FRUSTRATION FORCE MAJEURE AND IMPACT OF COVID-19 ON THE BUILT ENVIRONMENT

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ABSTRACT

Supervening events occur to make it impossible for the obligations respectively assigned to contracting parties to be performed at all, or partly. By reason of the fact that these occurrences are not anticipated, parties fail to accommodate such clauses into their contract. Hence, the frustrating events can cause the discharge of a contract. However, cautious parties have taken to input force majeure clauses in their contracts with the effect of listing occurrences that could lead to suspension or postponement of the performance of the terms therein. This paper examines the concepts of frustration, and that of force majeure and their effect on construction contracts. Furthermore, the impact of Covid-19 was examined and it was discovered that the word "pandemic" was hardly inputted into force majeure clauses prior to the advent of the Corona virus. This impacted on a lot of contracts negatively and even led to the termination of some agreements. This paper consequently recommends the prudence of factoring the pandemic as a force majeure that contracting parties ought to adopt in their agreements so as to avoid instances of legal disputes. The research methodology relied upon in this paper is qualitative with heavy dependence on relevant journal articles textbooks.

Keywords: Frustration, Force Majeure, Building Contracts, Pandemic, Covid-19

THE EMERGENCE OF THE DOCTRINE OF FRUSTRATION

Frustration is said to be the *"premature determination of an agreement between parties lawfully entered into and in the course of the operation at the time of the premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement."* Sagay (2000).

In the reported case of *Davis Contractors Ltd. v. Fareham U.D.C. [1956] A.C. 696* it was held that frustration is said to occur "whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from what was undertaken by the contract." Frustration implies the discharge of a contract by reason of prevailing incident or event which makes it impossible for the contractual obligations to be carried out.

Hundreds of years before the doctrine of frustration was developed and finetuned, the absolute contract rule was in effect to keep a party bound by his contract and to make him bear the effect of his inability to perform his contractual obligations in a situation where the circumstances surrounding the performance has changed. This rule was restated in *Paradine v. Jane (1648) Aleyn. 26; 82 E.R. 89* where the court stated that:

> *"..when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract…for the law will not protect him beyond his agreement."*

In essence, contingent situations which are not covered by the provisions of the contract agreement does not excuse a defaulting party from carrying out his own part of the agreement. The application of the absolute contract rule was however considered harsh and the courts found the need to modify the principle on frustration in the landmark case of *Taylor v. Caldwell (1863) 3 B. & S. 826 [1861-73] AER 24.* A music hall the plaintiffs booked for concerts and fetes was razed by fire. As the contract failed to have a clause exempting the defendants from carrying out their own part of the agreement, the aggrieved plaintiffs commenced legal action against the defendants for the award of damages. They argued that mere fact that the hall was consumed by fire did not exempt the

defendants from performance. The court exempted both parties from performing their respective obligations in respect of the contract and stated that the parties entered into a contract on the premise that the hall's existence will remain in existence. Given that its existence was vital to their performance, the fire incident had frustrated the performance of such contract. The doctrine of frustration was consequently created. Frustration is said to be the occurrence of events outside of the purview of the contract which makes the performance of the contract impossible. Giwa-Osagie (2020)

The doctrine was then expanded to include other unforeseen events, apart from the obliteration of the subject-matter of the agreement. Sagay (2000). In the case of *Mazin Eng Ltd. v. Tower Aluminium [1993] 5 NWLR (Pt. 295) 536,* the Supreme Court held that that frustration only operates where the event took place before either party breached the contract.

Usually, frustrating events are not taken into consideration at the initiation of the contract. Their collective aim is to fulfil their respective parts in the agreement. It should be noted though, that the following inter alia do not constitute frustrating events:

- Inconvenience;
- Increased costs,
- Hardship; and
- Material loss.

Any of the following would be a supervening event amounting to frustration:

- Outbreak of war;
- Destruction of the subject matter of the contract;
- Requisition of the contract's subject matter by the government;
- Cancellation of anticipated event: the coronation cases;
- Statutory changes.

Where any of the parties to a contract pleads frustration, it has the effect of bringing the contract to an end as continued performance of obligations in respect to same has become impossible. The parties are therefore, excused by the courts from the contract. As stated in the case of *Tatem v. Gamboa (1939) 1 K.B. 132,* by Lord Goddard;

"If the foundation of the contract goes, either by destruction of the subject matter or by reason of such a long interruption or delay that the performance is really in effect a different contract, and

the parties have not provided what in event is to happen, the performance of the contract in that event is to be regarded as frustrated."

FORCE MAJEURE

Oxford Dictionary of Law defined Force Majeure as "irresistible compulsion or coercion. The phrase is used particularly in commercial contracts to describe events possibly affecting the contract and that are completely outside the parties' control. Such events are normally listed in full to ensure their enforceability; they may include *acts of God, fires, failure of suppliers or subcontractors to supply their supplier under the agreement, and strikes and other labour disputes that interfere with the supplier's performance of an agreement. An express clause would normally excuse both a delay and a total failure to perform the agreement." In *Globe Spinning Mills (Nig) Plc v. Reliance Textile Industries Ltd (2017) LPELR-41433(CA),* it was defined by the Court of Appeal "as a clause which allows parties to rescind a contract upon the occurrence of certain specified events beyond the control of parties making performance unrealistic and impossible."

From the definition, Force Majeure is a clause that is inserted into the body of the contract. The parties to the contract therefore have the discretion to determine what constitutes Force Majeure. A force majeure incident usually does not arise by reason of either party's negligent act but it is usually an incident or series of incidents outside of the parties' control. The occurrence of the event must have been unforeseen and inevitable, and it makes the fulfilment of the affected obligation in respect of the contract to be impossible. The length of the continuity of the force majeure event will determine if the contract would be terminated or not. Hartman & Petterd (2020). it should be noted that whatever is not inserted in the clause as constituting a Force Majeure event cannot be classified or categorised as such. In essence, any event outside of the captured likelihoods in the relevant clause would not amount to a force majeure event. In a case where there is a conflict arising from interpretation of a force majeure clause, the court would have to refer to the clause itself to determine if a particular event constitutes one, or not. The contracting parties must therefore ensure that the clause contains a broad list of instances of force majeure, in order for either party to be protected.

THE DIFFERENCES BETWEEN FORCE MAJEURE AND FRUSTRATION

Force Majeure is not a creation of common law, but originated under Roman law with consequent adoption by civil law jurisdictions, particularly France. It is said to be the counterpart of the doctrine of frustration which was created by common law. Azfar (2012). However, there are certain differences between force majeure and frustration.

1. A force majeure event must be expressly inserted as a clause in the body of the contract, and a failure to insert it makes it impossible to be relied on by any of the parties to a contract. Adu & Adepoju (2020). A frustrating event is usually left to the court to pronounce as such.
2. The occasion of a force majeure does not particularly lead to the termination of a contract, but might lead to a suspension of same pending the end of the force majeure itself. The opposite applies in respect of frustration as it usually leads to the end of the contract.
3. A force majeure event can lead to an extension of the contract itself, unlike a frustrating event which inadvertently, terminates the contract.
4. A party who has been prevented from carrying on his obligations must inform the other party of his intention to terminate the contract or suspend same with the use of a notice. However, notice is not deployed upon the occurrence of a frustrating event. Adu & Adepoju (2020)
5. While a force majeure clause guarantees succor for a party affected by the occurrence of any event listed therein, a frustrating event offers a defence to the defendant who ordinarily would have been held liable for the breach of contract by reason of non-performance of his duties in respect of the contract. Giwa-Osagie (2020).

Where both parties agree to the inclusion of a force majeure clause in the contract, it can have the effect of preventing the operation of the doctrine of frustration, peradventure one of the parties wanted to rely on it in asking the court to declare the contract terminated by reason of frustration. The reason for this is that, the moment a force majeure clause is inserted in a contract, it gives the impression that the parties have ascertained how to appropriate the risk of frustration peradventure it occurs. This presents as the better option rather than not having provided for it in the contract

and having the contract terminated abruptly by reason of frustration. In the latter case, the court steps in to determine that the contract has become impossible to perform without fault on either party's part.

THE ADVENT OF COVID-19 PANDEMIC AND ITS EFFECT ON BUILDING CONTRACTS

As noted earlier, the 2019 pandemic changed the world as we knew it, halting movements and works ongoing on projects or slowing it maximally down, at best. While it led to the reliance of artificial intelligence to monitor on-site construction business, the pandemic had a great consequence on the industry (Ogunnusi, et al 2020). Prior to the era when the world woke up to the reality of the Covid-19 virus as a pandemic with tumultuous effect on every facet of life, a force majeure clause was hardly framed to include 'pandemic' as an occurence that could make performance of a contract impossible. This is because, in several decades, or perhaps a century, the world had not experienced a virus having such widespread effect. Listing a pandemic as a force majeure event was hardly conceivable. The pandemic however, resulted in many countries shutting down or closing their air and land borders, and economic activities were most hit by reason of this. The effect of this was that many contracts were either suspended or completely terminated.

Owing to the novelty of the virus, contracts that whose performance were affected have had their parties grappling for legal solutions. Given the peculiarities of the time, the pandemic ordinarily should provide the justification for contract extensions (Ogunnusi, et al 2020) without accompanying compensation to the affected party. However, an inadvertent failure to input a force majeure clause may saddle parties concerned with how to mitigate loss without having contracts terminated; or seeking relief from the courts or alternative dispute resolution mechanisms. For parties to claim force majeure, however, it is dependent on if the list of force majeure is a general list, or a specific list. A general list is a sweeping list that does not specifically provide for instances of force majeure such as 'pandemic'. Only a specific list might include the word 'pandemic' as a force majeure, thereby, making it easy for the party to claim force majeure.

A typical force majeure clause is phrased thus:

> "Force Majeure shall mean an event, condition or circumstance or combination of events, conditions or circumstances beyond the reasonable control of, and not due to the fault or negligence of, the Party affected, and which could not have been avoided by exercise of due diligence and use of reasonable efforts, which prevents the performance by such affected Party of its obligations hereunder and shall include, as to either Party, structural collapse of building/s, explosion and fire (in either case to the extent not attributable to the negligence of the affected party), flood, earthquake, storm or other natural calamity or act of God, strike or other labor dispute, war, insurrection or riot, actions or failures to act by governmental entities or officials, failure to obtain governmental permits or approvals, and changes in laws, rules, regulations, orders or ordinances affecting the operation of the terms of this agreement which events are not pending on the date of this Agreement."

This specific clause limits force majeure clause to instances of structural collapse of buildings, flood, earthquake, etc but fails to extend its application generally to

> "other unforeseeable circumstances beyond the control of the Parties against which it would be have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts."

Contracts whose terms became impossible to perform by reason of the outbreak of the Covid-19 virus could be set aside by the courts at the instance of the party who pleads a frustrating event. However, it should be noted that, difficulty of performance does not translate to impossibility to perform the obligations of the contract. The courts have the prerogative to draw the distinction between both in reaching a decision. For instance, where economic downturn by reason of the pandemic has made it more expensive and difficult to carry out the contract, it is not necessarily a frustrating event, nor a force majeure.

The impact of Covid-19 is felt in in building contracts with respect to delay in construction rather than termination of the contract by reason of impossibility of performance. The impact of delay in

construction contracts is felt financially as delay leads to loss of profit and increases costs. Alshammari S. et al (2017) Where such events are captured by force majeure clauses in the contracts, it excuses a party from being held liable for non-performance. Where it is not stipulated, however, the party concerned cannot plead a frustrating event. Whether the affected party can however make a claim for settlement as a result of loss arising from the force majeure event will depend on the provision of the force majeure clause itself, and the facts of each case.

THE WAY FORWARD FOR BUILDING CONTRACTS

Contracts should be drawn in the future to accommodate the possibility of covid-19 pandemic as a force majeure event. This will forestall instances of legal disputes and limit litigation costs. However, in respect of subsisting contracts without the pandemic being included in the force majeure clause, it is crucial to look at applying the doctrine of frustration.

Secondly, construction companies should explore, with their legal team avenue for resolving conflicts that may arise by reason of the delays in implementation of responsibilities. Another vital term that should be inserted into regular building contracts should be dispute resolution clauses which explore ways of resolving conflicts without necessarily making it to court.

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