



GREENWAY CHAMBERS

COVID Issues in Contract and Property: It Might Not Be Novel, But It Still Lingers

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Introduction to Jonathon's section

Part 1: Tiger King and COVID leasing regulations.

Part 2: Squid Game and Test Cases concerning business interruption.

Part 3: The Last of Us and Business Interruption Class Actions.



Part 1: Tiger King and COVID leasing regulations



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1. *Retail and Other Commercial Leases (COVID-19) Regulation 2020 (Lee v YOUth OK Pty Ltd [2022] NSWSC 1356).*
 2. *Conveyancing (General) Regulation 2018, Sch 5 (Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd [2022] NSWSC 1746).*
 3. *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth).*
 4. *Alamdo Holdings Pty Ltd v Croc's Franchising Pty Ltd (No 2) [2023] NSWSC 60*



Part 2: Squid Game and Test Cases.





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1. *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296
 2. *Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206
 3. *LCA Marrickville Pty Limited v Swiss Re International SE* [2022] FCAFC 17



Part 3: The Last of Us and Class Actions.



General Contractual Developments

Introduction

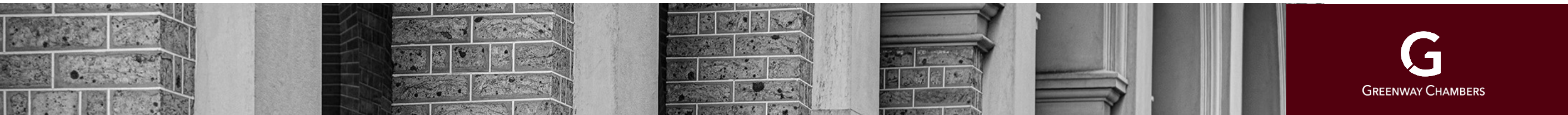
1. Repudiation
2. Frustration
3. Force Majeure



Repudiation

First, a finding of repudiation is based, not upon an inquiry into the subjective state of mind of the party in default, but upon an objective assessment of whether the conduct of that party conveys to the other party an inability or unwillingness to perform its obligations under the contract or to fulfil those obligations only in a manner substantially inconsistent with its obligations and not in any other way: Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 at 647.

J & Z Holding (Aust) Pty Ltd v Vitty Pty Ltd [2022] NSWSC 1718 at [83]



Repudiation

- *Carter v Mehmet* [2021] NSWCA 286
- *Hong v Gui* [2022] NSWCA 245
- *J & Z Holding (Aust) Pty Ltd v Vitti Pty Ltd* [2022] NSWSC 1718
- *H.T.H. Nominees Pty Ltd atf Hudson Property Trust v Secure Parking Pty Ltd* [2022] NSWSC 931



Repudiation

- *Sentinel Orange Homemaker Pty Ltd v Bailey, In the matter of Davis Investment Group Holdings Pty Ltd (in liq) (No 2) [2022] FCA 1200*
- *Tour Squad Pty Ltd v Fifth Amendment Entertainment Inc (No 2) [2021] FCA 546*



Repudiation

Other Jurisdictions

- *Next Stage Living Monee Ponds Pty Ltd v Ardmillan Place Nominees Pty Ltd* [2022] VSC 89



Repudiation

- Be sure that other party has repudiated the contract (check what objective indicators demonstrate they have repudiated the contract)
- Check whether there is a basis to terminate a contract, otherwise an attempt to terminate the contract may amount to repudiation
- Check that your client has clearly accepted that repudiation in a timely fashion
- If your client wants to claim damages, ensure they have evidence that there are damages owing to them



Frustration of Contract

Key Principles

Definition

1. Without the fault of either party a contractual obligation becomes incapable of being performed because circumstances in which performance is called for would be radically different to that which was promised by the contract
2. "It was not this that I promised to do"

See: *Davies Contractors Ltd v Fareham Urban District Council*

[1956] AC 729



Frustration of Contract

Key Principles

- *Taylor v Caldwell* (1863) 122 ER 309
- *Krell v Henry* [1903] 2 KB 740, 749
- *Chapman v Taylor & Ors; Vero Insurance Ltd v Taylor & Ors* [2004] NSWCA 456



Frustration of Contract

Frustration of Leases

- Frustration due to a pandemic: *Li Ching Wang v Xuan Yi Xiong* [2004] HKC 353

Reflected in:

- *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd* [2020] QDC 184
- *Dyco Hotels Pty Ltd v Laundry Hotels (Quarry) Pty Ltd* [2021] NSWCA 332
- *Kenneth Treacy v Lee James Menswear Ltd and James O'Regan* [2022] IEHC 600



Frustration of Contract

Other Jurisdictions

- *Luxury Vacation Home LLC; Hugh Barton; and Andrew Robbins as Trustee of Bird Street Real Estate Development Trust* 20 Civ. 4243 (PGG)



Force Majeure

Generally has three components:

- Definition of what amounts to “force majeure”
- Statement of what steps a party who wishes to rely on force majeure must take
- Statement of the consequences of force majeure



Force Majeure

- *Acciona Industrial Australia Pty Ltd v Kwinana WTE Project Co Pty Ltd* [2022] WASC 380
- *Woolworths Group Ltd v Twentieth Super Place Nominees Pty Ltd* [2021] NSWSC 344



Force Majeure

Other Jurisdictions

- *European Professional Club Rugby v RDA Television LLP*
[2022] EWHC 50 (Comm)
- *Rileys Sports Bars (2014) Ltd (In Administration) v CGW Snooker LLP* [2022] CSOH
- *Consolidate Fastfrate Inc v 2516295 Ontario Ltd* 2022
ONSC 1005



Conclusion

- Repudiation, frustration and reliance on force majeure clauses are live issues in litigation post Covid-19
- Start by reading the contract and considering dispassionately the options open to your client, including arguments against the relief they seek before acting on the contract or starting litigation in the area
- Consider running the three causes of action as alternatives
- There are far too many contract law “dad jokes” on the internet- see me afterwards for some examples of these!

