687:

> *… many if not most, cases of frustration … have occurred during the currency of a contract partly executed on both sides, when no question of total failure of consideration can possibly arise.*

4. Frustration is not limited to impossibility of performance

Although impossibility of performance can be a frustrating event, frustration can occur, even if the parties can each carry out their respective obligations. This is clearest in what are described as 'frustration of purpose cases' in *Treitel, Frustration and Force Majeure* (3rd edition, 2014), cited with approval in *Canary Wharf* at para 35:

> *In cases of frustration of purpose it is normally the recipient of the thing, service or facility who argues that the contract should be discharged. His own obligation, merely being one to pay money, cannot have become impossible, nor has any impossibility affected the obligation of the supplier which can still be performed. But the recipient's case is that the contract should be discharged because the supplier's performance is no longer of any use to the recipient for the purpose for which both parties had intended it to be used.*

This leads to the 'coronation cases' and to the issues which directly concern to the question of student lettings and licences.

Student lettings and licences

Krell v Henry

Any consideration of this topic must begin with the two well-known cases that arose out of the coronation of King Edward VII which had to be postponed because of the unexpected indisposition of the King. In *Krell v Henry* [1903], the plaintiff and the defendant agreed that the defendant should have a suite of rooms in Pall Mall overlooking the coronation procession route during the two days (but not the nights) when processions were to take place. The intended use – to enable the defendant and his guests to watch the procession – was not mentioned in any contractual document; the only reference to the coronation being on an announcement in the window. When the coronation did not take place on the day proclaimed for it, and the processions therefore did not take place on the days covered by the contract, the defendant refused to pay the balance said to be due. The defendant succeeded. As per Vaughan Williams LJ:

> *In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract?*

In *Krell*, the contract was held to have been discharged because the foundation of the contract was not the hire of a room, but the provision of a view of the procession; it was a licence 'to use the rooms for a particular purpose and none other' (p750). Upon the postponement of the procession, the contract had become impossible of fulfilment. The contract's foundation was so characterised because of evidence, extrinsic to the contract, that a view of the procession was what was being offered, that the rooms were in a position which gave a view of the route and that the use of the rooms, during the hours when the procession was not expected to take place, was precluded.

In *Krell*, it was argued for the landlord that if frustration applied, the scope of the doctrine would become unacceptably wide. The example was given of a cabman hired to drive a customer to Epsom on Derby day. Would the hire contract be frustrated if the Derby were cancelled? The answer was that it would not be frustrated. Firstly, the cab had no special qualifications for the purpose which led to its selection, secondly and in contrast, the owner of the rooms had no intention of permitting their use for any other purpose (Edwardian mores notwithstanding), and thirdly a person wishing to go to Epsom for some alternative purpose would be entitled to insist on performance of the contract if the Derby were cancelled. The cancellation of the event might influence the price, and make the hirer's bargain a bad one, but the law of frustration does not exist to rescue people from bad bargains. See also *Herne Bay Steam Boat Co v Hutton* [1903], another coronation case, but one which falls on the 'Epsom cabbie' side of the line.

Application to student accommodation

So how, then, do we apply these principles to the question of whether an agreement for student accommodation has been frustrated if in-person tuition is suspended because of the pandemic?

The first point to make is that it will not matter whether the agreement amounted to a lease or a licence. As Lord Roskill observed in *National Carriers* at p714:

> *In many [cases of holiday accommodation] the holiday-maker's rights are not only a licence to use but include a demise with the concomitant right to exclusive possession. The holiday-maker acquires an estate in land. But that, my Lords, has little meaning for him. He acquires that estate in land, it is true, but only in order to enjoy for a while that exclusive right to the demised premises for his holiday. I find it difficult to see why in principle such a lease should be incapable of being frustrated if the facts justify the result, especially as the doctrine would clearly be applicable had the holiday-maker's rights derived from a licence and not from a lease.*

When, therefore, will the facts 'justify the result'? First, a single event will often be neither necessary nor sufficient for frustration to occur, although that may be possible, as in *Krell*. With leases or licences, frustration is likely to require that the premises be rendered useless for a substantial part of the term of the agreement. See the *National Carriers* case itself, where 20 months' interruption of user during a 10-year lease was insufficient for frustration. In student accommodation cases, where the term is normally between six and 12 months, a suspension of in-person tuition for a few months may well be sufficient for this purpose. That, however, is not the only consideration – the agreement must not simply be for the provision of accommodation, it must instead be one for facilitating the occupant's in-person tuition. In other words, just as the subject matter in *Krell* was the provision of a view, so must the subject matter of the student's agreement be the facilitation of an on-campus experience.

It is submitted that on any such question as to the nature of the agreement, the nature of the accommodation will often prove decisive. An agreement for the occupation of a room in a university residence hall, for example, is clearly meant to provide for an on-campus experience. No other purpose is intended. At the other extreme, an agreement for accommodation in an ordinary dwelling which happens to be near a university campus will probably be incapable of being so described, even if the student requires the premises for that purpose and the landlord knows this, except possibly where occupancy during term time is limited to students and there is some reason for this requirement. As with the Epsom cabbie, there would generally be no reason to select one set of premises over others in the same general area; the parties' common purpose would be no more than the provision and acceptance of a dwelling. Similarly, the letting of a house in London SW19 during Wimbledon fortnight would probably not fail if the tournament were cancelled one year.

Agreements concerning purpose-built or adapted blocks for student accommodation would be more likely than not to be subject to frustration, even if the landlord is a private company, rather than a university, because once again there would be a reason for the student's selection of this accommodation. Marketing of the accommodation to students and a restriction to occupation by students during term time could amount to further reasons for categorising the agreement in this way, especially if a restriction of this sort were a condition of a planning permission.

A further issue in a student accommodation case concerns the foreseeability of the onset of

the pandemic and its consequences to in-person tuition. Foreseeability, as we have seen, is one of the factors which is taken into account in the multi-factorial approach to the application of the doctrine, but it is merely a factor, rather than a precondition for the operation of the doctrine. Moreover, it is 'a slippery concept that needs careful handling'. See *Canary Wharf* at paras 211-213, where it is noted:

> *… foreseeability … is relevant only insofar as it informs the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk. If a future event is sufficiently foreseeable that it should have informed the manner in which the parties framed their agreement …, then (to put it no higher than this) a court will be inclined to consider that the parties will have framed their agreement taking this factor into account.*

Still, if a contract actually specifies who is to bear a particular risk, and if an event within that category of risk was foreseeable when the contract was made, such an event would be unlikely to give rise to frustration.

Because foreseeability is relevant, advisers will need to consider the extent to which the public was aware, when the contract was made, of the possibilities that there might be a lengthy suspension of the occupant's in-person tuition or the imposition of a lockdown preventing access to the premises. A case based on frustration in respect of a contract made before such knowledge was widespread would be unlikely to fail on grounds of foreseeability, whereas this factor would probably become more important to contracts made later. That said, courts should not be too quick to rule out frustration on account of foreseeability, because of the likely imbalance in sophistication between landlord and occupier and because the purpose of the doctrine is to achieve justice by mitigating the common law rule that bargains must be strictly performed.

Where foreseeability does need to be considered, the following matters may be relevant:

- The absence of any clear direction to the public before primary and secondary schools were closed on 18 March 2020, and the first national lockdown was announced on 23 March.
- The reassurance implicit in the various easings of the lockdown over the summer, such as the government's 'eat out to help out' campaign in August.
- The return of students to in-person tuition in the early autumn of 2020.
- The various local lockdowns when the tiered system for various local authority areas was introduced in the autumn.
- The government's guidance on 2 November 2020 that in-person learning should be suspended where practicable, followed by the second nation-wide restrictions introduced on 5 November.
- The introduction of a tiered system on the 2 December 2020, followed by the cancellation of a Christmas period relaxation of the restrictions and the introduction of a new national lockdown on 4 January 2021.
- The announcement of the 'roadmap' out of lockdown on 23 February 2021, expected to begin on 8 March.

Events such as these may possibly have a further relevance in cases where the student's university has not suspended in-person tuition, but where the student has been unable to get to the university because of difficulties in travelling (although the accessing of

education has usually been treated by the government as a valid reason to make journeys which would otherwise be prohibited).

Whatever the general situation might be, it would clearly be relevant if the individual student's own vulnerabilities made university attendance and the occupation of the accommodation impossible for that individual.

A further question could arise where in-person tuition was suspended while the student was occupying the accommodation, and where the student was obliged to remain there nonetheless, because of measures imposed to control the pandemic. The situation would be analogous to a *Krell*-type case where the rooms were actually occupied, but the procession was cancelled at the last moment. It is submitted that frustration could arise here because, although the room has been provided, the underlying basis for providing it will have failed.

Even if a contract could not be held to have been frustrated in circumstances such as these, they could nonetheless still be relevant to a frustration claim, where there are other periods during the term of the agreement when the premises were not occupied at all.

The legal consequences of frustration

These consequences are governed by the Law Reform (Frustrated Contracts) Act 1943. Subsection 1 (2) sets out the default position, which is that anything paid under a frustrated contract before the frustrating event is repayable by the payee, and that anything which would have been payable thereafter ceases to be payable.

The same subsection, however, goes on to provide that the court may, if it considers it just to do so, allow the payee (ie, the landlord in this case) to retain any part of the sums paid before the frustrating event, or to recover any sums payable before that, if before that event the payee has incurred expenses 'in or for the purpose of the performance of the contract', though the sum retainable or recoverable is limited to those expenses. Subsection 2 (5) provides that expenses:

> *… include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.*

Subsection 2 (3) provides, moreover, that if any party receives a non-monetary benefit before the event of discharge, the court will have the power to award such sum as it considers just in all the circumstances, up to the value of the benefit conferred. The circumstances can include any expenses incurred in or for the purpose of performance of the contract (thus preventing double recovery by the landlord) and 'the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract' (thus reflecting any diminution in the value to the of the benefit to the occupier).

Because there is little authority on the 1943 Act, and because it has never been invoked with leases or licences, it is unclear how the courts would apply it to a student accommodation case. It is possible that a court, in its discretion, might award a sum limited to the costs of mortgage interest and building maintenance incurred for the unit in

question, although it is unclear whether such payments will have been incurred ‘in or for the purpose of performance of the contract’. A somewhat stronger claim could also be made for a sum to represent the value of the premises to the occupant enjoyed before frustration or after the lifting of restrictions, or for a period of enforced occupancy during restrictions. However, these are likely to be modest because of the length of the periods of restriction and the low value which enforced occupancy would have.

Questions to ask your clients

- Did the contract require the occupant to attend an educational institution during the contract term?
- Were the premises made or adapted specifically as student accommodation?
- Was there a relevant planning restriction?
- What was publicly known about the pandemic when the agreement was made?
- For what proportion of the period of the agreement was in-person tuition suspended?
- During what proportion of the period of the agreement were the premises occupied?
- Were there any reasons, other than the suspension of in-person tuition, which were connected with the pandemic and which made occupation of the premises impossible or pointless?
- Did the occupant have any particular vulnerability which made it difficult to take stay at the premises?

Cases Referenced

- Canary Wharf (BP4) T1 Ltd. v European Medicines Agency [2019] EWHC 335 (Ch)
- Davis Contractors Ltd. v Fareham Urban District Council [1956] A.C. 696
- Edwinton Commercial Corp v Tsavliris Russ etc., (The Sea Angel) [2007] EWCA Civ 547
- Herne Bay Steam Boat Co v Hutton [1903] 2 B.K. 683
- J Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd’s Rep 1
- Krell v Henry [1903] 2 K.B. 740
- National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675

Citation reference:
David Schmitz, 'Student lettings: Frustration and the pandemic', (March 2021 #385) *Property Law Journal*, https://www.lawjournals.co.uk/2021/03/02/property-law-journal/student-lettings-frustration-and-the-pandemic/, see footer for date accessed