A LOOK AT THE COVID-19 LOCKDOWN AS AN EVENT OF FRUSTRATION IN LEASE /TENANCY AGREEMENTS

Uganda faced its first COVID-19 lockdown ("the lockdown") on 18th March 2020 and it was only until 24th January 2022 that all aspects of the economy were fully "re-opened". In the post lockdown era, it has become increasingly common in cases filed in Uganda courts, for parties to rely on the lockdown as a frustrating event that discharges them from their responsibilities under contracts. This article analyses the viability of this argument with specific focus on leases/tenancy agreements.

THE DOCTRINE OF FRUSTRATION

Juxtaposition with the doctrine of *force majeure*

In the wake of COVID-19 lockdowns around the world, a lot has been said about the doctrine of *force majeure*, which is similar to the doctrine of frustration in the sense that they both presuppose the occurrence of an unexpected event that is of no fault of either party to a contract and may discharge parties or suspend the contract. This article focuses on frustration which, in contrast to *force majeure*, need not be expressly provided for in a contract. It can be relied upon as an implied term to a contract while *force majeure* cannot.

Case law history of the doctrine of frustration in relation to leases/tenancies

The doctrine of frustration has its roots in common law and was later codified (written out/summarised) in Section 66 of the Contracts Act, 2010 of Uganda. In this article, there will be repeated reference to English case law which is persuasive in Uganda courts.

Lord Radcliffe of the House of Lords in the case of **Davis Contractors Ltd vs Fareham Urban District Council [1956] 2 All ER 145 at page 160** defined frustration as follows:

> *"… 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."*

Lord Radcliffe was quite cryptic in the above quote but to put it simply, frustration, to him, rendered a contract so different from what was originally intended that it was incapable of performance.

Prior to 1980, the courts in England took the view that frustration as a tool of discharge from contractual obligation was inapplicable to leases/tenancies. Most of the cases referred to below speak of leases, but the same arguments can, by extension, be made for tenancies. The difference between the two is negligible.

The general rule in common law as far back as 1647, when the frustration doctrine had not yet been birthed, was laid down in the case of **Paradine vs Jane [1558-1774] All ER Rep 172**. In this case, a tenant who was unable to occupy the premises let to him due to an ongoing civil war tried to excuse himself from payment of rent. It was held that the *"performance of absolute promises is not excused by supervening impossibility of performance"*. Meaning that once one has made an absolute commitment to pay rent for premises, the fact of inability to occupy the premises is no excuse not to pay rent. This set the tone for other jurists in the development of jurisprudence in this area and hopefully, the justification is made clearer as you read on.

The doctrine of frustration then appears to have then been developed by Blackburn J in the 1863 case of **Taylor vs Caldwell [1861-73] All ER 24** and several English decisions then followed. The consistent theme was that the doctrine of frustration does not apply to leases as they contain an unconditional undertaking to pay rent. The justification according to these cases, was that leases/tenancies apply to real property as opposed to chattels and leases/tenancies involve a divestiture (transfer) of title/rights in immovable property. Therefore, a tenant cannot say he/she has not obtained the said title/right to the property regardless of whether the tenant has been able to physically access the premises. That the mere signing of the lease or tenancy agreement vests in the lessee/tenant some sort of title/right of occupation for which the lessee/tenant must pay.

Over the years a few dissenting voices on the issue of applicability of frustration to leases were drowned out by the overwhelming majority who stood by the position that the doctrine is completely inapplicable to leases. It was only in 1945 that the House of Lords came close to a departure from that long-standing position. The question came before it in the case of **Cricklewood Property and Investment Trust Ltd vs Leightons Investment Trust Ltd [1945] 1 All ER 252**. Four (4) of the quorum of five (5) Lords were split down the middle before Lord Porter swung the vote in favour of maintaining the position that frustration is inapplicable to leases. Lord Russel and Lord Goddard's views were in favour of maintaining the position while Viscount Simon LC and Lord Wright had chosen to turn the tide on the principle.

<u>The tide finally turns</u>

It came as no surprise, in 1980 when the dictum of Viscount Simon LC and Lord Wright (in the **Cricklewood case** (**supra**)) became the clarion call for the Lords in the leading case of **National Carriers Ltd vs Panalpina (Northern) Ltd, [1981] 1 All ER 161** in which the position of law as it was known was overturned.

In the **National Carriers case** the Appellant entered a ten (10) year lease commencing 1st January 1974 for use of the Respondent's warehouse located on a street called Kingston Street. As fate would have it, the only access to the warehouse on Kingston Street was blocked in 1979 due to the danger posed by a dilapidated building across the street from the warehouse that had to be demolished. The said

building was what is referred to in England as a "listed building" which means that it had some historical significance and thus could not be demolished without the consent of the Secretary of State for the Environment. Further, if demolition was objected to by local conservationists [as in fact, happened], this consent would not be granted without holding a public local inquiry. It therefore took close to two (2) years to obtain the consent and to demolish the building. The access to the warehouse was reopened in or about January 1981 leaving only three (3) years on the ten (10) year lease.

The Respondent (landlord) filed a suit against the Appellant (tenant) for unpaid rent for the two (2) year period during which the Appellant had no access to the warehouse. The Appellant's defence was that the blocking of the access to the warehouse for two (2) years was a frustrating event that rendered the contract impossible to honour. That the tenant should not be required to pay rent for a period in which it did not use the warehouse.

The trial court and the first appellate court ruled in favour of the Respondent i.e., that the Appellants had to pay the rent for the two (2) years in question. The basis of the decision by the two (2) courts was that they were bound by the precedent of the higher courts which had held that the doctrine of frustration is inapplicable to leases. The Appellant thus filed this appeal to the House of Lords to determine two (2) issues; (i) whether the doctrine of frustration applies to leases, and (ii) whether in this case, the lease was frustrated.

On issue (i), the House of Lords departed from its previous position and concluded that the doctrine of frustration can apply to leases, but that it is in "extremely rare" circumstances that it will be successfully applied. The Lords, to assist them arrive at this conclusion, asked a pertinent question, *"whether there is anything in the nature of an executed lease which prevents the doctrine of frustration, however formulated, from applying to it…*". They concluded that there is nothing.

Whilst the House of Lords was unanimous that the doctrine of frustration can apply to leases, they emphasized that it is a case of *"hardly ever"* as opposed to *"never"*. Meaning that the said doctrine "hardly ever" applies to leases, but it cannot be that it "never" applies. In determining issue (ii), **Lord Hailsham of St Marylebone LC**, in his concluding remarks compounds the point as follows:

> *"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 suitable deterrent to the litigious and eager to make legal history by being first in this field."*

Importantly, the House of Lords also posited that the effect of frustration is to terminate a contract and not suspend it. This is why any event that simply suspends the performance of an obligation under a contract cannot be said, strictly speaking, to be a frustrating event. So, if your argument, as a tenant, is that the lockdown suspended your rent obligations for a given period, but you can now continue the tenancy/lease after the lockdown was lifted then you cannot rely on frustration. Frustration should result in termination of the lease/tenancy.

In his concluding remarks, **Lord Wilberforce** also answers issue (ii) by holding that:

> *"continuance of the term after the interruption [temporary blockage of access to the warehouse] makes it impossible for the lessee to contend that the lease has been brought to an end… The obligation to pay rent under the lease is unconditional, …. I am of the opinion that the lessees have no defence to the action for rent…"*

Conclusion

It is now a clear position of the law that the doctrine of frustration can apply to leases/tenancies, but it is in the rarest of cases that it will be successfully applied. So, the common excuse by tenants or lessees who seek to rely on the lockdown not to pay rent for the period when they were unable to access the premises let out to them, is most likely to fail for the reasons given above, unless exceptional circumstances can be demonstrated. The exceptional circumstances must be that the lockdown indeed frustrated the contract by causing it to be completely incapable of being performed. It appears from the above authorities that not being able to access the premises in itself, does not render the lease/tenancy frustrated. In a recent decision by **Justice Basaza-Wasswa** in the case of **H.C.C.S No. 58 of 2021, Bukenya Vincent T/A Mc Don Kindergarten & Day Care vs Sajjad Butt**, while rejecting a "lockdown defence" by a tenant extensively relied on the principle in the **National Carriers case**.

That said, I will leave you with a caution that was aptly made by our **Justice Richard Wejuli Wabwire** in the case of **Jackson Kabikire Mubangizi vs Housing Finance Bank, Misc. Application No. 961 of 2020** when dismissing a "lockdown defence" by a debtor who sought to escape liability. The caution is that whilst courts take judicial notice of the impact of COVID-19 on business, each case must be decided on its own facts.

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