



COVID 19 and the law of Contract

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TRANSCRIPT

Hello, my name is Roger Halson, and I'm recording a short video blog for the law of contract module. I hope everybody is safe and well. Although I know you're probably fed up of hearing about the COVID-19 virus, I thought we'd try and do something positive with the present situation, and talk a little bit about the impact of COVID-19 upon contractual obligations. More particularly the impact of COVID-19 upon existing contractual obligations. There are two situations that we need to distinguish. The first is where a contract makes specific provision for circumstances such as the COVID-19, and the second where it does not.

The clause in a contract which deals with unexpected circumstances is usually called a force majeure clause. The purpose of inserting such a clause is to protect a party if they are unable to perform because of events that are beyond their control. Force majeure clauses are a feature of most B to B, business to business contracts, and those where feature of contract with consumers where the contract drafting has been done by a legal professional. There's no single type of clause, so the effect of a force majeure clause will depend upon its own terms. Some, such as those recommended by the International Chamber of Commerce in their standard form contracts, make specific reference to a pandemic, and so will obviously cover specifically the COVID-19 virus. Others refer to situations where performance is prevented, which means performance is impossible. Others where performance has been hindered, where performance endangers the business, or some other clauses refer to situations where performance has been delayed, everything turns upon the particular clause. The effect of such a clause is usually to suspend contractual performance until circumstances change. For example, in the standard construction contracts, which are known as JCT, contractors are usually allowed to apply for an extension of time. There were no further consequences beyond that specified in the clause, so everything turns on the wording of the clause.

But if the contract has no such force majeure clause, we have to look to the doctrine of frustration to see what is the effect of the COVID-19 outbreak upon contractual obligations. We know that frustration applies where a contract performance becomes impossible or illegal or radically different from that originally contemplated. It doesn't apply if the parties have provided for the circumstances themselves. The force majeure clause takes priority. We know frustration will only apply if it is not self-induced, i.e, if neither party is at fault. It will only apply if neither party is at fault. We also know that a mere increasing performance costs will not of itself amount to frustration. The difference between frustration and the application of a force majeure clause is also apparent in relation to the consequences of a contract being frustrated, because we know that under

the common law and the statute, those consequences are specified to the extent that the contract obligations are discharged. Unperformed obligations in the past are no longer performable. There is a right to retain monies for expenses incurred under section 1(2) of the Law Reform (Frustrated Contracts) Act, and any benefit conferred, something may be claimed in respect to that benefit under section 1(3) of the Law Reform (Frustrated Contracts) Act.

Let's just finish with two different examples. In example one, tickets for a football match. The government has banned all large gatherings. That contract is frustrated. The reason that contract is frustrated is not just the COVID-19 virus, it is the government's response which has made large gatherings illegal. Illegality is the reason for the frustration of that contract, and you, the ticket purchaser, are entitled to a refund.

In example two, let's suppose you have a shop selling bicycles. Under current government regulations, you're allowed to continue trading but lack of customers has reduced your profitability. You lease the shop premises, and the landlord has refused to reduce the rent. The law of contract, the law of frustration, will not operate to frustrate that lease because there has simply been a downturn in your business. Of course, the government is offering separate types of help.

I hope that quick overview is helpful and interesting, and I hope you all stay sound and safe and well provisioned. Thank you very much.