



Frustrated by COVID-19? Sure! But what about your contract?

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When the COVID-19 pandemic is discussed, we hear words like "unprecedented", "once in a lifetime" and "never-before-seen". The recent case of [Happy Lounge Pty Ltd v Choi & Lee Pty Ltd and Anor \[2020\] QDC 184](#) provides guidance as to whether these "unprecedented times" means commercial contracts are discharged by frustration. While this case deals with a number of issues, the focus of this article is the legal principle of frustration.

The Facts in Brief

On 26 February 2020 Happy Lounge Pty Ltd (**Happy Lounge**) entered into a contract with Choi & Lee Pty Ltd (as Trustee) (**Choi & Lee**) for the sale of its business – a bar and lounge open to the public offering food and alcohol for sale – known as The Palace Lounge or The Palace Supper Club (**The Palace**). The purchase price of \$550,000 comprised \$500,000 for the assets of the business and \$50,000 for goodwill.

Settlement of the contract was due on 18 March 2020, which the parties extended until 25 March 2020.

When it came time to settle, Choi & Lee were ready, willing and able to settle, but Happy Lounge was not.

Ultimately, Choi & Lee terminated the contract for Happy Lounge's breach and Happy Lounge applied to the Court seeking orders that Choi & Lee specifically perform the contract.

Frustration Argument

Choi & Lee's primary position was that it validly terminated the contract, but it made the alternative submission that the contract had been frustrated as a result of the Queensland Government's COVID-19 restrictions.

A contract will be discharged by frustration if an event or events occur resulting in a situation fundamentally different to what was contemplated by the parties at the time of entering into the contract.



Choi & Lee relied upon the Queensland Government's directions addressing the COVID-19 pandemic, including:

- 19 March 2020 – direction prohibiting indoor gatherings of more than 100 people, with a requirement that patrons be four square metres apart at venues including The Palace;
- 21 March 2020 – further direction limiting the number of people permitted at indoor gatherings; and
- 23 March 2020 – a direction requiring non-essential businesses, including The Palace, to close from midday on 23 March 2020 until the end of the public health emergency.

Choi & Lee argued that the contract was frustrated because the COVID-19 directions on 19, 21 and 23 March 2020 meant that Happy Lounge could not meet its obligations under the Contract including:

- to give Choi & Lee possession of the business and its assets;
- to carry on the business as a going concern nor ensure the business was carried on "...in its usual way... including, without limitation, the maintenance of the trading hours of the business that apply at the Contract Date"; and
- to provide tuition to Choi & Lee or introduce customers, suppliers and others to retain the goodwill of the business for Choi & Lee's benefit.

Did COVID-19 restrictions frustrate the contract?

The Court considered a number of factors in analysing the impact of the restrictions upon the contract.

It held that, at its core, the contract required the conveyance of a bar and lounge business, and that the COVID-19 restrictions did not fundamentally change the purpose of the contract.

The contract provided that Choi & Lee were to purchase business assets for \$500,000 (including plant, equipment and intellectual

property) and goodwill for \$50,000. The impact of the restrictions upon the goodwill of the business did not deprive Choi & Lee of the whole benefit of the contract.

The Court found that the COVID-19 pandemic must have been in the contemplation of the parties at the time of the contract because, prior to the contract, the Queensland Government declared and extended a public health emergency that remained in place at the time of the contract.

The Court also considered the likely period of the restrictions compared with the potential term of the lease of premises as part of the transaction until 2032 and found that the restrictions would likely represent only a relatively short interruption to the possible life of the business.

Her Honour Judge Rosengren said at [32]:

The type of business that the applicant was to give the first respondent possession of, was expressed in the Contract to be a bar and lounge. While it may have been an important benefit for the first respondent and the parties contemplated that it would get the benefit of the Business for such use, in my view it was not essential for the fulfilment of the Contract.

It is interesting that there were no customers enabling Choi & Lee to operate the business (comprising \$500,000 worth of assets) because of the COVID-19 directions, yet it was found that this did not deprive Choi & Lee of substantially the whole benefit of the business, even though the value of the goodwill was so low in comparison to the value of the business assets.

This decision reinforces the "all or nothing" effect of frustration. Temporary interruption "does not approach the gravity of a frustrating event".¹

Further information on frustration can be found in our previous articles:

[*The Application of the Doctrine of Frustration to Commercial Leases*](#)

[*It's not about COVID - Force Majeure and Frustration*](#)



When does the Regulation apply?

An interesting question follows from the facts of the case. What if the business contract had been completed and the landlord had consented to an assignment of the lease? Would the *Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* ("Regulation") have applied?

Section 5(1)(b) of the Regulation provides:

- 1) *a lease of premises is an **affected lease** if-*
...
 - b) *on the commencement the lease, or an agreement to enter into the lease, is binding on the lessee, whether or not the lease has commenced...*

Consequently, a lease must have been binding on **"the lessee"** at the commencement of the Regulation (20 May 2020).

It is arguable that an assignment of an existing lease to a new lessee does not trigger the application of the Regulation.

And what about the position for a lessee who holds premises under the holding over provisions of an expired lease?

Perhaps these are questions for another time.

¹ *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd and Anor* [2020] QDC 184, [34].

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