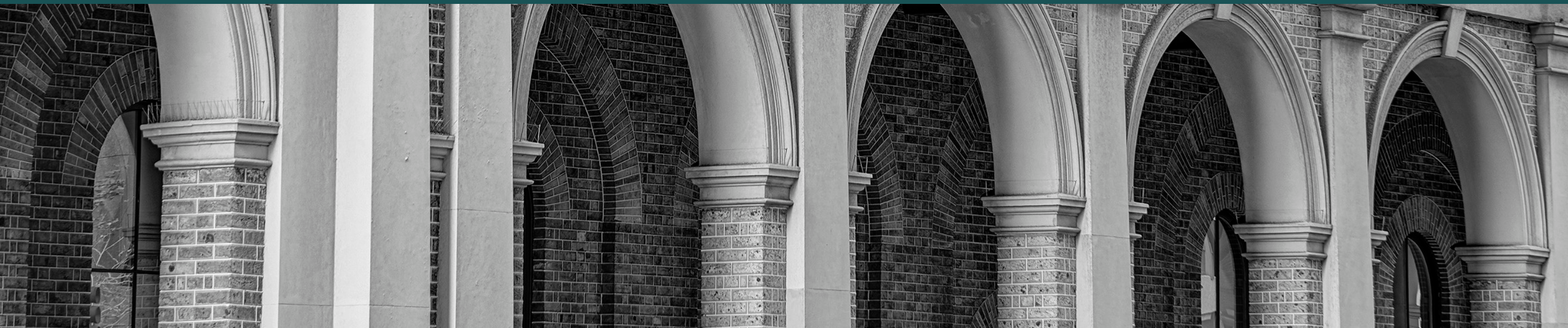




GREENWAY CHAMBERS

# Commerce and COVID-19: A Song of Pandemic and Insolvency

Carmel Lee and Jonathon Dooley

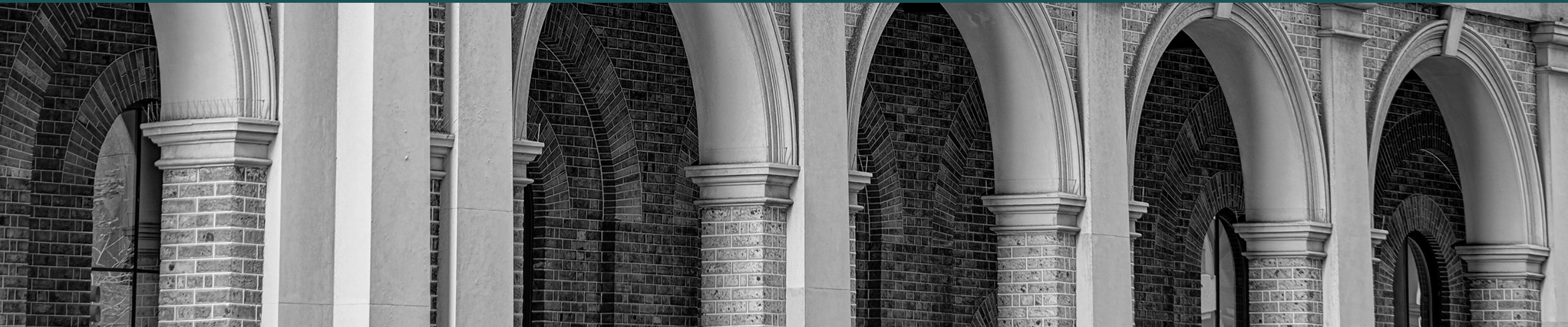




GREENWAY CHAMBERS

# Looking under the face mask of insolvency and commercial issues

---



## Looking under the face mask of insolvency and commercial issues

---

### Introduction

1. Part 1 - amendments to statutory demands and bankruptcy notices.
2. Part 2 - new "safe harbour" provision.
3. Part 3 - new regimes for small business restructuring, and streamlined liquidations.
4. Part 4 - select cases.



## Looking under the face mask of insolvency and commercial issues

---

### Part 1: Statutory demand and bankruptcy notices

1. Stat demand - amount from \$2,000 to \$20,000.
2. Bankruptcy notice - amount from \$5,000 to \$20,000 (now permanently \$10,000).
3. Changes in effect until 31 December 2020.



## Looking under the face mask of insolvency and commercial issues

---

### Part 2: Safe Harbour 588GAAA

1. Debts incurred up to 31 December 2020, prior to administrator or liquidator, in “ordinary course of business”.
2. Defendant bears onus.
3. “Ordinary course of business” has been considered in other areas.



## Looking under the face mask of insolvency and commercial issues

---

### Part 3: New insolvency regimes

1. New restructuring: Part 5.3B.
2. Insolvency practitioner assists with generating restructuring plan for small businesses.
3. Allows companies to release debt if fulfilled.
4. Streamlined liquidation: s 500A to 500AE.
5. More efficient liquidations, with no meetings of creditors.



## Looking under the face mask of insolvency and commercial issues

---

### Part 4: COVID in the Courts (just cases)

1. HDI v Wonkana (NSWCA).
  - a. Exclusion clause referred to Quarantine Act - had been repealed.
  - b. Insurers argued should be construed as the replacement Biosecurity Act.
  - c. Insurers lost.
2. Rockment v AAI (FCAFC).
  - a. Separate question re exclusion clause.
  - b. Found that causation issue and fact specific.

### Part 4: COVID in the Courts (just cases) (continued)

1. Ryals Hotel (NSWSC)
  - a. Lessor applied to wind-up lessee.
  - b. Conclusion that not insolvent, and not just and equitable.
  - c. Also found abuse of process, as legislature had sought to limit winding-up.
  - d. Indemnity costs ordered.



## Looking under the face mask of insolvency and commercial issues

---

### Conclusion

1. 2020: What a year.
2. 2021 and on: The tip of the COVID iceberg?



### Introduction

1. Payment of Rent Under Commercial Leases
2. Frustration of Contract
3. Procedure: Adjournment Applications

## Payment of Rent Under Commercial Leases

---

### Legislation

- *Retail and Other Commercial Lease (COVID-19)  
Regulation 2020 (No 3) NSW*
- *Retail and Other Commercial Leases (COVID-19)  
Regulation 2020 NSW*



## Payment of Rent Under Commercial Leases

---

### Cases

- *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd* [2020] NSWSC 996 and *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd (No 2)* [2020] NSWSC 1141
- *NTT Australia Digital Pty Ltd v Cover Genius Services Pty Ltd* [2020] NSWSC 1378
- *First Renewable Pty Ltd v Nastevski* [2020] NSWSC 1508

# Frustration of Contract

---

## Key Principles

### Definition

1. Without the fault of either party a contractual obligation becomes incapable of being performed because circumstances in which performance is called for would be radically different to that which was promised by the contract
2. "It was not this that I promised to do"

See: *Davies Contractors Ltd v Fareham Urban District Council*

[1956] AC 729



## Frustration of Contract

---

### Key Principles

- *Taylor v Caldwell* (1863) 122 ER 309
- *Krell v Henry* [1903] 2 KB 740, 749
- *Chapman v Taylor & Ors; Vero Insurance Ltd v Taylor & Ors* [2004] NSWCA 456

## Frustration of Contract

---

Commerical Considerations: Should you claim Frustration?

- Frustration due to a pandemic: *Li Ching Wang v Xuan Yi Xiong* [2004] HKC 353



## Procedure: Adjournment Applications at this Time

---

### Legislation

- *Evidence (Audio and Audio Visual Links) Act*  
1998 (NSW): s22
- Note: Expires 25 March 2021





## Where an Adjournment Will be Granted

---

- Witnesses unable to travel to hearing, cannot give evidence via AVL link from their location, issues of credit best addressed in person: *Motorola Solutions Inc v Hytera Communications Corporation Ltd* [2020] FCA 539, *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd* [2020] NSWSC 732
- National security issues: *Roberts-Smith v Fairfax Media Publications Pty Ltd* (No 4) [2020] FCA 614
- Need to assess a witnesses' demeanour: *Quince v Quince* [2020] NSWSC 326

## Where and Adjournment Refused

---

- Trial can proceed without any real risk of practical injustice:  
*ASIC v GetSwift Ltd* [2020] FCA 504
- Solutions can be found to difficulties posed by a virtual hearing, adjournment may result in adjournment for an indefinite period of time: *Capic v Ford Motor Company* [2020] FCA 486
- Ability of Counsel to “see” and “read” courtroom, remoteness of junior counsel and solicitors not sufficient reason: *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38



GREENWAY CHAMBERS

Questions?

---

