



ELI Webinar on Hardship & Force Majeure English law

Hugh Beale

Hugh.Beale@warwick.ac.uk



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Common law: odd ones out?

- ▶ Law is different
- ▶ Measures different to Principle 13 (1) & (2)

Strict liability to perform on time

- ▶ No doctrine of Force Majeure
- ▶ No adjustment of contract or termination because of hardship or change of circumstances

Frustration

- ▶ Automatic discharge of contract
 - No obligations to perform in future
 - If performance impossible
 - either factually or legally,
 - without the fault of either party,
 - the impossibility was unforeseeable (or possibly unforeseen) and
 - the contract does not allocate the risk of inability to perform to one of the parties, either expressly or impliedly because it is one of the risks that party is expected to bear

Temporary impossibility

- ▶ Only if so long that
 - performance of the contract becomes impossible (for example, if performance on the date set is essential or the impossibility lasts so long that it would make performance pointless), or
 - performance in the new situation would be completely different to what the contract called for.
- ▶ Otherwise breach; no defence that onerous

Workarounds

- ▶ FM clauses very common
- ▶ Application and effects depend on interpretation of particular clause
 - In context
 - No general doctrine to assist
- ▶ Some 'hardship'/ material adverse change clauses
 - Same true

Particular doctrines: e.g.

- ▶ Residential tenancies
 - Court order for eviction
 - ‘suspended possession orders’
 - T must pay current rent and something to arrears
- ▶ Consumer credit
 - ‘Time orders’
- ▶ But limited
 - Only if will be able to pay
 - Interest continues to accrue

Insolvency

- ▶ England makes insolvency or personal bankruptcy relatively easy

COVID-19 measures

- ▶ No changes to contract law
- ▶ Few to contract terms
 - Delay enforcement
 - Allow extra time for performance
- ▶ Possession proceedings suspended for 3m from 27 March
- ▶ Bailiffs may not execute judgments

New Regulatory requirements

- ▶ Financial Conduct Authority
 - Regulates consumer credit (CC)
 - Includes sole traders, small partnerships
 - Principles: ‘treat customers fairly’
 - ‘Payment holidays’ in many CC agreements
 - Sanctions for non-compliance
 - Ombudsman will apply same test
 - Firm may have to compensate consumer
 - Even if exercising strict legal rights
 - But interest continues to accrue
 - Some firms must review interest rates

Contracts, general contract law

- ▶ Essentially little or no change
- ▶ Protecting consumers including sole traders by other means
 - Small companies vulnerable

Judicial relief?

- ▶ A few little-known cases of something like FM
 - Employee who cannot work because sick
 - Not in breach
 - Employer has right to terminate if effect serious
 - Legal basis unclear
 - Construction of particular contract?
- ▶ Could this be developed?
- ▶ General change unlikely
 - E values certainty, freedom from judicial control
 - Especially in financial and other markets