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IMPACT OF COVID-19 ON CONTRACTS FOR REMEDIAL WORKS

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Introduction

Does the COVID-19 Pandemic entitle an owners corporation to cancel or delay a contract for remedial work to common property? If an owners corporation allows works to proceed, could it be liable if a resident contracts the COVID-19 virus from a contractor performing that work? In this article we discuss the answers to these questions.

The Scenario

An owners corporation enters into a contract with a remedial builder to repair concrete spalling. The contract was signed before the COVID-19 pandemic. The contract will require the builder to work from the interior of various apartments in the building. Many residents are self-isolating and do not want to come into contact with the builder's workers. Can the owners corporation cancel the contract or delay the performance of work under the contract due to the COVID-19 virus?

Force Majeure

Normally, the owners corporation will not be able to cancel the contract or delay performance of work under the contract unless the contract contains a force majeure clause.

A force majeure clause deals with what will occur if the continued performance of a contract is delayed or prevented by factors outside the control of the parties. Typically, a force majeure clause allows a party to suspend or terminate the performance of its obligations under a contract when certain circumstances beyond its control arise, making performance inadvisable, commercially impracticable, illegal, or impossible.

Force majeure is not a doctrine that applies to all contracts. It only applies if the contract contains a force majeure clause. Many contracts for remedial works do not.

In the absence of a force majeure clause, the position under contract law is that the defaulting party is liable for all of its breaches of the contract even if those breaches occur due to circumstances beyond that party's control.

Therefore, if the contract does not contain a force majeure clause, and the owners corporation attempted to cancel the contract or delay the performance of work under the contact, and refused to give the builder access to the site, the owners corporation would be in breach of, and repudiate its obligations under, the contract.

In those circumstances, the builder would be entitled to elect to keep the contract on foot and insist on its performance or terminate the contract and sue the owners corporation for damages.

Frustration

A contract becomes frustrated when it has become impossible for the parties to perform their obligations under the contract, or performance would be radically different from that which was contemplated by the parties at the time they entered into the contract, without the default of either party. Frustration automatically discharges the parties from the obligation to perform, or to be ready and willing to perform, their contractual duties.

All contracts involve the assumption by a party of an obligation to perform their obligations under the contract in the face of an uncertain future. Normally this requires a party to a contract to perform notwithstanding the future course of events.

It is therefore very rare that a contract will be frustrated. Indeed, there is an exceptionally high threshold that must be met before a contract will be frustrated. It is not sufficient that a party will suffer hardship or inconvenience if the contract is performed.

The critical issue is whether the situation resulting from the Covid-19 virus is fundamentally different from the situation contemplated by the contract.

The way matters currently stand, it is unlikely that the contract in our example (to repair concrete spalling) would be frustrated. This is because it is still possible for the parties to perform their obligations under the contract.

There is currently nothing which would make performance of the work under the contract unlawful. Further, the Covid-19 virus has not made performance of the builder's obligations under the contract impossible. It may have made performance of those obligations more difficult but that is not sufficient to demonstrate that the contract has been frustrated.

It might be the view of some residents that performance of the work from inside their apartments is undesirable, but that is not sufficient to frustrate the contract. The mere fact that performance of the work will result in hardship does not establish frustration.

A party cannot rely on self-induced frustration. In other words, a contract can only be frustrated without the default of either party. This means the owners corporation could not refuse to give the builder access to the site (when there is no lawful basis for it do so) and then insist that the contract has become frustrated.

The position may be different, and the contract may become frustrated, if the Federal or State Government introduces legislation that would make it unlawful for the builder to enter the apartments and carry out work under the contract.

But even under that scenario, the contract may not be frustrated. Where performance of a contract is delayed, the contract does not become frustrated until it has become clear that only a performance that is radically different from that originally contemplated will be possible.

So even if there is a change in the law which makes it unlawful for the work to be carried out by the builder *for the time being*, that itself will not necessarily result in the contract being frustrated.

Liability for Illnesses

Every owners corporation has a strict statutory duty to properly maintain and keep in good repair the common property under section 106 of the *Strata Schemes Management Act 2015.*

In our example, the work will be done by the builder to repair concrete spalling in order to discharge the owners corporation's strict duties to maintain and repair common property. In other words, the owners corporation would be repairing the concrete spalling to comply with its legal duties.

In those circumstances, it is unlikely that the owners corporation would be liable for any illnesses suffered by any residents as a result of the builder working from their apartments to fix the concrete spalling provided the work was done reasonably.

Further, in general, the owners corporation cannot be held liable for the negligence of its independent contractors such as the builder. Therefore, if the builder was negligent, because it did not, for example, abide by social distancing measures and proper sanitation to help avoid the spread of the Covid-19 virus, it is unlikely the owners corporation could be held liable for that negligence.

Of course, in our example, it would be sensible for the owners corporation to inform residents, well in advance, of the dates and times when the builder will be entering their apartments to carry out work and to stress to residents that they should take steps to preserve their own health and wellbeing by following the guidelines produced by the State and Federal Governments and health authorities relating to the Covid-19 virus.

Conclusion

The situation relating to the Covid-19 virus is a fluid one. The Federal and State Governments are moving rapidly to help stop the spread of the virus.

This may result in circumstances changing. In particular, if the Federal or State Government introduces legislation which makes it unlawful for certain types of building work to be undertaken in strata schemes that may result in contracts for remedial works becoming frustrated.

All owners corporations and strata managers should monitor Government announcements and, where necessary, obtain legal advice about whether or not contracts they have entered have become frustrated or are able to be cancelled or delayed due to any change in circumstances or the law.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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