OPINION

by

Professor Stewart Brymer OBE, LLB (Hons), W.S., NP,

Solicitor

Stewart Brymer WS

8B Rutland Square

Edinburgh

EH1 2AS

OPINION

for

Edinburgh Conveyancers' Forum and Glasgow Conveyancers' Forum

1. BACKGROUND

1.1 I, Professor Stewart Brymer, OBE, LLB (Hons), W.S., NP, Solicitor, 8B Rutland Square, Edinburgh, EH1 2AS have been requested by the Chair of Edinburgh Conveyancers' Forum ("ECF") ("the Memorialists") to give an Opinion on the law on frustration and the enforceability of the terms of concluded missives (by both purchaser and seller) for residential conveyancing transactions concluded prior to the Government lockdown as a result of Covid-19 ("the Pandemic") and the Registers of Scotland temporary closure of the Application Record all in terms of the Scottish Standard Clauses (Edition 3) ("the Clauses").

1.2 I am advised that a number of Member Firms of ECF have been, or are being, threatened with Breach of Contract on both sides of transactions for failing to settle at the moment. I am also advised that members of the Glasgow Conveyancers' Forum have had similar experiences so this Opinion is delivered to the Forums jointly. I have therefore been asked to opine on this matter for the benefit of members of both organisations.

1.3 Given the importance of the issue raised, I discussed this Opinion with my colleague and good friend Emeritus Professor Robert Rennie who kindly looked over the draft. He has authorised me to state that he agrees with my conclusions. I also thank Professor George Gretton for his input on certain points of law.

1.4 Details of my professional qualifications and background are contained within the Appendix to this Opinion.

2. OPINION

2.1 As a result of the Pandemic, the Government has introduced restrictions on economic and social activities and many businesses and individuals are experiencing serious commercial disruption and may be either struggling to meet their contractual obligations, or in turn,

finding that their contract is not being fulfilled. Residential property transactions, being based on contracts between sellers and purchasers, are not immune from such disruption.

2.2 As the Memorialists will be aware, both The Law Society of Scotland and Registers of Scotland have issued guidance to the legal profession. The Scottish Government has also issued guidance on "moving home" to accompany **The Health Protection (Coronavirus) (Restrictions)(Scotland) Regulations 2020** which are now in force. These, together, form part of the backdrop against which issues arising under individual contracts must be addressed – the factual background matrix as it were.

2.3 Contracts for the sale and purchase of heritable property were, for many years, the subject of individual negotiation by solicitors on behalf of their clients. That changed with the advent of what were then described as "Standard Offers" firstly in Dundee and Tayside (based on the style of Offer derived over the years by the late Professor AJ McDonald) and then on a regional basis across Scotland. The Clauses were first introduced throughout Scotland in 2014 following the success of the various regional initiatives. The Clauses have generally looked at the "settled for" position of what practitioners will usually accept. Their use is not mandatory but they tend to be adopted in most residential property transactions however and have been a success.

2.4 As in any dispute, the first port of call when an issue arises is the contract which is in place between seller and purchaser – assuming, of course, that one has been concluded. For the purpose of this Opinion, it is assumed that a contract has been concluded on the basis of the Clauses. The first point to note from a review of the Clauses and previous editions thereof, is that there is no reference therein to the Common law principle of *force majeure* or of the doctrine of frustration. Clauses 12 and 13 deal with breach of contract by the seller and the purchaser respectively but both are silent on *force majeure* and frustration generally.

2.5 At Common law, where a transaction has not yet settled and where, as a result, *restitutio in integrum* is almost always possible, both seller and purchaser have the alternative remedies of an action for implement, or rescission and damages. However, a court will not order implement in circumstances where implement is clearly impossible; and, in such cases, the only effective remedy is to rescind and claim damages. Also, where *restitutio* has become impossible, then the remedy is specific implement, if that is practicable; or damages.

2.6 The *Collins Dictionary of Law* © W.J. Stewart, 2006 defines *force majeure* as being "*an event*

that no human foresight could anticipate or which, if anticipated, is too strong to be controlled. Depending on the legal system, such an event may relieve a party of an obligation to perform a contract." Many contracts and conditions have a *force majeure* clause which provides that a party to the contract is unable to sue for non-performance if the reason is a *force majeure*. A *force majeure* clause (meaning "superior force") is often inserted into contracts to: (a) excuse parties to a contract from performing their obligations under the contract; or (b) suspend their obligations under the contract due to unforeseen difficulties out of their control or foreseen problems that are likely to occur, but the nature or extent cannot be foreseen. Oft-quoted examples are "acts of God" such as floods or other natural disasters. It is a moot point is the definition stretches to epidemics or pandemics. Much depends on the wording used in each case. In practice, most *force majeure* clauses one encounters do not excuse a party's non-performance entirely, but only suspend it for the duration of the *force majeure*. The issue becomes more complicated as different jurisdictions adopt different interpretations of *force majeure*.

2.7 That, of course, leads one to interpret individual contracts and *force majeure* clauses in particular to see if particular circumstances fall within the definition of *force majeure*. There is no legal presumption of *force majeure* in Scots law. Parties to contracts governed by Scots law (and English law) who wish to have *force majeure* relief must spell out what constitutes *force majeure* in the contract itself. Failure to do so means that a supervening event which prevents performance of the contract will not (and cannot) be caught as a *force majeure* event, so as to provide relief from performance – because it has not been named as a qualifying event in the contract. In any event, courts will likely interpret a *force majeure* clause strictly. Whether the Pandemic would constitute a *force majeure* event will depend on each particular contract; whether the virus has hindered performance of the contract or made it impossible; whether such outbreak was foreseeable at the time the contract was made; and what are the other provisions of the contract. In the case of the Clauses, there is no provision for *force majeure* so that aspect does not provide the answer in this case.

2.8 That then leads to a consideration of the Common law principle of frustration. Unlike *force majeure*, the doctrine of frustration is a legal presumption in Scots law and will be implied into a contract. If a contract is found to be frustrated, the future performance of the contract will be set aside, rather than excusing parties from their obligations or suspending the contract, as

is the case where a *force majeure* clause is invoked. The difference is described by Professor McBryde in *The Law of Contract in Scotland* at para 21-44 as follows: "*Frustration ends parties' rights and obligations to future performance under the contract. This happens automatically without any act of the parties. The contract is not merely suspended. Notice of an election to treat the contract as perished is not necessary. Frustration does not depend, as does rescission or repudiation of a contract, on the choice of a contracting party*." Frustration occurs when, without default by either party, a contractual obligation may no longer be able to be performed. As stated at para 21-04 of *The Law of Contract in Scotland*: *"Sometimes the doctrine is described as impossibility of performance, but that is too narrow if the law recognises that the purpose of a contract may be frustrated, although its performance is possible."* The legal presumption of the doctrine may provide some peace of mind for a contracting party in the absence of a *force majeure* clause. However, it must be stressed that the threshold for frustration of a contract is high. The frustrating event cannot have been envisaged by the parties and a court will interpret this strictly. For example, if the event was anticipated or ought to have been anticipated and no clause was incorporated into the contract to deal with it, the doctrine cannot be relied upon. In my opinion, even though we have had influenza outbreaks in the UK in recent times, the scale of the consequences of the Pandemic could not have been fully envisaged. At first pass, therefore, frustration would seem to apply to contracts concluded prior to the effects of the Pandemic becoming more widespread. That is not the end of the matter however.

2.9 The best expression of the general test to be applied in cases involving possible frustration of contract remains that laid down in the English case of *Davis Contractors Ltd v Fareham UDC [1956] AC 696*:

"frustration occurs whenever the law recognises 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 that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

In the most recent frustration case, *Canary Wharf (BP4) T1 Limited v European Medicines Agency [2019] EWHC 335*, Marcus Smith J described this as having stood the "test of time" (*paragraph 22*).

2.10 Frustrating events are not the same as those which are unforeseeable, reasonably unforeseeable or unforeseen events. However, if the supervening event was in some way in contemplation at the time of contracting, it is more likely that the parties will have impliedly allocated the risk of it which would prevent frustration. Conversely, if the supervening event was not in contemplation at the time of contracting, it is more likely that the parties have not allocated its risk and that may give greater scope to the frustration arguments. As was stated in the case of *The Sea Angel* [2007] EWCA Civ 547:

"*Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances*."

2.11 To the best of my knowledge, there is no reported case of frustration of contract by reason of a pandemic. This is partly due to the fact that the concept of frustration only really arose in the nineteenth century just as the frequency and extent of pandemics were being reduced by advances in public health and medicine - a particular irony in light of our current circumstances today.

2.12 The reported cases on frustration broadly fall into three subcategories: (a) impossibility of agreed performance; (b) the mutually agreed purpose of the contract becoming impossible (impossibility of the "commercial adventure" as referred to in case law); and (c) a significant change to a mutually agreed state of affairs (for example, destruction of the subject matter of the contract or cancellation of an event). These sub-categories often overlap. The so-called "coronation cases" are examples of (b) and (c) viz: *Krell v Henry [1903] 2 KB 740* and *Herne Bay Steam Boat Company v Hutton [1903] 2 KB 683*. These cases arose from the cancellation of coronation events due to King Edward VII's ill-health. In *Krell* the contract (hire of a flat) was held to be frustrated; in *Herne Bay* (hire of a boat) it was not. The difference between the two cases is best understood on the basis that there was an implied term in *Krell* that the coronation would go ahead. The same implied term did not exist in *Herne Bay*. This underlines that it is not enough to point to the unprecedented impact of the Pandemic: the argument has to be framed by reference to the express and implied allocation of risk in the contract. In the

case of the Clauses, there is no such express allocation of risk.

2.13 The recent *Canary Wharf* case (see para 2.9 above) is an interesting case. That case was based on the express terms of a lease. The European Medicines Agency (EMA) unsuccessfully sought to escape a 25-year lease on a London office block by arguing that the lease would be frustrated when the UK ceased to be an EU member state. Brexit, it claimed, represented a frustration of common purpose. But the lease itself contemplated that the EMA's headquarters might not remain in Canary Wharf for the duration of the lease. That was because, subject to (albeit onerous) conditions, the lease expressly permitted the EMA to assign or sub-let the property in part or in its entirety. Thus the EMA took the risk of its purpose for taking the lease vanishing, because it bargained for the right to transfer it to another party.

2.14 There is also the question as to whether the purpose of the contract has been rendered illegal. This would be by the introduction of supervening legislation. In this case, while the effects of **The Health Protection (Coronavirus) (Restrictions)(Scotland) Regulations 2020** undoubtedly restrict the performance of contracts they do not, as yet, render them illegal. As a result, I do not believe that contracts affected by the Pandemic will fall within the scope of the supervening illegality doctrine. As an aside, it is worth considering the terms of the Regulations at this point. Regulation 5(1) states that "*Except to the extent that a defence would be available under regulation 8(4), during the emergency period, no person may leave the place where they are living*." Regulation 8(4) states that: "I*t is a defence to a charge of committing an offence under paragraph (1), (2) or (3) to show that the person, in the circumstances, had a reasonable excuse*." And 8(5) goes on to provide that "*In paragraph (4), a reasonable excuse includes the need - (h) to fulfil a legal obligation, including attending court or satisfying bail conditions, or to participate in legal proceedings*." Regulation 5, taken by itself, means that it would be unlawful for a seller to give vacant possession. The question is whether the contractual obligation to give vacant possession would be to *"to fulfil a legal obligation*". I am of the opinion that it does but the point is that the examples given fall into the public law variety rather than private law. I do no more than highlight this point as the issue is certainly debatable. I should also add that the Regulations would not prevent sales where the property in question is vacant.

2.15 The Pandemic will likely lead to disputes as to which party bears the risks of non-performance on the date envisaged in the contract for settlement of the transaction. While there are some key principles which will help contracting parties assess the likely outcome of those disputes, there are arguments which can be advanced both to widen and to narrow the relevant doctrines and points of uncertainty. Accordingly, if *force majeure*, frustration and illegality do not suspend or end or the contract, then other arguments may well be advanced. One such argument might be whether there has there been a material adverse change (where the contract includes such a clause). This is not so in the case of the Clauses.

2.16 What then of the terms of Clauses 12 and 13 of the Clauses? Clause 12 deals with instances of breach of contract by the seller and is clear in its terms. Clause 13 is more extensive as it deals with interest on the Price in the event of late payment etc. As mentioned above, neither Clause deals with frustration. In both cases, the party not in default has certain contractual rights against the defaulting party and the question becomes whether or not the effects of the disruption caused by the Pandemic are deemed to interrupt the timetables therein specified as to the consequences of default. In my opinion, the logical analysis of the situation is that it does but not, at this stage, in a way in which would otherwise lead to performance of the contract being frustrated.

2.17 So, these general principles aside, what of the point in question in the case of a residential property transaction with concluded Missives governed by the Clauses where one party to the contract seeks to claim that the contract has been frustrated? In my opinion, it is consistent with the guidance promulgated by the Scottish Government, The Law Society of Scotland and Registers of Scotland that transactions should be postponed in light of the overarching importance of public health and safety and that such contracts are not frustrated. Government guidance is clear namely that if a contract for the sale and purchase of a property is in place and the property is occupied, all parties should work together to agree a delay or another way to resolve the matter. If moving is unavoidable or essential for other reasons, then settlement may still take place but, in such circumstances, people must follow advice on staying away from others in order to minimise the spread of the virus. Put simply we must all ensure that our actions do by not bring others into danger which they might otherwise have avoided. It is widely accepted that if a party wishes to claim under the doctrine of frustration for any contract affected by the Pandemic it must prove that the frustrating event has made

performance impossible – not merely difficult, time-consuming or expensive. As mentioned above, the threshold for frustration of a contract is high. In my opinion, performance of contracts for the sale and purchase of residential property is not impossible. The Advance Notice extension put in place by Registers of Scotland facilitates settlement generally – where same can be effected safely. Settlements can also still take place and deeds accepted on to the Application Record in special circumstances and a number of deeds have been accepted to date. While, in general, deeds are not being accepted on to the Land Register that is expected to change fairly soon with digital submission being rolled out.

2.18 Looking at the examples put to me by the Memorialists, in my opinion, it is not open for a purchaser, for example, to argue frustration of contract in circumstances where the seller can demonstrate that they can deliver a disposition in favour of the purchaser or their nominee and also demonstrate that there is a valid, marketable title that would allow Keeper to register the said disposition if the Land Register was open. Likewise, it is not open for a seller to claim frustration of contract in circumstances where the purchaser cannot implement their obligations because of them being unable to sign and deliver security documentation due to illness or the non-availability of loan finance owing to their lenders' operations being adversely affected by the Pandemic. Even if it were possible for the purchaser and/or the seller so to argue and time was not expressly of the essence of the contract (and time is not stated to be of the essence in the Clauses), they would still require to serve an ultimatum notice of a suitable period in terms of the Clauses – *Rodger (Builders) Limited v Fawdry 1950 SC 483.* By the time such an ultimatum notice had expired, the restrictions currently in place as a result of the Pandemic may well have been lifted.

In my opinion, although the Pandemic might delay settlement, it does not completely render the contract frustrated (but this will turn on the facts of each case and, I suspect, the period during which "normal " business is interrupted). If, for example, the restrictions remain in force for longer than three months (being the length of time which most informed scientists are talking about) then the case for frustration may be stronger. It is also, in my opinion, very unlikely that a Court would order implement when accepted guidelines and social responsibility generally dictate that transactions, where possible, be placed on hold for a period – it generally being implied in any contract that the parties to that contract are both working towards a common goal. It is, of course, essential that the whole facts and

circumstances be assessed and the delay in settlement viewed in the context of the overriding issue of public safety and individual and collective responsibilities in that regard. Registers of Scotland are moving quickly to introduce further measures to enable digital presentment firstly of Advance Notices and then of dispositions and other deeds being presented for registration. In that regard, the Keeper of the Registers and her staff are to be commended. Against that backdrop, I am of the view that a Court would not look favourably on any party to a contract who was trying to use the threat of frustration of contract as a way to potentially place other people at risk of contracting and/or spreading the virus. Obviously each case must be assessed against its own facts and circumstances and I do not doubt that many such Opinions will be sought in the coming weeks and months involving national and international contracts but, in my opinion based on the examples which have been made known to me by the Memorialists I am of the opinion that most, if not all, contracts for the sale and purchase of residential property in Scotland are not frustrated and that, instead, they are delayed for a reasonable period by reason of public health and safety. That is consistent with Government policy and guidelines laid down by The Law Society of Scotland and Registers of Scotland. It is also entirely consistent with the moral and social code of conduct which all civilised societies live. This may well mean that parties to the contract may have losses which they cannot recover. That, however, is the price of public safety. I regret that it is not possible for me to give an absolutely conclusive view on the issue. It is, for example, not impossible that under the impact of the present crisis the courts (when they fully re-open for business) might be more open than in the past to frustration arguments in certain circumstances. That is simply impossible to predict.

2.19 From a practical perspective, it is also recommended that a party to a contract based on the Clauses should consider the consequences, both practical and legal, before giving a termination notice to the other party. In general terms, wrongful termination of a legally binding contract constitutes a repudiatory breach of contract by the terminating party, the financial consequences of which are likely to be significant. In such circumstances, parties to a contract and their legal advisers might do well to heed the general guidance referred to above and seek to vary the Missives so as to delay settlement. Without placing too much emphasis on the point, we all have a social responsibility to each other in such challenging times. Solicitors ought also to be mindful of their own position if they are instructed by a client to

threaten frustration of contract as a way in which to pressurise the other party to the contract to implement their obligations. Such threats might lead to issues of public safety and might well be the sort of matter which would be investigated by The Law Society of Scotland and/or the Scottish Legal Complaints Commission.

2.20 I have nothing further to add other than to say that I am willing to make myself available for consultation if required.

STEWART BRYMER

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APPENDIX

QUALIFICATIONS

(1) Graduated with First Class Honours in Law from the University of Dundee in July, 1979 and admitted as a Solicitor in Scotland in August, 1981.

(2) Partner, Thorntons Law LLP (1983 -2009) and member of the Commercial Property Unit within the firm's Business Law Department.

(3) Since July 2009, in practice on own account trading as Stewart Brymer WS, the trading name of Brymer Legal Limited - Registered SC360203.

(4) Honorary Professor and part-time lecturer in the Practice of Conveyancing at the University of Dundee.

(5) Contributor to the Seventh Edition of Professor A.J McDonald's Conveyancing Manual. I have been involved with the Conveyancing Manual since it was first published in 1982 and previously chaired the Editorial Review Board.

(6) Past-Convenor of the Conveyancing Committee of The Law Society of Scotland and of the ARTL Implementation Group. Former member of the Joint Consultative Committee of the Law Society and the Registers of Scotland.

(7) Member of the Advisory Groups to the Scottish Law Commission on the Abolition of the Feudal System; Reform of Real Burdens; Reform of the Law of the Tenement; Conversion of Long Leases; and Reform of the Land Registration etc. (Scotland) Act 1979.

(8) Former member of Sub-Group B of the Housing Improvement Task Force set up by the Scottish Executive to review the House Buying Process in Scotland. Member of the UK Government's Home Buying & Selling Group looking at ways to improve the home moving process in the UK.

(9) Former External Examiner in Conveyancing and Professional Negligence Honours Course at the University of Glasgow.

(10) Former External Examiner in the Diploma in Legal Practice at the Universities of Aberdeen and Stirling.

(11) Author of various articles on Conveyancing and Commercial Leasing in the Journal of The Law Society of Scotland; the Scots Law Times; the Juridical Review and Greens Property Law Bulletin.

(12) Co-author of "Conveyancing in the Electronic Age" with Professor Robert Rennie.

(13) Co-author of “Leases” with Professor Robert Rennie.

(14) I have given many Opinions for litigants or prospective litigants in relation to negligence or alleged negligence by Solicitors and have given expert evidence in negligence cases in Court.