

AUSTRALIA / JUDGMENT

# Cao v ISPT Pty Ltd [2024] NSWCA 188

COURT

Court of Appeal

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

## Source record

Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Cao v ISPT Pty Ltd [2024] NSWCA 188

Hearing dates: 16 May 2024

Date of orders: 08 August 2024

Decision date: 08 August 2024

Before: Meagher JA at [1];

Kirk JA at [2];

Griffiths AJA at [73]

Decision: 1. Appeal dismissed.

2. Appellants to pay the respondents' costs of the appeal.

Catchwords: CONTRACTS – Construction of a commercial lease – Whether COVID public health restrictions prevented tenant from "opening" the premises for business – Paramount clause to be construed before paramountcy can take effect – Not construed to require illegal activity

CONTRACTS – Termination – Frustration – Impossibility of performance – Frustration does not apply as COVID public health orders as supervening event was risk for which tenant had assumed responsibility under the lease – Relevant orders did not require radical or fundamental change in what contracted for in any event

Legislation Cited: Biosecurity Act 2015 (Cth), Ch 8 Pt 2

Fair Work Act 2009 (Cth), s 789GDA

Frustrated Contracts Act 1978 (NSW)

Public Health Act 2010 (NSW)

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth)

Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW)

Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) (2020) (NSW), cl 8A

Public Health Bill 2010

Retail and Other Commercial Lease (COVID-19) Regulation 2020 (NSW)

Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 (NSW)

Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020 (NSW)

Cases Cited: Bank Line Ltd v Arthur Capel &amp; Co [1919] AC 435

Brisbane City Council v Group Projects Pty Ltd [1979] HCA 54; (1979) 145 CLR 143

Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited [2018] NSWCA 126  
City of Subiaco v Heytesbury Properties Pty Ltd [2001] WASCA 140; (2001) 24 WAR 146  
Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337  
Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696  
Edwinton Commercial Corporation & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep 517  
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640  
HDI Global Specialty SE v Wonkana No 3 Pty Ltd [2020] NSWCA 296; (2020) 104 NSWLR 634  
Housing Commission (NSW) v Falconer [1981] 1 NSWLR 547  
J & P Marlow (No 2) Pty Ltd v Hayes & McCabe [2023] NSWCA 117; (2023) 112 NSWLR 29  
Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd [2023] HCA 6; (2023) 276 CLR 500  
LCA Marrickville Pty Ltd v Swiss International SE [2022] FCAFC 17; (2022) 290 FCR 435  
Lee Chee Wei v Tan Hor Peow Victor [2007] 3 SLR 537; [2007] SGCA 22  
London & Northern Estates Co v Schlesinger [1916] 1 KB 20  
National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675  
oOh! Media Roadside Pty Ltd (Formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd [2011] VSCA 116; (2011) 32 VR 255  
Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724  
Qantas Airways Ltd v Flight Attendants' Association of Australia [2020] FCAFC 227; (2020) 282 FCR 243  
Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance [2020] FCAFC 228; (2020) 282 FCR 561  
Ross v IceTV [2010] NSWCA 272  
Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45  
Scanlan's New Neon Ltd v Tooheys Ltd [1943] HCA 43; (1943) 67 CLR 169  
Simic v New South Wales Land and Housing Corporation [2016] HCA 47; (2016) 260 CLR 85  
Star Entertainment Group Ltd v Chubb Insurance Australia Ltd [2022] FCAFC 16; (2022) 400 ALR 25  
Woolworths Group Ltd v Gazcorp Pty Ltd [2022] NSWCA 19  
Texts Cited: Jane Swanton, "Discharge of Contracts by Frustration" (1983) 57 ALJ 201  
NC Seddon and RA Bigwood, Cheshire & Fifoot: Law of Contract (11th Austn edition, LexisNexis, 2017)  
New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 24 November 2010  
The Hon John Logan, "Pandemic Justice – An Historical Perspective" (2020) 94 ALJ 709  
Category: Principal judgment  
Parties: Howard Cao (First Appellant)  
Yuan Zhao (Second Appellant)  
ISPT Pty Ltd (First Respondent)  
AWPF Management Pty Ltd (Second Respondent)  
Representation: Counsel:  
T Tzovaras (sol) (Appellants)  
J Mee (Respondents)

## Solicitors:

Tzovaras Legal (Australia) Pty Ltd (Appellants)

Holding Redlich (Respondents)

File Number(s): 2023/00429523

Publication restriction: Nil

Decision under appeal Court or tribunal: Supreme Court

Jurisdiction: Equity

Citation: ISPT Pty Ltd and AWPf Management No. 2 Pty Ltd v Cao and Zhao [2023] NSWSC 1115

Date of Decision: 14 September 2023

Before: Nixon J

File Number(s): 2021/348454

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

## HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellants were guarantors of a Tenant's obligations under a three year Lease which had commenced on 1 October 2019. The Tenant ran a large restaurant in a shopping centre in the Sydney CBD which was owned by the respondents. The Tenant's restaurant closed on 23 March 2020 when the first of a series of State COVID-19 public health orders came into effect. It never re-opened. The Tenant went into liquidation in May 2021. The respondents made a claim in the Supreme Court against the appellants for outstanding arrears of rent and other amounts owing under the Lease. In response the appellants argued that the Lease was frustrated from 23 March 2020 onwards. The primary judge, Nixon J, rejected that argument and ordered the appellants to pay the respondents the sum of \$4,231,033.06.

## There were two main issues on appeal:

1. whether a special condition requiring the Tenant to open the restaurant for business was rendered incapable of performance by the public health orders, such that the contract was frustrated;
2. whether the Lease was otherwise frustrated, in particular because compliance with the public health orders made the business unviable.

The Court (Kirk JA, Meagher JA and Griffiths AJA agreeing), dismissing the appeal, held:

1. The doctrine of frustration applies if some supervening circumstance renders the context of performance of a contract so different from what the parties had assumed as to render the contract a fundamentally or radically different thing from what had been contracted for. It does not apply if the supervening event is a risk for which one or other party had assumed responsibility under the contract. A finding of frustration involves issues of degree; it is not lightly made. The test looks to the effect of the supervening event on performance of the contractual obligations and enjoyment of the contractual rights. That does not preclude consideration of the effects on a business being carried out by the party, and frustration can arise even where the contractual obligations could still largely be performed. Frustration may occur as a result of creeping or gradual change. Any frustration will be taken to crystallise at some particular point taking account of what was known to the parties at the time. However, subsequent events might throw some light on the reasonable probabilities at the time: at [23]-[38].

Scanlan's New Neon Ltd v Tooheys Ltd [1943] HCA 43; (1943) 67 CLR 169; Brisbane

City Council v Group Projects Pty Ltd [1979] HCA 54; (1979) 145 CLR 143; Codelfa Construction Pty Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337; Bank Line Ltd v Arthur Capel & Co [1919] AC 435; Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696; National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675; Housing Commission (NSW) v Falconer [1981] 1 NSWLR 547; Pioneer Shipping Ltd v BTP Tioxide Ltd [1982] AC 724; City of Subiaco v Heytesbury Properties Pty Ltd [2001] WASCA 140; (2001) 24 WAR 146; Edwinton Commercial Corporation & Anor v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep 517; Lee Chee Wei v Tan Hor Peow Victor [2007] 3 SLR 537; [2007] SGCA 22; oOh! Media Roadside Pty Ltd (Formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd [2011] VSCA 116; (2011) 32 VR 255; Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited [2018] NSWCA 126; Woolworths Group Ltd v Gazcorp Pty Ltd [2022] NSWCA 19, considered.

As to the special condition:

2. Special condition 4 required that the business open during specified trading hours. The public health orders did not prevent the Tenant from opening the Premises as a takeaway business during the trading hours identified in the special condition. Thus the special condition was not incapable of being complied with: at [43]. Even if the contrary view was taken, the condition would not have been breached. While special condition 4 indicated that the provision was to be given paramountcy over all other terms of the Lease, it must be construed before that paramountcy can take effect. No reasonable businessperson would construe special condition 4 as giving the landlord the right to damages in circumstances where the restaurant was prohibited by law from opening. Such an operation would in effect require the Tenant to carry on the business unlawfully. Other provisions in the Lease made clear that there was no intention to require unlawful activity: at [44]-[49].

Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd [2023] HCA 6; (2023) 276 CLR 500, noted.

Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45; Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7; (2014) 251 CLR 640; Simic v New South Wales Land and Housing Corporation [2016] HCA 47; (2016) 260 CLR 85; J & P Marlow (No 2) Pty Ltd v Hayes & McCabe [2023] NSWCA 117; (2023) 112 NSWLR 29, applied.

As to whether the Lease was otherwise frustrated

3. Here, the risk of disruption to the Tenant's business by external events, including governmental action, was allocated to the Tenant under the Lease. That prevents a finding of frustration. The risk of business interruption caused by government restrictions in response to a human pandemic may not have been in the parties' minds, but the possibility of such restrictions was far from being unknown, and there is no reason why the express allocation of risk should not be given effect according to its terms: at [52]-[59].

4. The public health orders did not create a radical or fundamental change in what had been contracted for in any event. The appellants submitted that compliance with the public health orders would have transformed the Tenant's restaurant business on the Premises to a radically different business. Their argument that compliance with the public health orders would have required use of particular size tables, and significant changes to the restaurant, rested on a misunderstanding of the effects of the public health orders: at [61]-[63]. At no time was the restaurant precluded from operating altogether, albeit that it was significantly disrupted. As at 1 July 2020, from when the restaurant could have operated at 80% of dine-in capacity, the Lease had 2 years and three months to run. The ten week period that the restaurant was in

substance limited to takeaway sales was 6.4% of the term of the Lease. The Lease remained something of value. Moreover, assessing frustration is a practical matter. It is not to be approached in a one-sided fashion, focusing just on restrictive measures enacted in response to the pandemic without also taking account of governmental measures introduced to aid businesses through the crisis. The appellants' argument failed to do that: at [64]-[71].

## JUDGMENT

1. MEAGHER JA: I agree for the reasons given by Kirk JA that the appeal should be dismissed with costs.
2. KIRK JA: This appeal concerns a claim that the contractual doctrine of frustration enables the guarantors of a tenant's obligations under a commercial lease to avoid liability for amounts outstanding under the lease. The tenant, Beijing Roast Duck Sydney Pty Ltd (the Tenant), ran a large restaurant named "Quanjade" in the World Square Shopping Centre in the Sydney CBD. The centre is owned by the respondents, ISPT Pty Ltd and AWP Management Pty Ltd. The appellants, Mr Howard Cao and Mr Yuan Zhao, executed the lease as guarantors of the Tenant's obligations. The Tenant's restaurant closed on 23 March 2020 when the first of a series of State COVID-19 public health orders came into effect. It never reopened. The Tenant went into liquidation in May 2021. The respondents made a claim in the Supreme Court against the appellants for outstanding arrears of rent and other amounts owing under the lease. In response, the appellants argued that the lease was frustrated from 23 March 2020 onwards. The primary judge, Nixon J, rejected that argument and ordered the appellants to pay the respondents the sum of \$4,231,033.06.
3. The appellants raised three overlapping grounds of appeal:
  - (1) The primary judge erred in finding that on the facts of the case the lease the subject of the proceedings below (Lease) was not frustrated by the restrictions imposed by the Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW) under s 7 of the Public Health Act 2010 (NSW) that commenced on 23 March 2020, and the subsequent public health orders (Public Health Orders) made under that Act imposing restrictions from 26 March 2020 to 2 June 2021 (Lockdown Restrictions).
  - (2) The primary judge erred in failing to find that compliance with the Public Health Orders would have required a radical transformation in the business operated in the premises the subject of the Lease (Premises) by the tenant of the Premises (Tenant), or would have rendered the Tenant's business unviable for the remainder of the term of the Lease, or any significant part of it.

- (3) The primary judge erred in finding that the imposition of the Lockdown Restrictions did not have the result that special condition 4 of the Lease (under which the Tenant must open the Premises for business during specified hours) was incapable of performance, or that performance would have contravened the law, and that it did not lead to the Lease being frustrated.
1. The appeal was in substance determined on the papers in the following circumstances. When the matter was called on for hearing the solicitor appearing for the appellants applied for an adjournment on the basis that he was unwell. The application had not been notified to the Court in advance and was not supported by any medical evidence. The Court suggested that given the confined nature of the issues and the written submissions of the parties the matter was one that could be determined on the papers, subject to the Court notifying the parties if, on further reflection, any member of the Court considered that further oral submissions were appropriate. The solicitor for the appellants sought instructions during a brief adjournment and consented to that course being adopted. The respondents did not object to that approach. The Court then reserved its judgment. No member of the Court subsequently considered that oral submissions were required.
  2. None of the appellants' grounds is made out. Grounds 1 and 2 are in effect a complaint that the primary judge erred in failing to find frustration. I shall address them together. Ground 3 raises a distinct point of construction of the lease, which is then seemingly sought to be called in aid of the frustration claim. It is appropriate to address that ground before considering the other two. This judgment is structured as follows:
    1. background (at [6]-[12]);
    2. the public health orders (at [13]-[22]);
    3. relevant principles of frustration (at [23]-[39]);
    4. ground 3 (at [40]-[49]);
    5. grounds 1 and 2 (at [50]-[71]).

## Background

1. From 1 August 2017 until 23 March 2020, the Tenant conducted the "Quanjude" restaurant business in shops 10.41 and 11.05 (the Premises) at the World Square Shopping Centre. The lease in question here was in writing and was executed in early 2020 (the Lease). It was for a term of three years, with a backdated commencement date of 1 October 2019, and an option to renew for a further three years. The governing law of the Lease was that of New South Wales. The Premises covered a total area of 1,092.4 m<sup>2</sup> over two levels of the shopping centre, connected by an internal staircase. It was described by the appellants as an up-market licensed a la carte restaurant business. It had a seated capacity of 250 people in the following areas: a restaurant area on each level; six private function rooms over the two levels; and a large bar area, a performance stage, and a tea drinking ceremony area on the

lower level.

2. The base rent payable was \$1.2m per annum plus GST in Year 1, to be increased by fixed increments of 4% in each of Year 2 and Year 3. The rent was payable monthly in advance. The Tenant was also liable to pay for certain services and a monthly promotion levy. There was an incentive structure which is not relevant for the purposes of this judgment. Prior to entering the Lease the Tenant had leased the Premises on similar terms. The prior lease was for a three-year term expiring on 31 July 2020. As at September 2019 the Tenant was in arrears under the 2017 lease. Following negotiations, the 2017 lease was replaced with the 2020 lease. Even prior to the first pandemic lockdown the Tenant had failed to make any payments for January, February or March 2020.
3. The restaurant closed on 23 March 2020, which was the same day as the Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW) came into force. This initial order relevantly required that restaurants only sell food or beverages for persons to consume off the premises. The Tenant did not open the restaurant for takeaway service or dining-in at any time thereafter.
4. The final payment for rent made by the Tenant was an amount of \$100,000 on 14 July 2020. On 21 May 2021 the respondents issued a breach notice to the Tenant. It went into liquidation a few days later on 26 May 2021. On 10 June 2021 the respondents issued a termination notice.
5. In the Supreme Court proceedings the respondents claimed from the appellants, as guarantors of the Tenant's obligations, the outstanding arrears of rent and other amounts, offset by an amount covered by a bank guarantee. The respondents also claimed the loss of rent and the promotion levy for the balance of the term of the Lease, as they did not find a replacement lessee in that period. And they claimed for legal costs of enforcement and certain "make good" costs.
6. The primary judge identified three main issues in the proceedings (at [13]):
  - (a) Was the Lease frustrated by the lockdown that commenced on 23 March 2020 in response to the COVID-19 pandemic?
  - (b) Did the Plaintiffs fail to take reasonable steps to mitigate their loss?
  - (c) Are the Plaintiffs entitled to the amounts claimed to "make good" the Premises?
1. His Honour found the operation of the Lease was not frustrated. As to the latter two issues, his Honour held that the appellants had not established that the respondents had failed to take reasonable steps to mitigate their loss, but held that the respondents largely were not entitled to the claimed "make good" costs. Those latter conclusions are not challenged.

## The public health orders

1. Section 7 of the Public Health Act 2010 (NSW) authorised the Minister of Health to make orders considered necessary to reduce or remove any risk to public health in an area, to segregate or isolate inhabitants of the area, and to prevent or restrict access to the area. Pursuant to s 10 of the Act it was an offence for a person who is subject to a direction and has notice of it to fail to comply with the direction without reasonable excuse.
2. A series of public health orders were made under the Act in response to the COVID-19 pandemic, commencing relevantly from 23 March 2020 with the Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW). The primary judge identified the relevant orders and set out their effects at [56]-[65], and it is not necessary to repeat all the details here. The orders were amended on a regular basis. Without getting bogged in detail, in substance there were the following phases as regards the operation of the Tenant's restaurant in the period up to June 2021, when the Lease was terminated:
  1. The initial order relevantly provided that "food and drink premises (other than pubs)" must not be open to members of the public except for the purposes of "selling food or beverages for persons to consume off the premises". Thus the Tenant was not permitted to open its restaurant to dine-in customers but could sell food on a takeaway basis.
  2. From 15 May 2020 hospitality venues were permitted to also serve up to 10 dine-in customers at a time provided any liquor sold was sold with food.
  3. From 1 June 2020 hospitality venues were permitted to serve dine-in customers up to a maximum of the lesser of 50 people per "separate seated food or drink area" or "the total number of customers calculated by allowing 4 square metres of space for each customer (excluding staff members) on the premises".
  4. From 1 July 2020, the 4 m<sup>2</sup> space per customer rule continued to apply and the 50 person cap was lifted (at times there was a cap of 300 persons for each "separate area").
  5. From 12 February 2021 (and also earlier in a window in December 2020) the maximum number of customers was increased to that calculated by allowing 2 m<sup>2</sup> of space for each customer.
1. Within the third and fourth phases there were sometimes restrictions of 10, 20 or 30 persons per individual group booking. At no stage was the selling of takeaway food prohibited.
2. There was some dispute in the proceedings below as to how the square metre restrictions in the third, fourth and fifth stages applied. The appellants had submitted that the 4 m<sup>2</sup> rule would have limited the capacity of the Tenant's restaurant to 50 people. The basis of this calculation appeared to be Mr Cao's rough (unsupported) estimate that some 800 m<sup>2</sup> of the 1,092.4 m<sup>2</sup> in the Premises was usable open area in which customers could be seated, and his understanding that the 4 m<sup>2</sup> provision actually meant 4m x 4m, that is, 16 m<sup>2</sup>. That understanding was incorrect, as the primary judge explained at [143]. For example, the

Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) (2020) (NSW), as amended and in effect from 23 July 2020, stated at clause 8A that:

The Minister directs that the occupier of a hospitality venue must ensure that:

- (a) for a hospitality venue that consists of more than one separate area, the maximum number of persons in each of the areas is the lesser of:
  - (i) the number of persons that is equivalent to one person per 4 square metres of space in the area; or
  - (ii) 300 persons.
- 1. The first restriction is an equation which involves calculating a permissible capacity by allowing 4 m<sup>2</sup> per customer for each separate area – that is, the size of the separate area in m<sup>2</sup> was to be divided by 4 in order to ascertain the permitted number of customers in that area (serving staff were not taken into account in the calculation). A similar approach was adopted in the fifth phase, but dividing by 2. The public health orders did not require that individuals within a venue each remained at least 4m apart (or later 2m apart) from one another. The appellants' submissions below referred to needing to have "huge 4m x 4m tables" (noted by his Honour at [143]). The public health orders said nothing about table size.
- 2. In closing submissions below the solicitor for the appellants recognised the appellants' erroneous understanding of the public health orders, and came up with an estimate that the Premises would have been able to accommodate 114 persons under the 4 m<sup>2</sup> rule, and 228 persons under the 2 m<sup>2</sup> rule, although the basis of the calculation was not apparent (noted at [144]-[146]).
- 3. Inexplicably, on appeal the appellants went back to a version of their misunderstanding of the orders, submitting:

[The orders] also would have required having existing partitioning and fixtures removed in order to open up the area for use by patrons, and would have required a replacement of all existing tables with tables that would cover an area of 4 square metres (i.e. 2m by 2m) per person to be used over the period from 1 July 2020 to 17 December 2020; and area of 2 square metres (i.e. 1.4m by 1.4m) per person from 18 December 2020 to August 2021.

However, in addition to the 4 square metres or 2 square meters area for the tables, an allowance would need to be made of 0.5m on each side of the table for space that would be taken by each seat. This would have effectively be taking an a total area of 6.25 square meters (2.5m by 2.5m) for each table in respect of the 4 square metres restriction; and 3.6 square meters (1.9m by 1.9m) for each table in respect of the 2 square meters restriction.

- 1. These submissions are misconceived. As noted, the public health orders said nothing as to table size. Nor did they address removal of partitions or fixtures.

2. The respondents submitted in this Court that if one accepted Mr Cao's rough but plausible estimate of there being 800 m<sup>2</sup> of useable customer space within the Premises, then whilst the 4 m<sup>2</sup> rule applied the restaurant had a permitted capacity of 200 people – being 80% of its ordinary capacity of 250 people – and once the 2 m<sup>2</sup> rule came in there was no practical restriction on the capacity of the restaurant. That submission should be accepted.
3. On that understanding, then, the situation was as follows in the period from the commencement of the restrictions until the lease was terminated. For ten weeks from 23 March 2020 to 1 June 2020 the restaurant could only operate on a takeaway basis – ignoring, in favour of the appellants, the presumptively uneconomic possibility of the Tenant opening for 10 dine-in customers for the last two odd weeks of that period. For another month it was limited to 50 persons per separate seated food area – which meant 100 customers (or 40% of its capacity) given that the restaurant operated over two floors. For most of the time after that it could operate at 80% capacity, being 200 persons, with even that restriction being lifted from 12 February 2021.

### Relevant principles of frustration

1. The leading Australian judgment on the doctrine of frustration is that of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 (see at 356-360), drawing upon the earlier analysis by Stephen J in *Brisbane City Council v Group Projects Pty Ltd* [1979] HCA 54; (1979) 145 CLR 143 at 159-163; see also eg *oOh! Media Roadside Pty Ltd (Formerly Power Panels Pty Ltd) v Diamond Wheels Pty Ltd* [2011] VSCA 116; (2011) 32 VR 255 at [63]-[70]; *Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited* [2018] NSWCA 126 at [44]; *Woolworths Group Ltd v Gazcorp Pty Ltd* [2022] NSWCA 19 at [211]-[221].
2. In summary, the doctrine arises where the contract in question has continued operation and some new circumstance arises in which it falls to be performed. Frustration applies if that circumstance renders the context of performance so different from what the parties had assumed as to render the contract a fundamentally or radically different thing from what had been contracted for. Any relevant assumption of the parties is to be found from what is contemplated in the contract as understood in the surrounding circumstances in which it was made. The change in the assumed context must be such as to take it outside those risks for which either party had assumed responsibility.
3. Applying the test involves issues of degree, as Stephen J explained in *Brisbane City Council* (at 162-163):

How dramatic must be the impact of an allegedly frustrating event? To what degree or extent must such an event overturn expectations, or affect the foundation upon which the parties have contracted, or, again, how unjust and unreasonable a result must flow or how radically different from that originally undertaken must a contract become (to use the language of some of the various expositions), before it is to be regarded as frustrated? The cases provide little more than

single instances of solutions to these questions. These differences of application of the doctrine of frustration ... are, perhaps, inevitable in questions of degree arising when a broad principle must be applied to infinitely variable factual situations.

1. Where a contract is frustrated it is taken automatically to be terminated from that time on. An issue can arise as to timing which has some relevance here. Latham CJ said that frustration "must be decided at the time when the relevant alleged event happens, that is, upon probabilities and not upon a certainty arrived at after the event": *Scanlan's New Neon Ltd v Tooheys Ltd* [1943] HCA 43; (1943) 67 CLR 169 at 184. It has been observed that "in most case where frustration has successfully been established there has been a single catastrophic event such as the outbreak of war, requisition of a ship, death of a party, destruction of the subject-matter, change in the law or government action": Jane Swanton, "Discharge of Contracts by Frustration" (1983) 57 ALJ 201 at 202. Yet there can be "a frustrating event or series of events": *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 738 (Lord Diplock). And frustration may occur as a result of creeping or gradual change: note *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 723 (Lord Reid); Swanton at 202-203. Further, in some cases the significance and likely consequences of an event may be uncertain. The event or events might only become sufficiently certain or sufficiently severe to frustrate the contract at some point subsequent to the first occurrence.
2. That is not to dispute Latham CJ's statement that the issue is to be determined as at a particular point in time. Any frustration will be taken to crystallise at some particular point taking account of what was known to the parties at the time. However, subsequent events might throw some light on the reasonable probabilities at the time: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435 at 454-455; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 706-707. As it has been put in other areas of the law, such use of later evidence is "not to prove a hindsight, but to confirm a foresight": *Housing Commission (NSW) v Falconer* [1981] 1 NSWLR 547 at 558.
3. The cases do not speak with one voice on whether the doctrine can apply to leases: note *NC Seddon and RA Bigwood, Cheshire & Fifoot: Law of Contract* (11th Austn edition, LexisNexis, 2017), [19.25]. The primary judge considered that the issue should be resolved on a case by case basis rather than applying a blanket rule, but did not need to express a firm conclusion on the matter (see at [90]). On appeal both parties were content to adopt the English view that the doctrine could apply but that cases in which it would do so would be very rare: *Panalpina* at 689, 697, 711 and 715. It is sufficient here to proceed on that understanding.
4. A finding of frustration is not lightly made. The mere incidence of expense or delay or onerousness is not sufficient: *Edwinton Commercial Corporation & Anor v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep 517 at [111]. Nor are disappointed expectations: *Davis* at 715; *Ross v IceTV* [2010] NSWCA 272 at [78]. That is so in order that legitimate commercial expectations may be preserved and protected; imprudent commercial bargains cannot be aborted or modified merely because of an adverse change of circumstances: *Lee Chee Wei v Tan Hor Peow Victor* [2007] 3 SLR

537; [2007] SGCA 22 at [48].

5. It is worth mentioning a handful of cases which illustrate the point in ways pertinent to this matter. Scanlan's New Neon concerned a series of contracts in which the plaintiff had "leased" neon signs to advertisers on a number of buildings in this State and in Victoria. The plaintiff had borne the significant cost of erecting the signs. The contracts were for a five year term with an option to renew, and were entered between September 1937 and January 1941. In December 1941 and January 1942, in the course of World War Two, the governments of Victoria and New South Wales (respectively) made orders preventing the display of external lights at day or night. The High Court rejected the argument that the contracts were frustrated when these orders were made. Relevant, overlapping factors included that: the contract could still be performed; the owners had leased the signs but had not guaranteed that they could be illuminated; the advertisers had obtained the benefit of the signs for substantial periods, and still obtained some benefit from the unilluminated signs during the daytime; the lessor had spent significant sums on erection of the signs; and there were always risks that illumination of the signs might be restricted by government action during war or peace, and in the circumstances the advertisers and not the lessor should be understood to have accepted that risk. Reinforcing that frustration is not readily found, Latham CJ said that "[p]rima facie a promisor takes the risk of an event happening which prevents him from performing his promise" (at 200). Williams J considered that the evidence established "at most a case of hardship and not of frustration" (at 231).
6. In Panalpina a warehouse was leased for a period of ten years, with the lessees covenanting not to use it otherwise than for the purpose of a warehouse without the lessors' consent. Nearly five and a half years into the term the only road access to the warehouse was closed by government order because of a risk of collapse of a neighbouring building. It was initially expected that the closure would be for "well over a year". By the time the matter was heard in the House of Lords it looked likely be to about 20 months. The warehouse was rendered useless for the lessees' purposes without road access. The House of Lords held that these facts did not raise a triable issue of frustration. As Lord Wilberforce put it, the lessees' business had been "severely dislocated" but "this does not approach the gravity of a frustrating event" (at 697). Four factors were relevant to the conclusion of the House of Lords, brought out most clearly in the speech of Lord Simon of Glaisdale, and also in that of Lord Wilberforce:
  1. The significance of the restriction on the stipulated use of the property (see at 693B, 697C, 702H, 706E). That militated in favour of a finding of frustration, as the leased property was rendered unusable for the agreed use of warehousing.
  2. The length of time of the disruption, considered in the context of the term of the lease (at 697-698, 707). Lord Simon explained (at 707):

Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative — what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms?

1. Tied to these points, whether the lessees still held an interest of some value despite the supervening event. Lord Simon noted that the lessees "could, at the time when the road was closed, look forward to pristine enjoyment of the warehouse for about two thirds of the remaining currency of the lease" (at 707). He said further that "[j]udging by the drastic increase in rent under the rent review clause ... it seems likely that the appellants' occupation towards the end of the first quinquennium must have been on terms very favourable to them" (ibid). One of the reasons Lord Wilberforce gave for holding frustration could apply to leases was that even though a lease gave an estate in land, that was no answer "if that estate is unusable and unsaleable" (at 695).
2. The allocation of risk implicit in the lease (at 695, 698, 707). Lord Simon noted that the lease expressly provided for fire risk, and the parties "can hardly have contemplated that the ... fire risk was the only possible source of interruption of the business of the warehouse" (at 707).
1. The relevance of a lessee retaining something of value is illustrated by *London & Northern Estates Co v Schlesinger* [1916] 1 KB 20. A lessee of residential premises was Austrian and, as a designated "alien enemy", was prohibited by a war-time order from residing within certain specified areas which included where the leased premises were situated. The lease was not frustrated because although he could not personally exercise a right of personal occupation he could sublet the premises.
2. The issue of remaining value also arose in *City of Subiaco v Heytesbury Properties Pty Ltd* [2001] WASCA 140; (2001) 24 WAR 146, to which the primary judge in this matter referred (at [95]-[96]). The facts of the matter are unusual even for a frustration case. Four 99 year leases were entered between 1930 and 1959. The leases limited the permitted use of the premises to manufacturing or associated activities. In the late 1980s Heytesbury acquired the leasehold interests by assignment. It did so for speculative purposes, foreseeing (correctly) a possible rezoning. It did not intend to carry out manufacturing activities. The planning instrument then changed to prohibit manufacturing in early 1993. Heytesbury's development plans did not work out as it hoped, and it ended up selling the leasehold interests to a government redevelopment authority, achieved by deed to which the lessor was a party. In the leadup to that sale Heytesbury had vociferously dismissed any suggestion that its leasehold interests had come to an end because of a frustrating event. Having sold its leasehold interests for a significant sum, it then resisted the lessor's claim for rent owing on

several bases including that the leases had been frustrated by the change in planning restriction which prevented the core permitted use being carried out. Unsurprisingly, the Full Court of the Western Australian Supreme Court rejected that argument. The most important factor, relevantly, was a finding in effect that the lessee had still held a valuable interest despite the restriction imposed on use (see at [72] and [74]). The Court also held that even if there had been a frustrating event, Heytesbury's subsequent conduct prevented it from asserting that the leases were frustrated (at [75]-[78]).

3. In this matter, as addressed further below, the appellants submitted before the primary judge and on appeal that the effect of the public health orders "would have transformed the Tenant's Up-Market Restaurant Business on the Premises to a radically different business". The primary judge said of this argument:

[130] The Defendant's approach involves shifting the "radical difference" test from the effect of the supervening events on the performance of the contractual obligations which the parties have undertaken, to the effect of those events on the business of one of the parties.

1. The appellants' response on appeal was that whilst the appropriate approach was to look to the effect on performance of the contractual obligations:

such approach of itself does not exclude the consideration of the transformation of the tenant's business carried on in the premises by supervening events to a radically different business, for the purpose of determining whether the tenant's contractual obligations had become incapable of being performed.

1. The primary judge was correct to indicate that the test looks to the effect of the supervening event on performance of the contractual obligations and, it should be added, on enjoyment of the contractual rights. The focus is not per se on the consequences of supervening events on the business or fortunes of a contracting party. That events have turned out badly for that party does not mean that they are no longer bound by the contract. Conversely, the fact that the supervening events might have only limited, or even beneficial, effects on the business of a party does not establish that some particular contract is not frustrated by those events (some businesses benefit from catastrophes). Latham CJ made the former point in vivid terms in *Scanlan's New Neon* (at 191):

When a man agrees to buy a pair of boots for himself, both parties expect that he will be able to wear them. If he has an accident, so that he can no longer wear boots, he nevertheless still has to pay for them. If a man buys or hires a motor car, both parties know that he expects to be able to drive it. The stoppage of the sale of petrol, which would make it impossible for him to drive it, does not excuse him from his obligation to pay the purchase money or the hire for the agreed period.

1. In these examples, the distinction between the obligation itself and the utility of the agreement is evident. But that does not preclude any consideration of the effects on a business being carried out by the party. There are cases in which, despite the performance

of the obligation or enjoyment of the right still strictly being possible, a change in circumstances has neutered the commercial purpose of that obligation to the point that the contract is frustrated. The commercial purpose of a business-related contract may be tied to the nature of the business carried out. The effects on the contractor's business of the change in circumstance might throw light on how the context of performance was so different from what the parties had assumed as to render the contract a fundamentally or radically thing from what had been contracted for.

2. An example of where contractual obligations could still largely be performed despite the supervening events, but where the commercial purpose had been entirely undermined, is *Brisbane City Council*, decided by the High Court in 1979. A local council and a developer contracted that the council would apply to a State Minister to have land owned by the developer rezoned for development, with the aim of subdivision, in return for the company undertaking to build roads and other facilities in the area. After the contract was made and the rezoning achieved, but prior to subdivision, the developer's land was compulsorily acquired by the State government. The developer successfully argued that it was not bound to carry out the works. Stephen J, with whom Murphy J relevantly agreed, based this conclusion upon frustration. His Honour noted that it was "not a case in which performance of contractual obligations has either been rendered impossible or more onerous by the frustrating event", as the bulk of the work to be done was to take place outside of the acquired land and "can still be performed with no greater difficulty or expense than before" (at 157). However, "the acquisition of the land ... has wholly destroyed [the developer's] purpose in undertaking any obligations at all" (at 158). The council, too, had limited interest in some of the works being done given the changed circumstances. The link between the proposed subdivision and the required works emerged from the terms of the contract in that case. But the result would likely have been the same even if that was not so.
3. For completeness it should be noted that the primary judge stated at [69] that the Frustrated Contracts Act 1978 (NSW) does not contain any provisions regarding the circumstances in which frustration occurs, which is the issue in this case. Neither party suggested to the contrary on appeal. The issue falls to be determined by application of the common law.

### Ground 3 – special condition 4

1. One of the planks of the appellants' argument on frustration was special condition 4 of the Lease, which they asserted required the Tenant to keep its business open regardless of any legal restrictions. As it could not legally do so, the appellants said, the Lease was frustrated. The primary judge rejected this argument (at [116]-[125]). His Honour was correct to do so.
2. Special condition 4 provided:

Tenant's trading hours

- (a) Despite any other provisions in this lease, the Tenant must open the premises for business during the following trading hours:

Monday – Sunday – 11:30am to 12am (Tenant Trading Hours)

- (b) This special condition 4 is an essential term of the lease.
- (c) The Tenant may extend trading hours in response to customer demand subject to Landlord approval, which should not be unreasonably withheld.
- (d) If the Tenant fails to open during the Tenant Trading Hours, the Tenant agrees to pay to the Landlord liquidated damages of \$250.00 per hour for each hour the Tenant is in breach of this clause.
- (e) This hourly amount is a genuine pre-estimate of the damage likely to be suffered by the Landlord as a result of the Tenant's breach.
- (f) The Tenant's obligation to pay the Landlord the liquidated damages under special condition 4 is independent from any claim that the Landlord may make against the Tenant for breach of this Lease, except that the Landlord cannot recover from the Tenant, for breach of the Lease an amount which the Landlord has been compensated for by payment of the liquidated damages.
1. The respondents did not assert that this clause was breached by the Tenant and made no claim for damages under the clause.
  2. There are two answers to the appellants' argument. To begin with, it was not established that the public health orders prevented the Tenant at any stage from opening the Premises for business during the identified trading hours. Item 13 of the Reference Schedule to the Lease (given effect by cl 28.1) identified the permissible use of the premises as "Franchise and licenced a la carte/take away offering in keeping with the agreed menu as attached to this lease at Exhibit A". In fact, no menu was attached to the copy of the Lease that was in evidence, but neither side attached any significance to that point. Thus a permitted use was provision of takeaway food. At no stage was that activity prohibited. True, for that period when only takeaway sales were permitted only a small part of the premises could have been used by the Tenant, but that is a different point. The public health restrictions did not prevent the Tenant from being able to "open the premises for business", as the primary judge correctly held (at [119]).
  3. Even if the contrary view was taken, that would not have been a breach of special condition 4, properly understood. A commercial lease is to be construed in accordance with the general principles that apply to the construction of written commercial agreements: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45. The proper construction of a contract is to be determined objectively by reference to its text, context and purpose: *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; (2016) 260 CLR 85 at [78]; *J & P Marlow (No 2) Pty Ltd v Hayes & McCabe*

[2023] NSWCA 117; (2023) 112 NSWLR 29 at [90]. As explained for example in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35], the meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean, working on the presumption that the parties intended to produce a commercial result. The contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

4. Subclause (a) of special condition 4 indicated that the provision was to be given paramountcy over all other terms of the Lease (and cl 61 of the Lease was to the same effect). Nonetheless, it must be construed before that paramountcy can take effect. And it falls to be construed in context. No reasonable businessperson would construe special condition 4 as giving the landlord the right to liquidated damages of \$250 an hour in circumstances where the restaurant was prohibited by law from opening. Such an operation would be surprising, uncommercial and potentially contrary to public policy. It would render the Tenant liable to pay damages for breach because of something over which it had no control and in relation to which it had an overriding obligation to comply. Such an operation would in effect require the Tenant to carry on the business unlawfully. The presumptive working assumption of any reasonable businessperson construing the contract would be that contractual activities would be undertaken in accordance with the law: note *Laundy Hotels (Quarry) Pty Ltd v Dyco Hotels Pty Ltd* [2023] HCA 6; (2023) 276 CLR 500 at [28]-[31].
5. Other provisions in the Lease made clear that there was no intention to require unlawful activity; on the contrary. Clause 22 of the Lease provided:

22. The tenant must obey the law

The tenant must obey all laws relating to and the directions of any authority that requires the tenant to do anything concerning the premises, the tenant's use of the premises or this lease.

1. Clause 29, which was an essential term of the Lease (see item 21 in the Reference Schedule), stated:

29. Trading Hours

29.1 The tenant must keep the premises open for business during the Centre trading hours as set out in the Centre rules.

29.2 The tenant is not required to keep the premises open for business at any time which is prohibited by law.

1. The Centre Rules, to which clause 29.1 referred, were set out in Sch 1 to the Lease. They were part of the Lease and the Tenant was required to obey them (cl 54). Clause 4.3 of the Centre Rules stated that the Tenant "must not open the premises for business if any law prohibits this for the tenant's type of business or premises".

2. Even given its paramount status, special condition 4 cannot be read as though entirely segregated from the context in which it appears. The terms identified indicate that special condition 4 was to apply in circumstances where the Tenant had the choice to operate its business at those times. That condition cannot properly be construed in a simplistic and literalistic fashion to require illegal activity. Ground 3 has no merit.

### **Grounds 1 and 2 – the effect of the orders on the Tenant's business**

1. Ground 1 asserts that the primary judge erred in not finding that the public health orders frustrated the contract. Ground 2 suggests his Honour erred in not finding that the public health orders demanded a "radical transformation of the business" operated in the Premises, and would have rendered the business unviable for the remainder of the Lease term. The second ground seems to make factual points in support of the first. The appellants' submissions did not distinguish between them and they are best addressed together.
2. The primary judge was correct to conclude that frustration was not made out, for two overlapping reasons: under the Lease the risk of such an event lay with the Tenant; and in any event the appellants have not established that the public health orders rendered the Lease a fundamentally or radically thing from what had been contracted for.

### **Allocation of such a risk under the Lease**

1. As noted above at [24], frustration does not apply if the supervening event is a risk for which one or other party had assumed responsibility under the contract. The occurrence of the event is not, then, something which renders the contract a fundamentally or radically thing from what had been contracted for. Here, as the primary judge correctly discussed at [137]-[139], the risk of disruption to the Tenant's business by external events, including governmental action, was allocated to the Tenant under the Lease.
2. Various provisions contemplated the possibility of the operation of the business being interrupted or affected by external events:
  1. Clauses 47.1 and 47.3 provided that if the Premises or the shopping centre were damaged or destroyed such that the Tenant could not use or have access to the Premises then the lessor was required to reduce the rent and other amounts payable by a reasonable amount, but the Tenant "must continue to use any part of the premises that is useable, safe and accessible". As the primary judge noted at [138], as a result if the Tenant were only able to use the kitchen but not dining areas then it would be obliged to continue to use the kitchen from which a takeaway business could be operated. That provision was consistent with cl 28.4 of the Lease, which required the Tenant to "do all that is necessary to operate the tenant's business at the premises to the best advantage".

2. As discussed, cl 22 and 29 of the Lease and cl 4.3 of the Centre Rules contemplated that laws might affect the operation of the Tenant's business, including as to the time of operation or the type of business or premises.
3. Clause 50(b)(i) of the Lease provided that the Tenant must "promptly comply with all laws for the prevention or control of ... emergencies and disruptions". Clause 50(g) provided that the Tenant must "obey all instructions given by the landlord, the police, the fire brigade or other authority as to when to leave or re-enter the Centre or the premises".
1. Apart from the operation of cl 47, the Tenant's obligation to pay rent was unconditional, pursuant to cll 7.1 and 11. As is implicit in cll 28.4 and 47, the lessors had an interest in the Tenant's business being successful, not least because the Lease specified a level of sales above which the Tenant would be required to pay additional rent based on a percentage of gross sale: cl 14, Reference Schedule item 9, and special condition 7. However, the Lease did not specify any minimum level of sales below which rent would be reduced.
2. Most importantly, the Lease expressly provided for the allocation of risk in a manner which included business interruption, as follows:

#### 49. Tenant's risk

The tenant's property, the tenant's use or occupation of the premises and the Centre and the conduct of or ability to use the premises for the purposes described in Item 13 are each at the tenant's own risk. ...

1. The precise date on which the Lease was executed is unclear. The primary judge described it as occurring in early 2020 (at [3]). It may well be that the risk of business interruption caused by government restrictions in response to a human pandemic was not at the front, or even at the back, of the parties' minds when they entered the Lease (although the COVID-19 outbreak had in fact started prior to early 2020). Nevertheless, it cannot be said that this was a species of risk so alien to human experience that it could not reasonably be thought to be encompassed by the express allocation of risk in cl 49.
2. The possibility of such governmental restrictions was far from being unknown. Similar restrictions had been imposed some 100 years earlier in response to Spanish Influenza: see eg the Hon John Logan, "Pandemic Justice – An Historical Perspective" (2020) 94 ALJ 709. In the second reading speech for the Public Health Bill 2010 the parliamentary secretary, Dr Andrew McDonald, said the following (New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 24 November 2010 at 28128):

The updated provisions in part 2 of the bill will assist the Minister and public health authorities in ensuring that public health emergencies can be responded to rapidly and effectively in order to mitigate risks to the community. I can advise the House that the emergency powers under the current Public Health Act have only rarely been used, with two orders having been made in the past decade: one relating to severe acute respiratory syndrome [SARS] and the other relating to H1N1 influenza [swine flu].

1. The very existence of the provisions in the 2010 Act under which the public health orders were made illustrates that Parliaments and governments were prepared to introduce such measures in response to the constant threat of infectious disease; see similarly Biosecurity Act 2015 (Cth), Ch 8 Pt 2. The possibility of such measures was a topic regularly addressed (albeit with variable success and specificity) in business interruption insurance policies prior to the COVID-19 pandemic, as was reflected in the range of test cases on such policies that followed that crisis: eg *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296; (2020) 104 NSWLR 634; *Rockment Pty Ltd t/as Vanilla Lounge v AAI Ltd t/as Vero Insurance* [2020] FCAFC 228; (2020) 282 FCR 561; *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2022] FCAFC 16; (2022) 400 ALR 25; *LCA Marrickville Pty Ltd v Swiss International SE* [2022] FCAFC 17; (2022) 290 FCR 435.
2. In any event, the Lease contemplated the possibility of government restrictions affecting the operation of the Tenant's business, and such restrictions might be motivated by a wide range of concerns. There is no reason why cl 49, construed in context, should not be given effect according to its terms. The Tenant's use of the Premises and its ability to use the premises for the purposes of carrying on the business of a restaurant (as described in Item 13) was "at the tenant's own risk". The type of business interruption caused by the public health restrictions was a risk allocated to the Tenant under the Lease. That risk allocation precludes the operation of the doctrine of frustration when that risk eventuated.

### **Not a radical or fundamental change in what contracted for in any event**

1. The appellants argued below and on appeal that the initial public health order was the supervening event which frustrated the contract from 23 March 2020 onwards, albeit they also referred to the content of the orders that followed. The contents of the public health orders subsequent to 23 March 2020 are potentially relevant both because they may throw some practical light on the possibilities that were imminent as at that date, and in any event because a contract might become frustrated only at a certain stage of evolution of an ongoing event or series of events (see the explanation above at [26]-[27]). Although not put in terms, I am prepared to assume that the appellants meant to argue in the alternative that the Lease became frustrated at some point subsequent to the commencement of the initial order.
2. The appellants submitted to this Court, as they had below, that compliance with the public health orders "would have transformed the Tenant's Up-market Restaurant Business on the Premises to a radically different business". It was said that compliance "would have required

having existing partitioning and fixtures removed in order to open up the area for use by patrons, and would have required a replacement of all existing tables with tables that would cover an area of 4 square metres ... per person ... from 1 July 2020 to 17 December 2020".

Further, the appellants claimed:

Regardless of whether the 4 square meters or the 2 square meters area restrictions applied during the June 2020 – August 2021 Public Health COVID-19 Orders restrictions period, the number of 4-person tables that would have been accommodated in the Premises during that period is 16 tables, providing a total capacity of 64 customers. This would have been spread over the entire Premises, including the private function rooms for the high-end patrons, which would have been unusable for their purpose due to the 4 square meters area and the 2 square meters area restrictions.

1. The appellants went on to develop the significance of these supposed restrictions. It was on this basis that they sought to argue that the public health effects requiring transforming the restaurant into a radically different business. In making these arguments the appellants simply did not address the reasons of the primary judge in rejecting their erroneous understanding of the public health orders. No error has been shown in his Honour's analysis in this regard.
2. As explained above (at [16]-[20]), there was no need to replace all existing tables with new tables of a certain size, nor to remove partitions. The position in the period from the commencement of the restrictions until the lease was terminated was that for ten weeks from 23 March 2020 to 1 June 2020 the restaurant could in substance only operate on a takeaway basis; then for another month it was limited to 100 customers (or 40% of its capacity); then from 1 July 2020 it could operate at 80% capacity, being 200 persons, with even that restriction being lifted after 12 February 2021. Thus for a period of two months and a week the Tenant's restaurant was limited in substance to takeaway; for one month it was limited to 40% of dine-in capacity; and for the following seven months it could have operated at 80% of dining capacity, after which it was back to 100% capacity. The Lease was terminated in June 2021.
3. The appellants' submissions were directed to the effect of the public health orders on the conduct of the Tenant's business. As addressed above (at [34]-[38]), the doctrine of frustration looks to the effect of the supervening event on performance and enjoyment of the contractual obligations, but this does not preclude consideration of the effects on a business being carried out by the party in question. It should also be noted that the appellants' focus below and on appeal was on the public health orders and not on the pandemic, and its possible effects on consumer behaviour, more broadly.

4. The following factors, beyond allocation of risk, are of particular relevance here (see the discussion above at [29]-[38]): the significance of the restrictions on the stipulated use of the property and the extent to which the contractual rights and duties could still be performed; the length of time of the disruption in the context of the length of the lease; and whether the lessee still held an interest of some value despite the frustrating event.
5. As to the first, at no time was the restaurant prevented from operating altogether. As explained above with respect to ground 1, at all times the appellants could have complied with the requirement in the Lease to keep the business open during certain hours. That being said, the practical ability of the appellants to enjoy the commercial purpose of the Lease was undoubtedly disrupted. That leads to the second factor. As at 23 March 2020 the Lease still had two and a half years to run of its three year term. As at 1 July 2020, from when the restaurant could have operated at 80% of dine-in capacity, it had 2 years and three months to run. The ten week period in which it was in substance limited to takeaway sales was 6.4% of the term of the Lease. Taking account of the nature and length of the restrictions, it cannot be said that the public health orders rendered the context of performance of the Lease so different from what the parties had assumed as to render the contract a fundamentally or radically thing from what had been contracted for.
6. Moreover, it is apparent that the Lease remained something of value, even if that value had been reduced. On this issue, no error has been shown in the following observations of the primary judge:
  - [112] Further, the Defendants have not established that the leasehold estate was unsaleable. Clause 30.4 of the Lease provided that the Plaintiffs "will consent to an assignment of this lease" provided that the Tenant is not in breach and has taken each of the steps set out in clause 30.4(a)-(f). There is no evidence that the Tenant ever considered or explored the possibility of assigning the lease, let alone that it was unable to do so. Nor was there any expert evidence from the Defendants that the leasehold estate was unsaleable in the period from April 2020 to June 2021, noting that it was the Defendants' burden to establish this was the case insofar as it was put forward by them as the basis for contending frustration.
  - [113] In July 2020, the Defendants were negotiating with the Plaintiffs to reopen the restaurant, at a reduced rent. The terms proposed included, among other things, that the rent owed by the Tenant under the Lease be waived for the period that the restaurant had been closed (that is, from April 2020 to August 2020); that the restaurant reopen at the end of August 2020 under a new lease; and that the base rent under the new lease be set, for the period through to 31 December 2022, at 50% of the rent that had been payable under the Lease. The Plaintiffs did not accept these terms, requiring that 50% of the rent be paid for the period of the restaurant's closure, and that the 50% reduction in the future rent only apply until March 2021, with the full rent payable thereafter. While no agreement was reached at that time, those negotiations provide some evidence that the leasehold estate remained valuable while restrictions were in place under the Public Health Orders which limited the numbers for dining on the Premises.

1. The appellants made submissions about the effect of the public health restrictions on the revenue of the Tenant. These submissions were based on the appellants' erroneous understanding of the public health orders in relation to the square metre rules, and in any event were based on assumptions as to customer expenditure not founded on evidence. Moreover, when the appellants were making an argument about the detrimental effect of governmental COVID-19 restrictions on the operation of the business, it was incumbent on them to also bring to account governmental benefits designed to ameliorate the effects of the pandemic on businesses. As the primary judge explained (at [147]-[158]), there were two government schemes of note in that regard.
2. The first was the federal government's JobKeeper scheme, which was introduced on 9 April 2020 with the aim of assisting businesses which had experienced a significant decline in turnover as a result of the pandemic: Fair Work Act 2009 (Cth), s 789GDA; Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth). The scheme was explained in *Qantas Airways Ltd v Flight Attendants' Association of Australia* [2020] FCAFC 227; (2020) 282 FCR 243. It operated by subsidising the wages of employees for eligible businesses. As the primary judge noted at [149], it seemed likely that the Tenant's business would have been eligible for the subsidy. Yet the appellants made no attempt to address how the scheme might have ameliorated the economic difficulties they claimed the Tenant suffered.
3. The second was a State scheme which introduced measures benefitting an "impacted lessee": Retail and Other Commercial Lease (COVID-19) Regulation 2020 (NSW), Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020 (NSW); and the Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020 (NSW). Again, it appeared likely that the Tenant was eligible (see at [152]). Notably, the scheme provided that a relevant lessor "must, if requested, renegotiate in good faith the rent payable under, and other terms of, the commercial lease", and do so having regard to the economic impacts of the pandemic. The primary judge explained:

[156] There is no evidence that the Tenant made any request under reg 7(2) for a reduction in rent, or as to why it did not do so. It simply stopped paying any rent under the Lease. The negotiations which occurred between the Plaintiffs and the Defendants in July 2020 were for a new lease, rather than a renegotiation of the terms of the existing Lease. However, it is significant that in those negotiations the Plaintiffs indicated that they were willing to accept a 50% reduction in the rent payable for the Premises for a twelve-month period from April 2020 through to March 2021, with the full rental recommencing post-March 2021. This evidence suggests that, if the Tenant had made a request to renegotiate rent, whether under the Retail and Other Commercial Lease (COVID-19) Regulation 2020 or otherwise, it would have been favourably received.

1. Assessing frustration is a practical matter. It is not to be approached in a one-sided fashion, focusing just on restrictive measures enacted in response to the pandemic without also taking account of governmental measures introduced to aid businesses through the crisis. The appellants' evidence simply did not establish that, as claimed in appeal ground 2, the public health orders "would have rendered the Tenant's business unviable for the remainder of the term of the Lease, or any significant part of it".

## Conclusion

1. There is no reason to doubt that the Tenant's business was adversely affected by the pandemic. But the restrictions imposed by the public health orders did not put the Tenant in breach of the terms of the Lease. The Tenant accepted liability for that type of risk under the terms of the Lease. And, in any case, the appellants have not shown that the effects were such as meet the high threshold for establishing frustration. The appeal should be dismissed, with the appellants to pay the respondents' costs.
2. GRIFFITHS AJA: I agree with Kirk JA.

\*\*\*\*\*

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 08 August 2024

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/19100b829c63aa53e7f7d804>

CASE PAGE <https://chat.esheria.ai/case-law/australia/cao-v-ispt-pty-ltd-2024-nswca-188-2024>

Prepared on 29 October 2026 · Esheria