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ARE CONTRACTS ENFORCEABLE DESPITE COVID-19? PART 2: THE APPLICABLE LEGAL DOCTRINES

The new realities of our daily lives continue to evolve as we attempt to deal with the novel coronavirus which will continue to have fundamental impacts on many of our businesses and contractual relationships (both written and oral). In this time of uncertainty, what remains certain is the lack of clarity with which we see the effects and ramifications of the coronavirus on these relationships. Last week our colleagues introduced a weekly publication from JSS Barristers with the goal of providing answers to critical questions related to the enforceability of contracts in the COVID-19 world.

This week's publication focuses on the applicable legal doctrines outside of standard contractual *force majeure* clauses. In essence, we aim to answer the questions:

"What happens if I don't have a *force majeure* clause in my contract, is a frustration claim still possible?" and,

"What are the Applicable legal doctrines I can rely upon?"

Force majeure clauses, frustration, and other applicable legal doctrines

Generally, *force majeure* clauses are included in contracts to account for circumstances where a party cannot perform the contract for reasons outside of its control and are not as narrowly defined as circumstances giving rise to the common law and equitable doctrine of frustration (discussed in further detail below). *Force majeure* clauses will be more fulsomely interpreted in next week's publication, but, generally speaking, they operate to absolve the non-performing party of liability for its failure to meet contractual obligations as a result of the extenuating circumstance. The effect of a *force majeure* clause will depend heavily on the language of the provision or the surrounding circumstances of the contract. Similarly, other equitable doctrines like waiver or estoppel may also be available to absolve the non-performing party of liability but those instances will be highly fact specific and are not within the scope of this publication. If the foregoing options are not available, a party may still attempt to rely on the common law "doctrine of frustration."

If there is not a *force majeure* clause, is a frustration claim possible?

The short answer is yes. Without a contractual *force majeure* clause, a party may still attempt to rely on the doctrine of "impossibility of performance" or as it is now more generally called, the "doctrine of frustration." [1] The doctrine of frustration of contract in Alberta has been codified in the *Frustrated Contracts Act* ("***FCA***")[2]. The *FCA* is rarely cited in Alberta (a pattern that will likely shift in the coming months) and generally only applies in situations where "unforeseen actions by third parties makes the agreement impossible to perform." [3] This language stems from the seminal case on the doctrine, *Taylor v Caldwell*, wherein the defendant entered into an agreement with the plaintiff to use the defendant's music hall on a fixed date for a concert. However, the defendant's music hall was destroyed in a fire before the concert could happen. The defendant was not held responsible for damages stemming from the repudiated contract with the plaintiff. The Court in *Taylor v Caldwell* found that an implied term of the agreement was that the music hall would actually exist at the contracted time of performance.[4]

The Supreme Court of Canada has established that frustration occurs when a situation has arisen for which the parties made no provision in the contract, and performance of the contract becomes "a thing radically different from that which was undertaken by the contract".[5] As noted by Justice Binnie in *Naylor Group Inc v Ellis-Don Construction Ltd*, in frustration cases, the Court is asked to intervene to relieve the parties of their bargain because a supervening event has occurred without the fault of either party. [6]

Of note, for those attempting to rely on the *FCA* is that, if applicable, the *FCA* expressly requires severance of the contract at issue. This means that, if it appears to the Court that a part of the contract can be severed properly from the remainder of the contract, that portion, or parts, will be read as a separate and subsisting agreement between the parties. [7]

If there is a *force majeure* clause, is a frustration claim possible?

The short answer is also yes, but in such instances, frustration may be difficult to prove. As noted above, the doctrine of frustration has traditionally been applied sparsely and quite narrowly. The infrequent application of the doctrine heavily influenced the development and implementation of what is now standard contractual *force majeure* clauses in contracts. Accordingly, if a claim under a contractual *force majeure* was found faulty, it will likely be difficult to substantiate a similar claim in common law or under the *FCA*. Accordingly, whether a common law claim of frustration will be successful outside of the contractual provision will vary depending on the particular contractual terms at issue and the surrounding circumstances therein.

1 *Capital Quality Homes Ltd v Colwyn Construction Ltd*, 1975 CanLII 726 (ONCA)
2 *Frustrated Contracts Act*, RSA 2000, c F-27 (the "***FCA***")
3 *Clay v Bovaird*, 2003 ABQB 327 at para 11; *FCA* at s 2
4 *Taylor v Caldwell*, [1863] EWHC QB J1, (1863) 3 B & S 826, 122 ER 30 ("***Taylor v Caldwell***")
5 *Naylor Group Inc v Ellis-Don Construction Ltd*, [2001] 2 SCR 943 ("***Naylor Group Inc v Ellis-Don Construction Ltd***") at para 53; See also *Peter Kiewit Sons' Co v Eakins Construction Ltd*, [1960] SCR 361, per Judson J., at 368, quoting *Davis Contractors Ltd v Fareham Urban District Council*, [1956] AC 696 (HL) at 729
6 *Naylor Group Inc v Ellis-Don Construction Ltd* at para 56
7 FCA at s 8(b)

While JSS Barristers has acted as counsel on many *force majeure* and similar disputes, each involving tens of millions of dollars, the quantum of the claim does not, in and of itself, affect the application of these principles. Next week our colleagues will be focusing on the interpretation of *force majeure* clauses.

Stay tuned and stay safe.

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