Coronavirus and Contracts: Frustration and the Legal Impact of COVID-19

By

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CORONAVIRUS AND CONTRACTS: FRUSTRATION AND THE LEGAL IMPACT OF COVID-19 on CONTRACTS

Part 1: FRUSTRATION (13,000 words)

Abstract

Sets out the general principles of the common law doctrine of frustration of contract including its grounds, remedies and relationship with force majeure clauses and concludes by considering the likely impact of the Coronavirus pandemic and its associated legislation on contracts with specific consideration of the differing treatment of leases under Scots and English Law.

A second article will focus on force majeure clauses.

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Introduction

The global Covid-19 pandemic of 2020 is having a huge impact on the lives and businesses of millions of people around the world. The purpose of this article is
to consider the legal effect of the pandemic on contracts in Scots and English law. This is an area where the law is very similar in the two jurisdictions except in the area of leases.

There are two legal concepts relevant to coping with unforeseen events:

1. the *common law* doctrine of frustration and
2. the common commercial practice of including a *force majeure* within the *express terms of a contract*.

This article will concentrate on frustration and I will consider *force majeure* in more detail in a separate article.

**Frustration: How the Common Law copes with the impact of unexpected changes of circumstances on contracts**

**A. GENERAL PRINCIPLES OF FRUSTRATION**

The most fundamental principle of contract law is contained in the pithy Latin maxim *pacta sunt servanda*, “agreements must be kept” which expresses the central importance of *certainty* of performance in contract law as Lord Hope JSC said: “…the maxim *pacta sunt servanda* which lies at the root of the whole of the law of contract.”¹ Indeed, so important is this principle that it is often referred to, even in this secular age, as the “sanctity of contract,”² meaning that contractual agreements are so important they must not be interfered with except in exceptional circumstances. This principle is found in all sophisticated legal systems³.

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¹ *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3 per Lord Hope JSC at para. 47.
² It is also common to refer to the ‘sanctity of marriage’ but like ordinary contracts that too is often breached!
³ *Pacta sunt servanda* is the core principle of all national legal systems, as was commented in one international arbitration:
Accordingly, once the parties have made an agreement in the form of a legally binding contract then their liability to perform their contractual agreed duties is *strict*, which means in principle no excuses are allowed for non-performance and should here be any non-performance of any of the contractually agreed duties that will be treated as a *breach of contract* which will allow the innocent counter party to sue for damages or for performance of the contract (specific implement). The doctrine of frustration thus operates as a rare exception to the usual insistence of the courts that *pacta sunt servanda* but the courts have always been clear that this release from contractual liability is strictly controlled.

The key criteria for the successful invocation of the doctrine of frustration is that an unforeseen radical change in the circumstances in which a contract is to be performed makes it impossible that the contract be performed as agreed by the parties, see *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 [discussed further below] and there can be no doubt that the Coronavirus is having such a “catastrophic impact” on the world that many contracts cannot be performed as originally agreed and therefore that the doctrine of frustration can potentially be invoked to provide a rough and ready justice for the parties to the millions of contracts disrupted by the pandemic.

The ‘justice’ provided by frustration is rough and ready because its grounds are rather narrow and it only provides one remedy, viz that the contract is avoided, that is brought to an end on the courage of the frustrating event (this is discussed in much more detail below) and to remedy these remedial deficiencies *force majeure* clauses are included in many contacts to allow remedies other than the avoiding of the contract.

Frustration only operates within narrowly circumscribed limits and in normal circumstances is rarely successfully invoked in commercial contracts. The doctrine of frustration is “not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.” Lord Roskill in *Pioneer Shipping Ltd v. B. T. P. Tioxide Ltd (The Nema)* [1982] A.C. 724 at 752. Nevertheless, although the doctrine is not ‘lightly to be invoked’ it can...

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“The principle of the sanctity of contracts ... has always constituted an integral Part of most legal systems. These include those systems that are based an Roman law, the Napoleonic Code (e.g. article 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence 'Shari'a'.” *Ad hoc Arbitration Award in Liamco v. Libya*, April 12, 1977, Yb. Comm. Arb., 1981, 89 at 101.
certainly be invoked in appropriate circumstances and it is likely that frustration will be very frequently invoked over the coming weeks, months and years because of the Coronavirus crisis, as individuals and businesses wrestle with the catastrophic effects of both the virus itself and the radical legal measures taken by governments across the globe, including the British Government, to attempt to mitigate the spread of the virus.

The exception to the strictly liability to perform a contract which the doctrine of frustration allows is justified on the ground of justice:

“The doctrine of frustration has been developed as a judicial device to relieve a contracting party in certain limited circumstances where it would be harsh to hold him to the apparent terms of the contract. It applies when circumstances have so radically altered from the state of things when the contract was made that the court can say that the parties cannot have intended their contractual obligations to apply in such altered circumstances.

In all the cases to which the doctrine has been applied it is possible to point to some supervening event which has had a catastrophic effect on the contract and has occurred without the fault of the parties... They include the outbreak of war, the cancellation of an expected event, the destruction of the object that was the subject matter of the contract, seizure of a ship by a foreign government, an explosion and so forth. Reference is also made to extraordinary delay sufficiently long to frustrate the commercial adventure of the parties. But in every case the delay has been due to some unexpected external cause beyond the control of the parties.”

*The Hannah Blumenthal* [1983] 1 A.C. 854 at 881 per Griffiths LJ

Frustration was also justified on grounds of providing justice between the contractual parties by Bingham LJ in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 10 WLUK 146; [1990] 1 Lloyd's Rep.

“The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C.497 at 510; *Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C.265 at 275; *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C.154 at 171). The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement
of a contract in its literal terms after a significant change in circumstances [italics added for emphasis] (Hirji Mulji, supra, at 510; Joseph Constantine Steamship Line Ltd. (supra), at 183, 193; National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] A.C.675 at 701."

Note that the fourfold requirements for frustration of contract are that the supervening event must be unexpected, have occurred without the fault of the parties and have a catastrophic effect on the performance of the contract. There is no doubt that the covid-19 pandemic was unexpected and beyond the control of the entire human race and that it is having a catastrophic effect on very many but not all contracts. There can also be no doubt that the extreme but entirely justified legislation brought in by the British and Scots Governments to inhibit the rapid spread of this incurable disease has had a frustrating effect on very many kinds of businesses. Admittedly not all businesses are equally affected. For example cinemas, hairdressers and pubs have had to close down but it is boom time for manufacturers of ventilators and personal protective equipment! The impact on those businesses forced to close by legislation will be discussed in the later part of this article. Frustration will be invoked in these circumstances either because the contract lacks a force majeure clause or because particular the terms of the force majeure clause does not cover the event of the pandemic.

B. THE REMEDY PROVIDED BY FRUSTRATION

As discussed above, the basic justification for the doctrine of frustration is that it would be unjust to allow an innocent party to be sued for an obligation that has become impossible to perform due to the occurrence of an unexpected event beyond the control of either party. Although rooted in the notion of justice, the remedy provided by the courts is an imperfect one, viz the frustrated contract will be declared void at the moment the unexpected event occurs. The effect of a contract being declared void from the moment of the occurrence of the frustrating event/change of circumstances is that the contract ceases to exist at that moment or, to put it another way, both parties are discharged from any obligation to perform any future duties specified in the contract.
“I should prefer to describe it as a substantive and particular rule which the common law has evolved. Where it applies there is no breach of contract. What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force.” Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd., 72 per Lord Wright.

In principle this happens automatically, see Hirji Mulji v. Cheong Yue Steamship Co. Ltd. [1926] A.C.497. This automatic avoiding of the contract is a fair outcome, in that it excuses a party from being obliged to perform an obligation that has become impossible to do, and insulates both parties from claims of damages for breach, but it can be unsatisfactory to the parties in that both may well prefer that performance of the contract be postponed rather than completely cancelled. Avoiding the contract may also be unfair to one or other of the parties with regard to obligations already performed in anticipation of a reciprocal performance by the counter party. This is because when a contract is avoided and discharged the courts have held that “the loss lies where it fall” because the law considers that frustration does not have retrospective effect and any obligations arising before the time of frustration remain valid and enforceable. The scope of this principle is the one area where English and Scots Law take slightly different approaches.

English Law

The loss lies where it falls rule can be very unfair in its effect. For example, if A has paid B in advance for a service or goods but that performance is now impossible, B can retain the payment, so getting their money for free. This very harsh rule was a result of the decision of the English High Court in Chandler v. Webster⁴, where it was held that there would be no restitution for any

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⁴ Chandler is one of a trio of frustration “coronation cases” cases whose import was aptly summarised by Victor P. Goldberg’ “When Edward VII’s appendicitis caused the postponement of his Coronation processions the postponement was only temporary, but its impact on contract doctrine was enduring.” After Frustration: Three Cheers for Chandler v. Webster 68 WASH. & LEE L. REV. 1133 (2011). In Chandler a Mr. Webster let Mr. Chandler a room on Pall Mall to watch the King’s coronation on June 26 1902 for £141 15s. It was understood between the parties that the money for the room should be paid before the procession. Mr. Chandler had in fact hired the room not for himself, but for a customer. Ultimately the customer did not want the room, since a relative had died. On June 10 Mr. Chandler wrote to Mr. Webster saying,
payments made prior to the frustrating event. Anything done or still owed prior to the frustrating event is not be undone by the occurrence of that event.

“... the law leaves the parties where they were when the further performance of the contract became impossible. It treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time; but, as the basis of the contract has failed, it excuses the parties from further responsibility under it.”

So obviously unfair was this outcome in *Chandler* that it has subsequently been greatly modified both by the courts and by parliament. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 the House of Lords partially over ruled *Chandler* on the grounds that there had been a total failure of consideration. The facts in that case was that Fibrosa, a Polish textile company, had entered into a contract with a British firm Fairbairn to buy industrial machinery for £4,800. The contract was signed on 12 July 1939 and, the following week, Fibrosa made an advance payment of £1,000. However the German attack on Poland on 1st September 1939 and the subsequent declaration of war on Germany by Britain on the 3rd September prevented the delivery of the machines, as it was now illegal to send machines to the swiftly defeated Poland. Subsequently, Fibrosa sued for the reimbursement of the advance payment of £1,000. The House of Lords held that *Chandler* applied only where there was no failure of consideration. However, in these circumstances there was a total failure of the consideration: because Fibrosa had received none of the machinery ordered in return for the monies paid. In these circumstances of complete failure of consideration the frustrated contract would not be subject the rule in the *Chandler* decision rather Fibrosa would succeed in their claim on the grounds that Fairbairn had been “unjustly enriched” by being paid £1,000 for goods never delivered and accordingly they were obliged to repay the £1,000 to Fibrosa. The unsatisfactory effects of

“I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7, Pall Mall, to view the procession on Thursday, June 26, for the sum of £141, 15s., which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room, for which I will erect a stand. If the seats thus sold in the ordinary way of business do not realize the above amount by June 26, I agree to pay you the balance to make up such amount of £141, 15s.”

5 [1904] 1 KB 493 at 500-1 per Collins MR
Chandler were further mitigate by the Law Reform (Frustrated Contracts) Act 1943 which provided that the sums paid in advance would become either partially or fully recoverable, if a contract was impossible to perform. Section 1(2) provides that there is a prima facie presumption that all sums paid in advance are recoverable and that sums due to be paid prior to termination cease to be payable but that proviso is subject to the discretion of the court to set off repayment due on account of expenses incurred. Section 1(3) has an analogous provision for the potential recovery of valuable non-monetary benefits. The 1934 Act has generated very little case law and is generally thought to be a rather badly drafted piece of legislation. Its meaning was considered in BP Exploration v Hunt (No 2) [1979] 1 WLR 232 where the Court of Appeal, adopting a different interpretation from the High Court stressed that ultimately much discretion is left in the hands of the judges. In Gamerco S.A. v I.C.M./Fair Warning (Agency) Ltd [1995] 1 WLR 1226 a contract between the rock group Guns N Roses and the promoter was held to be frustrated because of the refusal of a safety certificate on the 1st July for the stadium in which the concert had been scheduled to be performed on 4th July. On the difficult issue of the interpretation of the terms of the 1943 Act Garland J commented that he thought the act should be interpreted as conferring a broad discretion on the court:

“Broad discretion. It is self-evident that any rigid rule is liable to produce injustice. The words, “if it considers it just to do so having regard to all the circumstances of the case,” clearly confer a very broad discretion. Obviously the court must not take into account anything which is not “a circumstance of the case” or fail to take into account anything that is and then exercise its discretion rationally. I see no indication in the Act, the authorities or the relevant literature that the court is obliged to incline towards either total retention or equal division. Its task is to do justice in a situation which the parties had neither contemplated nor provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen.”

Scots Law

Due to its grounding Roman Law, from the very beginning the Scottish Courts declined to follow Chandler. Instead in Cantiare San Rocco SA (Shipbuilding Co)
v Clyde Shipbuilding & Engineering Co Ltd. 1922 SC 723, 1922 SLT 477, [1924] AC 226 the Scots courts held that the principle of unjust enrichment applied to frustrated contracts where money was paid in advance for goods which could not be delivered because performance subsequently became illegal because of war. As Lord Hope JSC said in Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc [2013] UKSC 3

“The rule in Scots law is that the loss does not lie where it falls on the frustration of a contract. There must be, as McBryde, The Law of Contract in Scotland, 3rd ed (2007), para 21-47 puts it, an equitable adjustment. That was what was done in Cantiere San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd [1924] AC 226, where it was held that the buyer was entitled to repetition of the instalment of the price that was paid on signature of the contract as, owing to the war, further performance of the contract had become impossible.”

The effect of the decision in Cantiere is to leave a wide discretion in the hands of the Scots courts to decide what will happen to any monies already paid, but the scope of that discretion to award remedies on frustration is not entirely clear. It certainly includes the ability to restore to the payer sums which has unjustly enriched the payee prior to the frustration event (Cantiere) but its

The facts were that in May 1914 a Scottish firm of engineers had contracted with an Austrian firm of shipbuilders to build and supply a set of marine engines for them. The first instalment had been paid but no part of the engines had been built, when World War 1 broke out and further performance of the contract became legally impossible because the buyers were now enemies. After the war Cantiere brought an action for repetition (repayment) of the instalment paid before the outbreak of war. The House of Lords held that as the contract had been frustrated but an instalment had been paid as part of the price of the engines, and as the engines had not been delivered owing to a cause for which neither of the parties was responsible, the defenders, Clydebank, were bound to make restitution of the instalment (subject to any counter-claim which they might establish), upon the principle of the unjust enrichment principle conductio causa data causa non secutu.
scope is otherwise rather uncertain. In *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3; [2013] 1 W.L.R. 366; [2013] 2 All E.R. 103; 2013 S.C. (U.K.S.C.) 169, where as a matter of fact the court held although there had been some significant changes to the background conditions of the contract there was no frustration, the Supreme Court seemed to reject the notion that Scots courts had a *general* power of equitable adjustment of contracts, but that was decided in a context where the contract had not been frustrated. The Supreme Court while declining the recognise a general power of equitable adjustment outwith the context of frustration at the same time made it clear that flexibility of remedies remained possible where frustration had occurred. Lord Hope JSC set out the position in an important judgment which is worth quoting at length:

“37. The Lord Ordinary recognised, when this argument was before him in the Outer House, that the bank’s success on the issue of construction made it unnecessary for him to deal with it. He had held that the Foundation must fail in its claim against the bank in any event. But he dealt with the argument nevertheless and, having examined the authorities, he concluded that there was no such doctrine in Scots law: 2012 SLT 13, para 89. The point was raised in the Inner House by way of a cross-appeal. As the First Division decided to reverse the Lord Ordinary on the issue of construction, it had to deal with it: 2012 SC 259, para 22. In its view however there was no foundation for the equitable adjustment of contracts, as a generality, in Scots law. Lord President Hamilton recognised the existence of the doctrine, but he said it would be beyond the judicial power to develop it in a way that would assist the bank in this case: para 29.

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38. We are in the same position as the Lord Ordinary. The bank’s success on the main issue makes it unnecessary for us to decide whether a remedy by way of equitable adjustment is available. But the point was dealt with fully in the parties’ written cases as well as in oral argument, and it is of some general interest. So I should like to say a word or two about it. Despite Mr Barne’s able submissions to the contrary, I have reached the same conclusion as the judges in the Court of Session. I add these few words to explain why.

an equitable adjustment. That was what was done in *Cantiare San Rocco SA v Clyde Shipbuilding and Engineering Co Ltd* [1924] AC 226, where it was held that the buyer was entitled to repetition of the instalment of the price that was paid on signature of the contract as, owing to the war, further performance of the contract had become impossible. As Lord Dunedin explained, at pp 248–249, the remedy for frustration of the contract was given

“not under the contract or because of breach of the contract inferring damages, but in respect of the equitable (of course I am not using the words in the technical English sense) doctrine of *condictio causa data causa non secuta.***

It should be noted that the term *causa data causa non secuta* is used today not to describe a remedy as such, but rather to describe one particular group of situations in which the law may provide a remedy because one party is unjustifiably enriched at the expense of the other: *Shiliday v Smith* 1998 SC 725, 728, per Lord President Rodger.

41. The situation that was discussed in *Cantiare San Rocco* is not the situation in this case, as it was not part of the bank's argument that if the Foundation were to succeed on the interpretation argument its obligations under the deed could not be implemented. But Lord President Cooper, in Frustration of Contract in Scots Law (1946) Vol 28 *Journal of Comparative Legislation and International Law*, at p 1, saw frustration of the contract as a by-product of a wider question: “how the relations of two parties should be *381 equitably readjusted by the court when the one has been unintentionally enriched at the expense of the other.” He made it clear at pp 4–5 that in his opinion the principle of frustration was capable of being expanded in the future into other areas. [underlining added for emphasis] In *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, 272, Lord Macmillan (who was counsel for the unsuccessful shipbuilding company in *Cantiare San Rocco*) said that the doctrine of frustration was so inherently just as inevitably to find a place in any civilised system of law: “The manner in which it has developed in order to meet the problems arising from the disturbances of business due to world wars is a tribute to the progressive adaptability of the common law.” In *Muir v McIntyre* (1887) 14 R 470 it was held that a tenant was not bound to pay the full rent where, due to no fault of his own, almost the whole of the
accommodation on the farm was destroyed by a fire. Lord Shand, at p 473, said that the principle on which the tenant was entitled to an abatement of his rent was “founded on the highest equity”.

42. These observations provide the background to Mr Barne’s submission that, while the concept of equitable adjustment overlapped with unjustified enrichment, it was broader in its application. It was a matter of degree, he said, whether the contract was discharged or was equitably adjusted. It all depended on the extent or nature of the change. Cases such as *Muir v McIntyre* and *Sharp v Thomson* 1930 SC 1092, where the tenant was held to be entitled to an abatement of his rent upon the partial destruction of the subjects, showed how equitable principles could operate where the contract was not frustrated. It could continue on terms which were adjusted to reflect the changed circumstances. Rankine, *A Treatise on the Law of Leases in Scotland*, 3rd ed (1916), p 227 said that the court will not be confined in adjusting the rights of the parties by any artificial rule that the loss must either be total or at least plus *quam tolerabile*. In *Wilkie v Bethune* (1848) 11 D 132, due to the failure of the potato crop, the farm servant’s employer was unable to deliver the potatoes to which the servant was entitled in addition to his money wages. The court fixed a sum which was regarded equitably as the money equivalent of the employer’s obligation. The contract had not been frustrated, but the court applied an equitable construction and held the servant entitled, not to his potatoes, but to a sum which would purchase the equivalent of other food: McBryde, *The Law of Contract in Scotland*, para 21-21.

43. This is not the occasion to cast doubt on the ability of Scots law to find equitable solutions to unforeseen problems. Adaptability has a part to play in any civilised system of law, [italics added for emphasis] as Lord Macmillan recognised in *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] AC 265, 272. The way that use has been made of civilian principles to develop the law of frustration of contract in Scots law is a powerful demonstration of that fact. So too is Reinhard Zimmermann’s observation that the doctrine of *Wegfall der Geschäftsgrundlage* (collapse of the underlying basis of the transaction), which was formulated in response to the problems posed by the consequences of the First World War, has become part and parcel of the modern German law of contract: *The Law of Obligations, Roman Foundations of the Civilian Tradition* (1990), p 582. It can also be seen in the way strict rules for the interpretation of contracts have been discarded in favour of giving effect to what a reasonable person would have understood the parties to have
The purpose of this long quotation is to highlight the fact that Lord Hope expressly held out the possibility of Scots law developing new remedies for frustration or other extreme situations and it is hard to imagine a more extreme situation than that created by the current global pandemic. It is therefore submitted that faced with such a major catastrophe as Covid-19 which will affect numerous businesses in diverse ways the Scots courts may well find it necessary to develop remedies in a creative and dynamic way. Out of the ruins of numerous business agreements the courts may well build wider and more responsive remedies for frustration.

C. FORCE MAJEURE:
HOW CONTRACTS SEEK TO DEAL WITH UNEXPECTED EVENTS

As discussed above while frustration is the common law remedy available for unexpected changes which make performance of a contract illegal, impossible or fundamentally different it is a bit of a blunt legal ‘hammer’ with which to deal with the delicate ‘nut’ of frustrated contractual purposes, given that it simply avoids the contract but many parties would rather have legal ‘screwdriver’ to save the contract by postponing or altering performance. This legal ‘screwdriver’ is the force majeure clause. Although not a term of art in Scots or English law the phrase force majeure is commonly used to describe an express term of a contract which seeks to deal with those situations covered in the common law by the doctrine of frustration. Typically a force majeure clause seeks to widen the grounds on which non performance may be excused and to change the remedy by providing that the obligation to perform may be postponed rather than permanently ended as happens under frustration. Due to these limitations of the common law doctrine of frustration force majeure clauses are found in almost all commercial contracts. One unfortunate consequence of the near ubiquity of force majeure clauses is that it is comparatively rare for frustration cases to come to court and so the courts
have had only comparatively few occasions to reconsider the doctrine. Had there been more frustration cases it is possible that the judges might have delivered a more flexible approach to the remedies available for frustration.

When a court considers a force majeure clause it engages in an exercise in contractual construction where it must consider the scope and meaning of the wording of the force majeure clause. Although many force majeure clauses have fairly similar wording there is also a wide variety in their wording, and so it follows that, like any other express term of a contract, the court will have to construe the meaning of each force majeure clause in terms of its particular wording set in the context of the whole of the contract and the nexus of circumstances surrounding the contract. (This issue will be discussed more fully in my second article).

**Relationship between Force Majuere and Frustration**

One important issue which may well be litigated in the coming months is the relationship between the express terms of a force majeure clause and frustration. As frustration is a principle of fundamental justice the possibility of invoking frustration is potentially applied to all contracts but where there is an express force majeure clause in a contract the first recourse of the parties and, where necessary, of the courts will be to consider the precise terms set out in the force majeure clause. This is because of the principle of ‘freedom of contract’ which allows parties to contract for anything that is not illegal or contrary to public policy. Accordingly, parties could contract to expressly exclude the doctrine of frustration but this very seldom happens and even that power has limitations as it has been held that express provision cannot exclude frustration of contract by supervening illegality if this would be contrary to public policy, *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260.

In *Chitty on Contracts* the competing policy considerations are well set out

“Para. 23-058 A clause in the contract which is intended to deal with the event which has occurred will normally preclude the application of the doctrine of

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7 Chitty on contracts. 33rd Edition
Chitty, Joseph, d. 1838.; Beale, H. G.; Burrows, A. S. (Andrew S.); 2018-2019
Frustration. Frustration is concerned with unforeseen, supervening events, not events which have been anticipated and provided for in the contract itself. Thus the effect of a *force majeure* clause or a hardship clause may be to shut out the doctrine of frustration because the contract, on its proper construction, will be held to have covered the event which has occurred. Similarly, the presence of a price-escalation clause in a contract may make a court more reluctant to conclude that a sudden increase in prices has frustrated the contract. But the courts are likely to construe such clauses narrowly and insist that the provision for the event be “full and complete” before the conclusion is reached that frustration is excluded. The more catastrophic the event, the less likely it is that a clause will be held to cover the event which has occurred, unless particularly clear words are used.”

More generally the inter-relationship between a *force majeure* clause and the doctrine of frustration under the general law is not entirely clear. In *Select Commodities Ltd v Valdo SA* (2006) EWHC 1137 a case on the interpretation of a charter party Tomlinson J took the view that a ‘liberty clause’ could potentially prevent charterers from relying on the doctrine of frustration, but only if the liberty clause dealt fully and completely with the effects of the frustrating event.

“The arbitrator referred in his Reasons to the most immediately relevant authorities being *Bank Line Ltd v. Arthur Capel and Company* [1919] AC 435, *The Evia No.2* [1981] 2 Lloyd’s Rep 613 and *The Safeer* [1994] 1 Lloyd’s Rep 637. These authorities demonstrate that where the parties have included in their contract a clause which is intended to and does deal fully and completely with the effects of an event which would otherwise, absent the clause, frustrate the contract, the doctrine of frustration is inapplicable to the effects of that event if it occurs. [Underlining added for emphasis] Put another way, an event for the effects of which full and complete provision is made in the

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8 A charter party is a contract for the hire of a ship. It is common bills of lading and standard form charterparties to contain widely drafted ‘liberty clauses’. These give the carrier, as part of the contract voyage, the ability or ‘liberty’ to deviate - for a wide variety of purposes - from the route that would otherwise be followed under the contract.
contract cannot, by definition, effect so radical a change in the contractual
adventure that, on a true construction of the contract, it ceases to bind the
parties – c.f. per Robert Goff J in The Evia No.2 at p.616. As Lord Sumner
pointed out in Bank Line v. Capel at p.456: -

“A contingency may be provided for, but not in such terms as to show that the
provision is meant to be all the provision for it. A contingency may be provided
for, but in such a way as shows that it is provided for only for the purpose of
dealing with one of its effects and not with all.”

“These authorities demonstrate that where the parties have included in their
contract a clause which is intended to and does deal fully and completely with
the effects of an event which would otherwise, absent the clause, frustrate the
contract, the doctrine of frustration is inapplicable to the effects of that event
if it occurs. Put another way, an event for the effects of which full and
complete provision is made in the contract cannot, by definition, effect so
radical a change in the contractual adventure that, on a true construction of
the contract, it ceases to bind the parties.”

So where an event falls within the literal words of a force majeure clause, the
courts have held that frustration is inapplicable where the event in question
could not have been contemplated by the parties but it could still apply if the
unforeseen event is not covered by the wording of the force majeure clause.

So everything will depend on the precise wording of the force majeure clause
and the nature of the unexpected event.

D. THE DETAILED GROUNDS OF
FRUSTRATION

General Criteria of Frustration
The classic definition of the modern law of frustration is to be found in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 by Lord Radcliffe:

“So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes 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.*

There is, however, no uncertainty as to the materials upon which the court must proceed. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred" (*Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.*, 72 per Lord Wright)” [underlining added for emphasis.]

If *Davis* expresses the core of the modern doctrine of frustration its wider limits can be found in a very useful concise overview of the core five principles of the doctrine of frustration set out by the Court of Appeal decision *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 10 WLUK 146; [1990] 1 Lloyd's Rep. 1 where Bingham LJ at p.8 stated that

“Certain propositions, established by the highest authority, are not open to question:

1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises (*Hirji Mulji v. Cheong Yue Steamship Co. Ltd.* [1926] A.C.497 at 510; *Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C.265 at 275; *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd.* [1942] A.C.154 at 171). The object of the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances (*Hirji Mulji*, supra, at 510; *Joseph Constantine Steamship Line Line

2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended (Bank Line Ltd. v. Arthur Capel & Co. [1919] A.C.435 at 459; Davis Contractors Ltd. supra, at 715, 727; Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The Nema) [1982] A.C.724 at 752).

3. Frustration brings the contract to an end forthwith, without more and automatically ( Hirji Mulji, supra, at 505, 509; Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [1935] A.C.524 at 527; Joseph Constantine Steamship Line Ltd. supra, at 163, 170, 171, 187, 200; Denny Mott & Dickson Ltd. supra, at 274).

4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ( Hirji Mulji, supra, at 510; Maritime National Fish Ltd. supra, at 530; Joseph Constantine Steamship Ltd. supra, at 170; Denny Mott & Dickson Ltd. supra, at 274; Davis Contractors Ltd. supra, at 728. A frustrating event must be some outside event or extraneous change of situation ( Paal Wilson & Co. A/S v. Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 A.C.854 at 909).

5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it ( Bank Line Ltd. supra, at 452; Joseph Constantine Steamship Ltd. supra, at 171; Davis Contractors Ltd. supra, at 729; The Hannah Blumenthal, supra, at 882,909).”

As we saw in Davis above there is a contextual test for frustration: we judge the abilities of the parties to fulfil their contractual obligations within the radically changed context of the unforeseen circumstances which has transformed the performance of the contract into “a thing radically different from that which was undertaken by the contract”. This approach was reinforced by Lord Simon in National Carriers Ltd v. Panalpina (Northern) Ltd [1981] A.C.675 at 701 were he said:
"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."

The width of factors that a court must consider when deciding if a contract has been frustrated is very wide as stated in a recent case arising out of Brexit: *Canary Wharf (BP4) T1 Limited, Canary Wharf (BP4) T2 Limited, Canary Wharf Management Limited v European Medicines Agency* [2019] EWHC 335 (Ch)\(^9\) Marcus Smith J expressly approved of the multi-factorial approach taken in *The Sea Angel*:

“These factors were identified (with emphasis added) by Rix LJ in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at [111]: "In my judgment, 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."

This breadth of factors is inevitable even if it does mean that it can be difficult to predict which way a court will decide individual cases. Frustration as a doctrine designed to assess the impact of an infinite variety of unforeseen events on the infinite variety of contracts can only be expressed in very general

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\(^9\) The facts were that the European Medicines Agency (EMA) and Canary Wharf Limited entered into a 25-year old lease of premises in London to be used as the EMA’s headquarters. The parties contractually agreed to enter into the lease in 2011 but the lease started in 2014. The lease was governed by English law. Following the UK’s decision to leave the EU, the EU decided to move the EMA’s headquarters to Amsterdam on the basis that, after Brexit, it would not be able to operate from the UK. An EU Regulation was then enacted to that effect in 2018. The EMA argued that Brexit had frustrated the contract but that argument failed before the High Court.
terms “No detailed absolute rules can be stated. A certain elasticity is essential.” Denny Mott & Dickson Ltd. *supra*, per Lord Wright. Or to use the famous words of Donald Rumsford:

“There are things we know that we know. There are known unknowns. That is to say there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know.” The doctrine of frustration is the common law’s way of dealing with the unknown unknowns!

E. THE IMPACT OF COVID-19 ON CONTRACTS and THE SPECIFIC - CATEGORIES OF GROUNDS FRUSTRATION

Although every case is considered on its merits in a multifactorial analysis there are three broad categories of frustrating event\(^\text{10}\): *illegality, impossibility* and *frustration of purpose* all of which are potentially relevant to the impact of Covid 19.

**Illegality**

Supervening Illegality is a ground for frustration of a contract under the fundamental principle that the courts will not enforce an illegal contract.

“It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.” *Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* 1944 SC (HL) 35; [1944] A.C.265 per Lord MacMillan at 41.

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\(^{10}\) The classification of the different grounds of frustration is a matter of some debate among jurists but the present author considers that this threefold classification is the most satisfactory.
In many ways this is the most straightforward criteria to apply, as it is generally clear if a given course of actings is lawful or unlawful. Legality is binary: an act is either legal or it is not. A classic example of supervening illegality is where the outbreak of war makes it illegal to do business with a party based in a foreign country which has become an enemy state, see eg. Cantiere and Fibrosa discussed above. Another common effect of Britain being at war was that numerous pieces of emergency legislation made previously lawful activities unlawful. This was precisely the situation in Denny Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd. where a lease for a timber yard business was frustrated because it had been made unlawful to trade in imported timber:

“Here is an agreement between two parties for carrying on dealings in imported timber. By emergency legislation the importation of timber has been rendered illegal. Neither party can be said to be in default. The further fulfilment of their mutual obligations has been brought to an abrupt stop by an irresistible extraneous cause for which neither party is responsible.” Per Lord MacMillan 1944 SC (HL) 35 at 41.

This is precisely the situation faced today by many businesses in the ‘war’ against Coronavirus. As of late March 2020 in response the ever worsening spread of Covid-19 the UK government moved swiftly to take powers to close many categories of business providing services to the public in order to minimise social interaction and facilitate its policy of social isolation to try and slow the spread of the highly infectious virus. To this end the British government enacted the Coronavirus Act 2020, in force from 25 March 2020, which conferred many new powers upon the British Government and the devolved administrations. For present purposes the most relevant parts of the Act are Section 49 ‘Health protection regulations: Scotland’ and Schedule 19 which contains provisions enabling the Scottish Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere).

11 The Scots Parliament also passed the Coronavirus (Scotland) Act 2020 on 1st April and it received the Royal Assent on 6th April but its provisions although very important are not especially relevant to the present discussion on frustration.
The other relevant provision is Section 52 and Schedule 22 which confers powers on British Government to issue directions in relation to events, gatherings and premises. These authorise the Secretary of State, Scottish Ministers, Welsh Ministers and Executive Office in Northern Ireland to restrict or prohibit gatherings or events and to close and restrict access to premises during a public health response period (which is determined by Ministers based on criteria defined in the Schedule).

The Prohibiting Regulations

For present purposes the most important pieces of prohibiting legislation are two statutory instruments one English, one Scots. *The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020* which came into force at 2 pm on 21st March 2020 in England. The Scottish Government had to wait until the Coronavirus Act came into force on 25 March before it could enact similar legislation acting under the powers granted to it by Section 49 ‘Health protection regulations: Scotland’ and Schedule 19 of the Act. The next day the Scottish Government enacted very similar regulations to the English provisions in the form of the *The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020*, which came into force at 7.15 p.m. on 26th March 2020 in Scotland. For the duration of the “emergency period” under these regulations both the English and Scots statutory instruments forbid an extremely wide variety of businesses from providing services to the public until the government declares that the emergency period has ended. Under the Scottish Regulations, Reg.2 (2) the Scottish Ministers must review the need for restrictions and requirements imposed by these Regulations at least once every 21 days, with the first review being carried out by 16 April 2020 but it seems likely that the emergency period may well last several months or longer but as of early April that is impossible to predict.

The Scottish Regulations, Regs. 3 and 4 and schedule 1 Part 1 forbid the opening of cafes, restaurants and bars and Schedule 1 and Part 2 forbids the following long list of other kinds of businesses from opening:

5. Cinemas.

6. Theatres.
7. Nightclubs.
8. Bingo halls.
9. Concert halls.
10. Museums and galleries
11. Casinos.
12. Betting shops.
13. Spas.
14. Nail, beauty, hair salons and barbers.
15. Massage parlours.
16. Tattoo and piercing parlours.
17. Skating rinks.
18. Indoor fitness studios, gyms, swimming pools, bowling alleys, amusement arcades or soft play areas or other indoor leisure centres or facilities.
19. Funfairs (whether outdoors or indoors).
20. Playgrounds, sports courts and outdoor gyms.

Part 3 of Schedule 1 of the Regulations gives a list of those businesses which are expressly permitted to continue trading. These are:

24. Food retailers, including food markets, supermarkets, convenience stores and corner shops.
25. Off licenses and licensed shops selling alcohol (including breweries).
26. Pharmacies (including non-dispensing pharmacies) and chemists.
27. Newsagents.
28. Homeware, building supplies and hardware stores.
29. Petrol stations.
30. Car repair and MOT services.
31. Bicycle shops.

32. Taxi or vehicle hire businesses.

33. Banks, building societies, credit unions, short-term loan providers and cash points.

34. Post offices.

35. Funeral directors.

36. Laundrettes and dry cleaners.

37. Dental services, opticians, audiology services, chiropody services, chiropractors, osteopaths and other medical or health services, including services relating to mental health.

38. Veterinary surgeons and pet shops.

39. Agricultural supplies shops.

40. Storage and distribution facilities, including delivery drop off or collection points, where the facilities are in the premises of a business included in this Part.

41. Car parks.

42. Public toilets.

Even these permitted businesses must enforce social distancing on their customers under Reg 4(1). Any business not expressly permitted under Part

12 Reg 4.—(1) A person who is responsible for carrying on a business or providing a service listed in Part 3 of schedule 1 must, during the emergency period—

(a) take all reasonable measures to ensure that a distance of two metres is maintained between any persons on the premises (except between two members of the same household, or a carer and the person assisted by the carer),

(b) take all reasonable measures to ensure that it only admits people to its premises in sufficiently small numbers to make it possible to maintain that distance,

(c) take all reasonable measures to ensure that a distance of two metres is maintained between any person waiting to enter its premises (except between two members of the same household, or a carer and the person assisted by the carer).
3 may still trade but only online or by delivery Reg.4(2). Hotels and similar businesses are prohibited under Reg.4(3)

Given that none of the prohibited types of businesses listed in schedule 1 Parts 1 and 2 and Reg. 4(3) may operate legally in Scotland from the 26 March until further notice their operation as a business has clearly been frustrated on grounds of illegality or, if there is a force majeure clause in the contract, that clause will almost certainly have been triggered (see discussion above about the relation between force majeure clauses and frustration). A useful definition of frustrating illegality is given in Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335 (Ch).

“170. It was contended by CW that the only sort of illegality capable of frustrating a contract was illegality on “public policy” grounds as considered in Patel v. Mirza. I reject that contention. Chitty makes clear that “[i]n Patel v. Mirza the court was addressing illegality in the narrower sense identified above, viz contracts that somehow involve a legal wrong. The decision seems not to affect the enforceability of contracts that are contrary to public policy for other reasons...”. Supervening illegality means more than simply Patel v. Mirza type illegality: it can arise where the performance of a contract becomes unlawful for one party by reason of a supervening change in law or by reason

13 Reg.4 (2) A person who is responsible for carrying on a business not listed in Part 3 of schedule 1 and which offers goods for sale or hire in a shop or provides library services must, during the emergency period—

(a) cease to carry on that business or provide that service except by making deliveries or otherwise providing services in response to orders received—

(i) through a website, or otherwise by on-line communication, (ii) by telephone, including orders by text message, or

(iii) by post,

(b) close any premises which are not required to carry out its business or provide its services as permitted by sub-paragraph (a),

(c) cease to admit any person to its premises who is not required to carry on its business or provide its services as permitted by sub-paragraph (a).

14 Reg. 4(4) Subject to paragraph (5), a person who is responsible for carrying on a business consisting of the provision of holiday accommodation, whether in a hotel, hostel, bed and breakfast accommodation, holiday apartment, home, cottage or bungalow, campsite, caravan park or boarding house, must cease to carry on that business during the emergency period.
of a supervening change of circumstance rendering that which was previously lawful unlawful.” [underlining added]

This is clearly the situation faced by many businesses today, where as a result of the regulations mentioned above to offer their services is illegal. So any owner whose business is now illegal can potentially apply the doctrine of frustration to any of the contracts it has agreed in order to conduct its now illegal business. It is no exaggeration to say that the effect of this blanket illegality will be catastrophic for many business and their contracts: all contracts to do illegal business are frustrated and the number of such business is legion. A simple and straightforward example of frustration would be a singer or actor who had contracted to perform in April 2020. As all theaters have now been closed their contract to perform in a theatre is frustrated and they cannot claim their fee and indeed may well be obliged to return any advance payment.

Prohibited Businesses

At the time of writing this article in early April 2020 it has become illegal in the UK to run a pub, café or restaurant or other prohibited business. For conciseness I will refer to these all collectively as ‘prohibited businesses’. The income for all of these businesses is now zero, as they have no customers, but at least the doctrine of frustration will allow the owners to avoid any the contracts they have made to conduct their now illegal business. To conduct any of these businesses the owners must have made contracts to purchase supplies (contracts of sale), employ staff (contracts of employment) and rent premises (leases) but all of these contracts are now frustrated and instantly brought to an end albeit subject to the =courts’ powers to rectify any unjust enrichment.

Contracts of Sale:
The owners are under no obligation to pay for any future supplies even if there was a long term contract but conversely for past supplies they may be able to claim reimbursement for sums paid in advance on grounds of unjust enrichment or be obliged to return the goods already delivered or to pay for them.

Contracts of employment:
As these businesses have ceased to be able to operate legally the owners are
under no obligation to pay employees for any future work even where they have a long term contract but they must for all services already provided.

**Leases:**
Payment of rent on a lease is often one of the most expensive obligations occurred by a commercial business like a pub or shop. Properties are usually rented out for significant periods of time ranging from months to centuries. This is an area where Scots and English Law differ radically: Scots law allows frustration of a lease but, at least in the past English law makes it almost impossible and still sets the bar for frustration higher than Scots law. It will therefore be crucial if the contract is governed by Scots or English law. The governing law is determined by the physical location in Scotland or England respectively of the leased property.

**English leases**
English law is very reluctant to find a lease to be frustrated, indeed there is no reported case where this has occurred. In *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221 the House of Lords decided unanimously that on the facts there had been no frustration of a long-term building lease by the imposition of building restrictions following the outbreak of war. On the question of principle, the House of Lords was evenly divided with Viscount Simon and Lord Wright willing to consider the possibility that on very rare occasions a lease may be frustrated, as, for instance, if some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. By contrast Lord Russell and Lord Goddard thought that on principle it is impossible for lease to be frustrated. They reached this conclusion because they held that a lease is more than a mere contract in that it creates an estate in the land vested in the lessee, and that this estate in the land could never be frustrated, even though some contractual obligations under the lease might be suspended by wartime regulations. This precedent would point strongly to the non frustration of leases on account of the Coronavirus emergency legislation but English law has moved since then. In *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 the majority in the House of Lords agreed with the reasoning of Viscount Simon and Lord Wright in the *Cricklewood* case, and thus held that the doctrine of frustration is, in principle, applicable to leases; but several of their Lordships considered that the doctrine would “hardly ever”¹⁵ be applied

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¹⁵ “The point, though one of principle, is a narrow one. It is the difference immortalised in H.M.S. Pinafore between “never” and “hardly ever,” since both Viscount Simon and Lord Wright clearly conceded that, though they thought the doctrine applicable in principle to leases, the cases in which it could properly be applied must be extremely rare.” *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 Lord Hailsham LC at 688-9.
to a lease. It will be interesting to see if the English courts are more sympathetic to frustration of leases in the current context, perhaps now is the occasion for the “hardly ever” to actually occur! Two further points can be derived from National Carriers one making it easier to find frustration, the other harder. The following passage in Corbin, Contracts was cited with approval in the House of Lords in National Carriers: “If there was one principal use contemplated by the lessee, known to the lessor, and one that played a large part in fixing rental value, a governmental prohibition or prevention of that use has been held to discharge the lessee from his duty to pay the rent. It is otherwise if other substantial uses, permitted by the lease and in the contemplation of the parties, remain possible to the lessee.” This would seem to make it easier to hold a commercial lease for a shop or a pub frustrated where the lease specifies that a pub or shop is the sole or principal use of the premises contemplated in the lease.

On the other hand the English authorities, to a far greater degree than the Scots authorities, take the duration of the unexpired term of the lease set against the likely future duration of the frustrating event into account. The English authorities tend to the view that a potentially frustrating event which causes an interruption in the enjoyment of expected use of the premises by the lessee, will nevertheless not frustrate the lease unless the interruption is expected to last for the whole of the unexpired term of the lease, or, at least, for a significant portion of that unexpired term. We might call this the “double duration” test: the court considers both the certain legal fact of the lease’s future length in the context of the uncertain empirical fact of the likely duration of the lease. This is a test which is favorable to upholding the lease and to denying the application of the doctrine of frustration. This result can be seen in the two leading cases of Cricklewood and National Carriers already mentioned above.

In Cricklewood, the lessee under a 99-year building lease claimed that wartime building restrictions had frustrated the lease. The House of Lords held that there had been no frustration, since the lease had over 90 years to run when the war broke out, and that it was unlikely that the war would last for more than a small fraction of the whole term. Likewise, in National Carriers Ltd v

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This is a reference to Captain Corcoan in HMS Pinafore who sings
CAPTAIN: “Bad language or abuse, I never, never use, Whatever the emergency;
Though "Bother it" I may Occasionally say, I never use a big, big D—”
Panalpina (Northern) Ltd the tenant held a 10-year lease of a warehouse and the frustrating event was that a temporary order made by the City Council closed the street which gave the only access to the warehouse, so making it impossible to use as a warehouse. However, the House of Lords held that on the facts the lease was not frustrated because the closure was expected to last only for a year or a little longer, which would still allow the lease to run for three more years after the street re-opened. As Lord Simon of Glaisdale remarked that when deciding if frustration applies: “In a lease, as in a licence or a demise charter, the length of the unexpired term will be a potent factor.” On the facts however his lordship concluded that the lease was not frustrated as “The interruption would be only one sixth of the total term.”

In Canary Wharf Smith J made comments which indicate that the English courts may now be more willing to allow leases to be frustrated:

“194. It may be doubted whether Lush J’s second point – namely, that the defendant had acquired a property interest, in the form of a lease, which was unaffected by the supervening illegality – remains good or reliable law in light of Panalpina, where the House of Lords held that, at least in theory, a lease that continued to subsist as a property interest could nevertheless be frustrated.”

More generally, the concept of the estate, which prior to National Carriers which provided such a conceptual obstacle to the extension of the doctrine to leases, is no longer viewed as the foundation of that relationship but merely one of its incidents. Indeed, the judicial trend in English law appears to be towards a general assimilation of leases with other contracts. It is interesting, for example, to observe that the doctrine of disclaimer of a landlord’s title has been held to be analogous to the doctrine of repudiation of contract. 16

Scots Leases

Scots Law, by stark contrast with English Law, has no inherent difficulty with recognizing that leases may be frustrated like any other kind of contract, not least because it has no doctrine of separate estates in land to confuse the issue. In Tay Salmon Fisheries Co Ltd v Speedie 1929 SC 593 a 19 year lease of

salmon fishings was held frustrated when the RAF took using statutory powers over the land for target practice thus making the fishings incapable of possession for the purpose of the lease even although target practice was only occasional. In a similar vein in Denny, Mott & Dickson (supra) a long lease on a timber yard was held frustrated by a 1939 emergency order arising out of the war.

“...many of the recent cases have arisen from the supervention of emergency legislation rendering the implement of the contract illegal. It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.” Per Lord Macmillan

The duration of emergency regulation prohibitions is inevitably uncertain and unknowable and on this situation Lord Wright made the following very useful remarks in Denny, Mott & Dickson:

“It is true that the agreement [the lease] was for an indefinite time, and that the war might end within a comparatively short period. The position must be determined as at the date when the parties came to know of the cause of the prevention and the probabilities of its length as they appeared at the date of the Order, but subsequent events ascertained at or before the trial may assist in showing what the probabilities really were (as Lord Sumner said *47 in Bank Line, Ltd. v. Arthur Capel & Co.). In addition, there is to be remembered the principle stated by Lush, J., in Geipel v. Smith, that “a state of war must be presumed to be likely to continue long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure.” It is true that Lush, J., was there referring to a single definite adventure, not to a continuous trading, but the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period. Lord Shaw emphasised this principle in the Bank Line case, and so did Lord Sumner. This, I think, is the true basis of the rule. It does not depend simply on the consideration that, when the interruption ceases, conditions of performance may be different, though that may also be worth dwelling on in certain cases, as in Metropolitan Water Board v. Dick, Kerr & Co., Ltd., where it was said that the interruption destroyed the identity of the performance contracted for.”
The Scots approach to the frustration of leases, which we might call for convenience the ‘sterility from uncertainty’ test is in complete contrast with ‘double duration’ test approach applied by the English Courts in *Cricklewood* and *National Carriers* and discussed above. It is submitted that the Scots approach fits better with both the aim of frustration to deliver justice to parties in unforeseen events (see quotation from *The Hannah Blumenthal* [1983] 1 A.C. 854 at 881 per Griffiths LJ above) and also fits better within the general operation of the doctrine of contractual frustration. If we consider the impact of *The Health Protection (Coronavirus) (Restrictions) (Scotland)* Regulations 2020 and *The Health Protection (Coronavirus, Business Closure) (England) Regulations 2020* respectively on prohibited businesses we can see the likely difference in the approach to be taken by the two different jurisdictions.

In Scotland it is submitted that, as of April 2020, there is “a reasonable probability from the nature of the interruption” viz the continued prohibition by the regulations of services to the public such as running pubs, cafes, restaurants and many shops and other businesses in order to inhibit the spread of Covid-19 that this prohibition is such that in the words of Lord Wright in *Denny, Mott & Dickson* “that it will be of indefinite duration,” and accordingly for both tenants and landlords that “they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period.” Indeed as of April 2020 it seems that pubs and cafes may not be allowed to operate until the end of the year, if then. Accordingly, if a Scots lease for premises is let for the express purpose of conducting a prohibited business then there is a strong argument that such leases were ended when *The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020* came into force at 7.15 p.m. on 26th March 2020. The effect of this is that the tenant of frustrated lease will have no obligation to pay for future occupation of the premises, but can claim back any sums paid in advance under the principle of unjust enrichment. With leases there is always an issue of how much of a delay constitutes frustration but it is submitted that the ‘sterility through uncertainty’ principle discussed above (*Denny, Mott & Dickson*) would apply thus creating a rebuttable presumption in favour of frustration of the lease.
But if the lease is governed by English law, because the property is located in England, then frustration is relatively unlikely to be available to the tenant and they will continue to be obliged to pay the rent because of the ‘double duration’ test so far favored by the English courts. On the other hand, given the cataclysmic impact of the frustrating event that is Covid-19 and its associated legislation making the conduct of many businesses illegal it is possible that the English courts might finally adopt a less strict approach to the frustration of leases by focusing less on the ‘principle’ of an estate in land and more on the ‘fact’ of the economic hardship caused by the proscribing legislation but they will also have to move away from the ‘double duration’ test and embrace the ‘sterility from uncertainty’ criteria used by the Scots courts.

In practice if the English courts will not allow frustration of leases then, in the face of the economic reality situation of high ongoing rents and no current income it is likely many owners of prohibited businesses will put their business into administration or declare themselves bankrupt in order to escape their liability for rent on premises which they can no longer trade from. A wise landlord would waive their prohibited business tenants’ rent for not only the duration of the prescription of the business but also for at least 6 months afterwards to allow them to rebuild their business.

**Impossibility**

The law recognises two forms of physical impossibility: destruction of subject matter and for personal contracts the death or illness of the party. Physical impossibility is unlikely to be an issue in the current Coronavirus crisis but death and illness are very likely to be relevant, given the high numbers that are falling ill and dying. Obviously, this is only potentially an issue if the business of the employer in question has not been frustrated so here we are concerned with frustration by the employee or an independent contractor. If a person has agreed to provide a service and they are unable to do so because of death or illness that would afford grounds for frustration.

The rule for the death of a person contracted to perform a personal service was stated by Pollock C.B. in *Hall v Wright*:

“All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he

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17 Such as occurred in *Taylor v Caldwell* (1863) 3 B&Ś 826 where the premises were destroyed shortly before they were contracted to be used.
shall be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.”

So for example when Michael Jackson died in 2009 shortly after announcing a series of farewell concerts in the O2 Arena in London that contract was clearly frustrated: only Michael Jackson could perform his unique show.

In *Robinson v Davison* (1870-71) L.R. 6 Ex. 269 a Mrs Davison was contracted to play the piano at a concert to be given by the plaintiff on a specified day. The contract was held to be frustrated because on the day in question she was unable to perform through illness. On the other hand the court in *Condor v The Barron Knights Ltd* [1966] 1 WLR 87 held that a long term contract of employment was not frustrated state by illness but that the employee had been fairly dismissed for breach of contract in refusing to perform. This decision seems overly harsh to me. The leading modern case is *Marshall v Harland & Wolff Ltd* [1972] I.C.R. 10 which held that the test of whether a contract of employment has been frustrated by the employee’s illness/incapacity depends on whether the illness or incapacity was of such a nature, or likely to continue for such a period, that future performance of his contractual duties would be either impossible or radically different from that undertaken by him and agreed to be accepted by the employer by the agreed terms of his employment. So the court will consider the nature of the illness, the period of time involved and what performance of the contract would look like in the future. The *Marshall* test was further developed in *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] ICR 260 by Phillips J where he said of the *Marshall* test: ‘That is helpful, but one needs to know in what kind of circumstances can it be said that further performance of his obligations in the future will be possible? It seems to us that an important question to be asked in cases such as the present – we are not suggesting that it is the only question – is: ‘has the time arrived when the employer can no longer reasonably be expected to keep the absent employee’s post open for him?’ And ‘Among the matters to be taken into account in such a case in reaching a decision are these: (1) the length of the previous employment; (2) how long it had been expected that the employment would continue; (3) the nature of the job; (4) the nature, length and effect of the illness or disabling event; (5) the need of the employer for the work to be done, and the need for a replacement to do it; (6) the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replacement employee; (7) whether wages have continued to be paid; (8) the acts including the dismissal of, or failure to dismiss, the employee; and (9) whether in all the circumstances a reasonable employer could be expected to wait any longer.’
The health impact of infection with the Coronavirus for most people is fairly short term and so frustration would not be allowed in those circumstances but where the illness has caused permanent long term physical impairment, say by severe lung damage for an employee with a physical job it is certainly possible for the contract to be frustrated, see by analogy Warner v Armfield Retail & Leisure Ltd UKEAT/0376/12/SM where impairment of abilities caused by a stroke resulted in frustration of the employment.

Where goods were contracted to be supplied from abroad then if those goods were unavailable on time it might be possible to argue frustration but it is more likely the at the parties would rely of the force majeure clause the contract almost certainly has.

**Performance Radically different.**

This is the most uncertain of the three grounds of frustration. Its core idea is set out in the quotation by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 quoted above “…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.”

This principle could be invoked for contracts whose performance although not illegal has been prevented for some other significant unexpected reason beyond the control of the parties. One possible example might be where an employee or contractor is unable to perform their contractual duties because of their childcare responsibilities. Children must be looked after by adults and given that all schools, nurseries and childcare facilities have been closed by the government then it is impossible for parents to find alternative arrangements especially when combined with the obligation for households to socially isolate and so it may be impossible for the employee to go to work. Another example might be where goods have not been delivered because the manufacturer is in lockdown.

**CONCLUSION**

Ultimately no one knows how long the Coronavirus lock down will last but it seems very likely that many businesses will seek to invoke frustration to free them of their business liabilities. It will be interesting to see how the Courts both north and south of the border chose to develop the law. This is the greatest economic challenge in many years and it is to be hoped that the courts will rise to the change by developing the law of frustration.