GREENWAY CHAMBERS

COMMERCIAL LITIGATION IN THE TIME OF COVID-19

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INTRODUCTION

1. It is clear that the COVID-19 pandemic, and the government health orders and "lockdowns" that have followed, have changed the commercial environment and the way practitioners advise and represent their clients, first changing the way that businesses were permitted to operate, secondly in the way they operated in a changed commercial environment. The pandemic has changed the priorities of many businesses who in turn have reconsidered their commercial arrangements as a result.

2. A plethora of law firm updates have been published since February 2020, the beginning of the pandemic in Australia. These aimed to advise corporate clients in a rapidly changing environment, and recognised that clients would look to their commercial contracts when considering a change in their position. Arguably, it is of limited assistance to write a general paper addressing many of the remedies clients may look to in their contracts as each will turn upon the exact wording and proper construction of the contractual clauses. These include *force majeure* provisions, termination and variation clauses. However, one topic that is possible to examine in a general sense is that of frustration of contract – a relief several commercial clients have no doubt turned their minds to since the start of the pandemic.

3. This paper, whilst not exhaustive, will examine some issues relevant to commercial clients considering amending their commercial positions at this time. It will first examine commercial leases as an example of a contract that clients have attempted to renegotiate in light of the changing legislative and commercial environment. It will then examine the doctrine of frustration in light of commercial clients' growing interest in this remedy. Finally, it will consider the procedure of running commercial litigation during the pandemic; namely when a court will grant an adjournment application, when such an application will be refused, and considerations for parties in running an adjournment application.

RETAIL AND OTHER COMMERCIAL LEASES (COVID-19 REGULATION)

4. One of the most obvious commercial areas that has been impacted by the COVID-19 pandemic is lease arrangements, specifically commercial leases. Companies sought to save funds on unused commercial space as the government made a number of stay-at-home orders and workers worked from home during 2020 and, in many cases, into 2021.

5. On 7 April 2020, the National Cabinet released a Mandatory Code of Conduct (**Code**) for commercial tenancies. This contained a number of "good faith leasing principles"[1] which were to be applied in negotiating temporary arrangements between a landlord and tenant during the COVID-19 period.

6. The Code was given force in NSW through a number of amendments to the *Retail Leases Act 1994* (NSW). Most relevantly these have been the *Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020* (NSW) which came into operation on 1 January 2021 and extended the time period of the two previous regulations in this area: the *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* (NSW) which applied from 24 October 2020 to 31 December 2020; and the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) which provided for the period 24 April 2020 to 24 October 2020.

7. The *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) inserted schedule 5 into the *Conveyancing (General) Regulation 2018* (NSW) (**Schedule**). The Schedule outlines special provisions relating to leases during the COVID-19 pandemic. It is applicable to "impacted lessees" during the "prescribed period" ending on 28 March 2021.[2] In order to fall under the category of an "impacted lessee", a person must:

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1 National Cabinet, *Mandatory Code of Conduct: SME Commercial Leasing Principles During COVID-19* (7 April 2020) <https://www.pm.gov.au/sites/default/files/files/national-cabinet-mandatory-code-ofconduct-sme-commercial-leasing-principles.pdf> 1.

2 *Retail and Other Commercial Leases (COVID-19) Regulation (No 3) 2020* (NSW) s 3 (definition of 'prescribed period'); *Conveyancing (General) Regulation 2018* (NSW) sch 5, cl 3.

a. be a party to a lease for a premises or land for commercial purposes on or after 24 April 2020;[3]
b. qualify for the JobKeeper scheme under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth);[4]
c. be a part of a corporate group where the turnover for the 2018–19 financial year was less than $50 million.[5]

8. The Schedule prevents lessors from commencing an action against an impacted lessee for failing to pay rent or outgoings, or because the lessee's business is not open during the hours specified in the lease agreement.[6] It also protects lessees against increased rent rates and exempts them from liability for a breach of their lease agreement for an act or omission that was required by state or Commonwealth legislation responding to the pandemic.[7]

9. Parties to a "commercial lease" are also given the option to request a renegotiation of any terms impacted by COVID-19, including rent rates.[8] Should the parties choose to renegotiate any terms of their lease, the Schedule requires them to consider the economic impacts of the pandemic and the principles set out in the National Cabinet's National Code of Conduct;[9] the latter of which courts must also have regard to should a proceeding arise under the Schedule.[10]

10. This Schedule does not impact the lessor from commencing actions unrelated to COVID-19.[11]

PAYMENT OF RENT UNDER COMMERCIAL LEASES

11. A number of recent cases demonstrate how the above negotiations would operate in practice. The Sneakerboy cases: *Sneakerboy Retail Pty Ltd v Georges*

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3 *Conveyancing (General) Regulation 2018* (NSW) sch 5, cl 1 (definitions of 'impacted lessee' and 'commercial lease').
4 *Conveyancing (General) Regulation 2018* (NSW) sch 5, cl 2(1)(a).
5 Ibid sch5, cl 2(1)(b).
6 Ibid sch 5, cl 4(2).
7 Ibid sch 5, sub-cls 4(3), (6).
8 Ibid sch 5, cl 5(2).
9 Ibid sch 5, cl 5(6).
10 Ibid sch 5, cl 7.
11 Ibid sch 5, cl 8.

Properties Pty Ltd (***Sneakerboy***)[12] and *Sneakerboy Retail Pty Ltd v Georges Properties Pty Ltd (No 2)* (***Sneakerboy (No 2)***),[13] provide an excellent example of the application of the above legislation to commercial concerns during the height of the COVID-19 shutdown in Sydney in 2020 and have been referred to in subsequent cases in this area.[14]

12. Sneakerboy was the lessee of retail premises owned by Georges Properties. Sneakerboy experienced a decline in revenue due to COVID-19 and removed stock from its premises. The lease was terminated by the landlord when it had three years to run, on the basis of non-payment of rent and abandonment of the premises. In response, Sneakerboy sought relief against forfeiture.

13. In *Sneakerboy* the Court found that removing stock from the premises did not constitute an abandonment of the premises but was a decision to temporarily cease trading in response to COVID-19 restrictions. As such, abandonment was not an appropriate ground for termination of the lease[15].

14. The Court found that the normal principles concerning relief were to be applied. That is, that where the only ground of termination is arrears, relief should be granted.[16] Significantly the above events occurred prior to the operation of the *Retail and Other Commercial Leases (COVID-19) Regulation 2020.* The Court indicated that had the Regulation applied at that time, the terminating the lease would have breached the Regulation.[17]

15. In *Sneakerboy (No 2)*, Sneakerboy sought a reduction of the value of its bank guarantee that it was required to provide.[18] The Court found that COVID-19 had impacted lease rental payments which required the Court to vary the value of the replacement bank guarantee that Sneakerboy was required to provide.[19] The new value required consideration of the reduction in Sneakerboy's "tenants trade"

12 [2020] NSWSC 996.
13 [2020] NSWSC 1141.
14 See, eg, *NTT Australia Digital Pty Ltd v Cover Genius Services Pty Ltd* [2020] NSWSC 1378.
15 [2020] NSWSC 996, [87].
16 Ibid [67]–[70].
17 Ibid [48]–[51].
18 [2020] NSWSC 1411, [25].
19 Ibid [58].

during the COVID-19 period. The "tenants trade" included turnover from both the leased premises and online sales.[20]

16. An example of attempting to avoid commercial costs incurred under agreements made just prior to the COVID-19 pandemic can be seen in *NTT Australia Digital Pty Ltd v Cover Genius Services Pty Ltd*.[21] In this case, the plaintiff (**NTT**) was a tenant of an area of office space. Through a Deed of Assignment (**Deed**), the NTT assigned the lease of the office premises to the first defendant, Cover Genius Services Pty Ltd (**CGS**). CGS signed the Deed on 7 January 2020, with the assignment to take place on 1 May 2020.[22]

17. From 24 March 2020 to 27 April 2020, CGS communicated with the third defendant, the Landlord, Dexus Funds Management Ltd (**Dexus**) with the stated purpose of CGS obtaining a rental or some other form of assistance with respect to their obligations as a tenant under the lease from 1 May 2020, initially seeking a "100% waiver of rent and outgoings due to the impact of the Pandemic".[23] A claim for frustration was later abandoned.[24]

18. NTT sought an order for specific performance of the Deed by CGS. Dexus sought payment from NTT, or in the alternative, CGS for rent, outgoings and other amounts payable under the lease along with interest.

19. The Court asked:[25]

    a. Is the Deed valid and enforceable?
    b. Is NTT entitled to specific performance?
    c. Is CGS liable to indemnify NTT for all amounts claimed by Perpetual Trustee Company Ltd (second defendant) (**Perpetual**) in respect of CGS' default or delay in the performance of its obligations under the lease?
    d. Is Perpetual (and/or Dexus) entitled to call upon the NTT Bank Guarantee?

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20 Ibid [112]–[116].
21 [2020] NSWSC 1378.
22 Ibid [18], [27].
23 Ibid [58].
24 Ibid [60].
25 Ibid [65].

20. The Court found:

a. The Deed was valid and enforceable against CGS. It was validly executed. Significantly, CGS' conduct after execution of the Deed supported this finding: CGS immediately proceeded to spend large sums of money on the fit out of the premises, moved its staff into the premises and consistently referred to its impending obligations under the lease following execution of the Deed. CGS' attempts to negotiate with Dexus demonstrated it understood what it was obliged to pay as of 1 May 2020.[26]

b. The lease was due to terminate in August 2021. The Court found that specific performance should not be ordered for the following reasons:

   i. First there was some doubt as to whether damages would not be an adequate remedy.
   ii. Secondly, an order for specific performance would result in significant hardship to CGS.
   iii. Third, the Court was reluctant to order specific performance that relied on the consent of a third-party financier to issue a bank guarantee, especially in the midst of an economic crisis caused by COVID-19 and for a company with little or no asset backing.
   iv. Fourth, the Court was reluctant to order specific performance of a short-term lease, and although hardship was not pleaded the need for an expedited hearing may explain the hardship.

   As such the Court in an exercise of discretion declined to make an order for specific performance[27] and NTT would be left to a claim in damages. The quantum of those damages was referable to the moneys that: one, NTT had already paid to the Dexus entities in satisfaction of CGS' liabilities under the Deed from the date on which CGS became liable; and two, that NTT would, for the balance of the lease term, pay over to the Dexus entities in satisfaction of the liability that CGS has taken under the Deed.

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26 Ibid [169]–[170].
27 Ibid [185]–[191].

c. CGS was liable to indemnify NTT pursuant to the Deed.[28]

d. After a detailed examination of the COVID-19 legislative regime and caselaw the Court found that CGS should not be permitted to rely upon the COVID-19 regulations. In considering the operation of *Uniform Civil Procedure Rules* r 14.14, the Court noted that reliance on the COVID-19 regulations was raised for the first time in the expedited hearing. That is, CGS raised matters of fact not arising from its Amended Defence being whether it was an "impacted lessee" which in turn depended on a determination of its eligibility for the JobKeeper scheme and the turnover of the CGS group in the last financial year.[29] NTT would be materially prejudiced if CGS were permitted to assert that the parties were compelled to proceed to mediation before the Court could make a decision regarding appropriate remedy or that the principle relief should be declined or damages sought should be reduced by 50%.[30] Further, NTT would be prejudiced from being unable to test CGS' claim of eligibility.[31] The Court declined to exercise its discretion to permit CGS to rely on the COVID-19 regulations.[32] After a detailed analysis of s 128 of the *Conveyancing Act 1919* (NSW), the Court found the Deed was a "commercial lease" for the purposes of the COVID-19 regulations.[33]

21. The parties were referred to mediation with the aim of reaching an arrangement that accommodated each of their interests in light of the reasons. Costs were to follow the event with CGS bearing the costs of the proceedings.[34]

22. In *First Renewable Pty Ltd v Nastevski*[35] the First Renewable (plaintiff) was a tenant of Natevski's (the defendant's) premises. Against their lease agreement First Renewable sublet the premises to another party without the consent of the Natevski

28 Ibid [194].
29 Ibid [258].
30 Ibid [263].
31 Ibid [295].
32 Ibid [298].
33 Ibid [306].
34 Ibid [315]–[316].
35 [2020] NSWSC 1508.

in August 2019. Nastevski re-entered the premises. First Renewable sought relief against forfeiture. In declining to grant the relief, the Court found that the then recently introduced *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) did not apply in cases involving a breach of a lease covenant unrelated to rent.[36] Nothing in the Regulation prevented the lessor from taking action (including the right to re-enter the property and terminate a lease) on grounds unrelated to the economic impacts of COVID-19.[37] The Court further noted the *Retail and Other Commercial Leases (COVID-19) Regulation 2020* (NSW) described the relationship between a lessor and lessee. Generally, sublessees cannot benefit from the Regulation.[38]

FRUSTRATION

23. Given the recent renewed interest in frustration of contract as a remedy, including in circumstances where the doctrine does not apply, it is worth revisiting the key authorities in frustration of contract. Perhaps the best definition of frustration is found in *Davies Contractors Ltd v Fareham Urban District Council* in which Lord Radcliffe stated:

> [F]rustration occurs whenever the law recognizes that without default of either party a contractual obligation of a party 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.[39]

24. Put another way, the doctrine applies in default, when an unforeseen supervening event, not caused by either party, makes performance of the contract impossible, or radically different to that agreed to by the parties.[40] Frustration brings the operation of a contract to an end without damages being due to either party.

25. The doctrine is perhaps best illustrated through the following three key authorities: *Taylor v Caldwell*,[41] *Krell v Henry*,[42] and *Chapman v Taylor*.[43]

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36 Ibid [26].
37 Ibid [24].
38 Ibid [21].
39 [1956] AC 696, 729.
40 *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337.
41 (1863) 122 ER 309.
42 [1903] 2 KB 740.
43 [2004] NSWCA 456.

26. In *Taylor v Caldwell* the plaintiff hired a music hall from the defendant for a concert. An express term of the contract was the purpose for which the hall would be used, requiring that the premises be in a fit state for a concert. Before the date of the concert, the hall was destroyed by fire. Taylor claimed damages from the owner of the hall for his failure to complete his part of the bargain. The Court found that as the agreement was a licence to use a hall that had now been destroyed, the contract was frustrated. There was a reasonable expectation that the contract was based on the continued existence of the music hall.

27. *Krell v Henry* is the perhaps most useful for clients seeking advice on contracts regarding public events, now cancelled by the pandemic or various COVID-19 outbreaks. This case concerned a contract for the use of rooms on Pall Mall to watch the planned coronation procession of King Edward VII. It was held that the contract for the use of the rooms was frustrated when the procession was cancelled as a result of the King's illness.

28. Given the recent government restrictions on the size of indoor gatherings, live performances and requirements on overseas arrivals to quarantine for 14 days (if they are able to gain a seat on a flight!) it is easy to see how the doctrine of frustration would be especially relevant for contracts relating to personal services, such as for entertainers contracted to perform. The case *Chapman v Taylor* provides an excellent example of issues for contracts for personal services. In this case a builder, Chapman, had entered into a contact for residential building work. The contract was to be performed by Chapman personally or by another person under his supervision. Chapman was injured on another building site and admitted to hospital in a coma. This meant he was unable to continue the tasks he had been contracted to do for the Taylors as he was unable to undertake work personally or supervise work on their property from 15 April 2000 to September 2000.

29. The Court found that there was a temporary incapacity of Chapman; he was in a coma for over two weeks and there was no indication if or when he would regain capacity. Further the Court found that Chapman's personal participation was required as the contract could only be done by or under the supervision of

Chapman, or an employee of his that held a supervision certificate. There was no employee with a supervision certificate in Chapman's employment and the contract could not be varied without the Taylor's consent. Chapman's injuries were such that it was unclear whether he would ever regain consciousness. The Court found in those circumstances that the performance of the contract would be radically different to that promised.

30. Each client will need to consider their commercial position prior to applying to terminate a contract due to frustration. Simply because a particular relief is available to a party does not mean that it is necessarily in the client's best interests to begin proceedings to terminate a contract due to frustration. For example, where a long-term contract has been frustrated, parties may consider: (1) whether the whole or part of the contract has been frustrated; and (2) the length of time in which the contract has been frustrated compared to the duration of the contract. Parties should particularly consider the impact of a termination of a contract for frustration on the (possibly ongoing) commercial relationship between the parties.

31. The case *Li Ching Wing v Xuan Yi Xiong*[44] provides an example of a contract in which the period of time of the supervening event was relevant to the question of whether the event changed the nature of the outstanding contractual rights or obligations between the parties, and therefore frustrated the contract. In this case the Court asked: "what relation does the likely period of interruption bear to the outstanding period for performance?".[45] This case is also relevant on its facts as it concerns public health orders relating to the SARS epidemic.

32. In *Li Ching Wing v Xuan Yi Xiong*, the plaintiff was the owner of a flat in a residential development. The plaintiff leased the flat to the defendant for a fixed term of two years, beginning on 1 August 2002. In March 2003 several residents in the development became ill with the SARS virus. The defendant moved out of the flat on 29 March 2003. On 31 March 2003 the Hong Kong Department of Health ordered that the relevant block of apartments was to be isolated for 10 days and residents were evacuated to other areas. The defendant returned to their rented

44 [2004] 1 HKC 353.
45 Ibid [9].

apartment on 10 April 2003 when other residents returned to their apartments. On 24 April 2003 the defendant terminated the rental agreement.

33. The plaintiff brought proceedings for summary judgment for accrued rent and damages arising from the repudiation. The defendant claimed that the tenancy agreement was frustrated by the making of the isolation order due to SARS and that the plaintiff was in breach of an implied covenant including the covenant that the premises be fit for human habitation.

34. In judgment Justice Lok asked: "what relation does the likely period of interruption bear to the outstanding period for performance?".[46] His Honour found that the supervening event did not sufficiently change the rights or obligations of the parties from what the parties could have reasonably expected at the time of the tenancy agreement, given that the isolation order lasted for 10 days out of a two-year lease. His Honour stated:

> The Defendant relies on the Isolation Order as a ground to frustrate the tenancy agreement. However, out of a term of 2 years, a period of about 10 days, of which the Defendant was not allowed to stay in the Premises by virtue of the Isolation Order, was quite insignificant in term of the overall use of the Premises. The outbreak of SARS may arguably be an unforeseen event, however, such supervening event did not, in my judgment, significantly change the nature of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of the execution of the Tenancy Agreement. Hence, the defence of frustration cannot possibly succeed in the present case.[47]

35. Although the above case is a Hong Kong case, it provides an interesting insight, not only into how Australian courts may approach a frustration case in which the supervening event affected only a small period of the contract; but also how a court may approach the issue of frustration due to a pandemic given the factual background of the matter, the SARS virus. It further provides an example of the effect of a pandemic on a residential tenancy agreement.

36. Caselaw on frustration of contract during the COVID-19 pandemic has been limited in Australia. There has been significant interest in the profession on how a claim of COVID-19 related frustration might be received by an Australian court, as demonstrated in the number of pieces written by law firms and others about this

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46 *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353, [7]–[9] citing *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.

47 *Li Ching Wing v Xuan Yi Xiong* [2004] 1 HKC 353, [11].

topic in the past year. However, as demonstrated above, the remedy would be successful in a limited number of cases. This likely explains the limited caselaw in this area in the past year.

37. *Happy Lounge Pty Ltd v Choi & Lee Pty Ltd*[48] a case from the District Court of Queensland last year, demonstrates some of the difficulties parties might face in bringing a claim a claim of frustration of contract due to COVID-19 related circumstances. In this case the applicant entered into a contract to sell a business to the first respondent. The business was carried on in Fortitude Valley, one of the entertainment areas of Brisbane, and operated as a bar and lounge for members of the public to purchase food, drinks and enjoy some entertainment.[49] The contract was entered into on 26 February 2020 for a purchase price of $550,000. The first respondent paid a 10% deposit soon after.[50]

38. On 29 January 2020, the Queensland Health Minister declared a public health emergency in relation to COVID-19; on 5 February 2020 the Minister extended the public health emergency until 12 February 2020; and on 18 February 2020 the Minister further extended the public health emergency until 19 May 2020.[51]

39. On 19 and 21 March 2020, the Chief Health Officer of Queensland issued public health directions with the effect of limiting the number of people who could be present at the business at any one time. On 23 March 2020, the Chief Health Officer issued a third public health direction mandating that non-essential premises like the business close and cease operations.[52] Two days later, the first respondent wrote to the applicant purporting to terminate the contract and asking for their deposit to be returned. The applicant treated this as a repudiation of contract and advised that it would be suing for specific performance.[53] In its defence, the respondents claimed that either (a) the contract had been frustrated, or (b) it had lawfully terminated the contract in light of the applicant's breaches of contract.[54]

48 [2020] QDC 184.
49 Ibid [6].
50 Ibid [8].
51 Ibid [9].
52 Ibid [14].
53 Ibid [19].
54 Ibid [2].

40. The respondents specifically pleaded that the frustrating event occurred on either 19, 21 or 23 March 2020; the dates on which the Chief Health Officer issued public health directions affecting the operation of the business.[55] They alleged that the third public health direction so radically changed the nature of the contract they had entered into because they could no longer comply with some conditions of the contract.[56]

41. Justice Rosengren was not sympathetic to the respondents' claims of frustration of contract. Her Honour said:

> The obligations of the first respondent were to accept and take possession of the Business and the Business Assets and pay the purchase price. The Third Direction did not interfere with the performance of those obligations. Rather, it simply placed a restriction on the liberty of the action of the first respondent when it became the owner of the Business. This restriction would no doubt cause hardship to the first respondent by temporarily depriving it of the right to make an important use of the Business, but in my view the applicant fulfilled its obligations [in respect of the sale clause]. … Further, in the weeks and days leading up to the execution of the Contract, the COVID-19 pandemic was widely known to be unfolding and evolving globally, including in Queensland. … In these circumstances, the potential for restrictions to be placed on the use of the premises by the Action of the State government subsequent to the execution of the Contract is a risk that the first respondent must have foreseen …[57]

42. The Judge's reasons bore some similarity to those in *Li Ching Wing v Xuan Yi Xiong*. Her Honour stated that the effect of the third public health direction, which prohibited the business from operating at all, was to prevent the respondents from carrying on business for an 'indefinite, albeit temporary period'.[58] The lease on the premises would continue until August 2032, and could be extended even beyond that. In these circumstances, the respondent could 'look forward to operating [the business] at the premises for 12 or so years'.[59] Ultimately, Justice Rosengren was not persuaded that the contract had been frustrated.

43. As the pandemic (hopefully) comes to an end and understanding of the risks associated with the volatile public health regulatory environment increase, the prospects of successes of pleading frustration of contract due to the operation of public health directions may lessen over time. However, in circumstances where

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55 Ibid [22].
56 Ibid [29].
57 Ibid [33], [35].
58 Ibid [36].
59 Ibid.

the contract was entered into some time prior to the onset of domestic and international responses to COVID-19 there may be greater prospects of success.

PROCEDURE: ADJOURNMENT APPLICATIONS AT THIS TIME

44. Special provisions inserted into the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) through s 22C increased the court's power to direct that a witness appear by audio visual link during the pandemic. The court may give such a direction only if it is in the interests of justice and with regard to a number of considerations, including the public health risk posed by the COVID-19 pandemic as well as the efficient use of judicial and administrative resources. Section 22C remains in force until 26 March 2021.[60] The following cases provide some guidance as to how courts may consider applications both during the operation of the above Act, and once s 22C ceases to have effect.

Where Adjournment Applications Have Been Granted

45. Both the NSW Supreme Court and the Federal Court of Australia have adjourned proceedings in circumstances where a witness was based in China and would be required to give evidence by audio visual link from China due to Australia's travel restrictions. In *Motorola Solutions, Inc v Hytera Communications Corporation Ltd* (***Motorola***)[61] the Court granted an adjournment in circumstances where seven witnesses were located in China and were unable to travel to Australia to be cross-examined person due to COVID-19 travel restrictions. Evidence was provided to the Court that the taking of evidence by video link to China would arguably not be permissible under Chinese law.

46. In *Haiye Developments Pty Ltd v The Commercial Business Centre Pty Ltd*[62] the Court also adjourned a hearing due to witnesses being located in China who were unable to travel to Australia and following evidence that it would be unlawful for the witnesses to give evidence via video link from China. The Court found that although the courts had adopted the approach that hearings were to continue despite the

60 *Evidence (Audio Visual and Audio Visual Links) Regulation 2015* (NSW) reg 4B.
61 [2020] FCA 539.
62 [2020] NSWSC 732.

pandemic, even where credit was an issue, the delay and inefficiency of the provision of evidence combined with the possible illegality of the provision of the evidence by audio visual link from China put the application into the exceptional category and the application was granted.[63] His Honour Justice Robb expanded his considerations for the adjournment from those outlined in *Motorola* above, noting that the credit of the witnesses would be critical to the plaintiff's success in the case and the fact the witnesses were located remotely from their interpreters there would cause delay and inefficiency in the provision of the evidence to the Court.

47. In *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 4)*[64] the Court granted an adjournment as the trial would potentially involve national security information being put to witnesses. Justice Besanko found that as the national security information could not be securely communicated to the witnesses via Microsoft Teams, and as the credibility and reliability of the witnesses would be critical to the case, the trial should occur in person.

48. Although each of the above cases referred to the credit of witness as part of the circumstances considered by the court in determining whether to grant an adjournment application, the need to assess a witnesses' credibility through an in-person hearing was examined in detail in *Quince v Quince*.[65]

49. In *Quince v Quince* the Court found that had the trial proceeded remotely, the cross-examination of a defendant on matters of credit would have occurred by audio visual link where there was little documentary or other circumstantial evidence. The Court considered the importance of assessing a witnesses' credit in circumstances where there was little documentary or other evidence. Justice Sackar found that the judge's ability to assess the defendant's demeanour during cross-examination would be critical to accessing the defendant's credit and the trial should be adjourned to a time when it could be heard in person.

63 Ibid [82].
64 [2020] FCA 614.
65 [2020] NSWSC 326.

Where Adjournment Applications Have Been Refused

50. In *Australian Securities and Investments Commission v GetSwift Ltd*[66] the Court found on balance that a remote hearing could proceed without any real risk of practical injustice and the adjournment application was denied. This case concerned an ASIC regulatory action and a class action concerning the same issues. The case involved 41 witnesses to be cross-examined by Microsoft Teams with two defendants located in New York and unable to travel to give evidence in person.

51. The Court found that perceived difficulties in conducting a remote hearing could be overcome. Many of the reasons for denying an adjournment in this case were also articulated, in a similar format, in *Capic v Ford Motor Company*[67] outlined below. These included consideration of s 37M(3) of the *Federal Court of Australia Act 1976* (Cth) which provides a similar consideration as s 56(3) of the *Civil Procedure Act 2005* (NSW), stating that the application of civil practice and power "must be exercised or carried out, in a way that best promotes the overarching purpose"[68] – being to facilitate the just resolution of disputes as quickly and efficiently as possible.[69]

52. Justice Lee drew on previous experiences of the Court in successfully using Microsoft Teams technology to hear cases and noted that whilst a number of witnesses would be required to give evidence, the evidence given by those witnesses would be relatively confined and that the evidence in chief had already been filed and served by affidavit.[70] Further, a witnesses' demeanour could be effectively assessed closely (perhaps even easier than in person in the witness box) through the use of technology.[71] Senior counsel indicated a willingness to cross-examine witnesses in New York at a time convenient to the witnesses so that they would not be cross-examined late at night and the Court indicated it would be willing to sit outside court hours.

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66 [2020] FCA 504.
67 [2020] FCA 486.
68 *Federal Court of Australia Act 1976* (Cth) s 37M(3).
69 Ibid s 37M(1)(b).
70 *Australian Securities and Investments Commission v GetSwift Ltd* [2020] FCA 504, [29].
71 Ibid [33].

53. The Court stated that either party was able to revisit the issue of adjournment if additional matters arose that had not been raised during the course of the adjournment application, and that the Court would seek to show some latitude and forbearance in having unexpected difficulties with technology work themselves out.[72] Significantly the Court considered not only the seriousness of the ASIC proceeding but also the disruptive effect the adjournment of the matter would have on the listing of other cases and the rights of those litigants to "have their day in court".[73] Finally there was no order as to costs in light of the properly made (although close, ultimately denied) adjournment application.

54. In *Capic v Ford Motor Company* the Court noted that solutions could be found to the difficulties posed by a remote hearing, noting that should an adjournment be granted it may result in an adjournment for an indefinite period. Justice Perram concluded that the Court should attempt to make the trial work and adjourn it later only if the virtual hearing became unworkable.[74]

55. In making the above finding his Honour found that the following difficulties could be overcome. First, although intermittent internet connection issues were tiresome, they were not insurmountable, indeed there was often a fluidity to the order in which witnesses gave their evidence in any trial.[75] Secondly, practitioners who were not in the same room could communicate by other means than tugging on senior counsel's robes even if "[r]eceiving whilst in full flight a WhatsApp message with a document attached is not the same experience as having one's gown tugged and a piece of paper thrust into one's hands".[76] Thirdly, although conferring with expert witnesses remotely would be slower and therefore more expensive, it would not result in a process that was unfair or unjust.[77] Additionally experts could "hot tub" on virtual platforms.[78]

56. Justice Perram found that it was unlikely that lay witnesses would be "coached" whilst appearing remotely. He noted that as the case was a class action about

72 Ibid [35], [31].
73 Ibid [40], [38].
74 *Capic v Ford Motor Company* [2020] FCA 486, [25].
75 Ibid [10]–[11].
76 Ibid [13].
77 Ibid.
78 Ibid [15].

allegedly defective gear boxes. Even if a witness were to exaggerate how defective their vehicles were, it would be unlikely to help the witnesses significantly. Further a would-be assistant to a witness would need to brave health regulations to do so which his Honour found to be unlikely.[79] His Honour then considered witnesses who may be unable to use a computer or not have a computer, noting that whilst this would be a significant problem, by the time of the hearing a solution may have been found in other cases.[80]

57. His Honour found that cross-examination through an online platform, although reducing the "chemistry" developed between counsel and the witness, would be as effective as in person, actually allowing a greater perception of the witnesses' facial expressions than in court.[81] The large number of documents could be managed through the use of digital court book and online document management systems such as Dropbox.[82] Future problems, such as illness or carer responsibilities of practitioners or witnesses could be addressed sensitively and with allowances being made for the if/when they arose.[83] Although a virtual hearing would likely be longer and increase expense it did not justify an adjournment especially with the effect that a postponement of six months would result in all cases being reallocated thereafter. Further an adjournment would likely be for an indeterminate period of time, an unsatisfactory outcome in the circumstances of a case that had been waiting years to be heard already.[84]

58. Finally, the ability of counsel to "see" and "read" the court during an appeal and remoteness of senior counsel, junior counsel and instructing solicitors who were located in three separate locations was found not to be a sufficient reason to adjourn a hearing that would run by telephone to a time when an in-person appeal could be run: *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd*.[85] The Court rejected the submission that procedural fairness required an in-person hearing. The Court found that in light of the pandemic, although it was not ideal for

79 Ibid [16].
80 Ibid [17].
81 Ibid [19].
82 Ibid [20].
83 Ibid [21].
84 Ibid [22]–[24].
85 [2020] WASCA 38.

practitioners, court staff and witnesses to work from their offices, the Court must do all they could to ensure the continuation of the economy and essential services of government including the administration of justice.[86]

59. The common jurisprudence appears to be that courts will likely adjourn a matter where a virtual hearing cannot be run, rather than run with some amendments and accommodations by practitioners and the court. An adjournment will likely be granted where it would be illegal for a witness to give evidence by audio visual link from their current location, and where a witness will rely on interpreters who themselves will be located remotely, leading to significant delays and complexity in cross-examination.

60. Where there are minimal documents and a case will depend on the credit of witnesses requiring a judge to assess a witnesses' demeanour for findings of credit, a virtual hearing is likely to be postponed. However, where cross-examination is on limited issues and the court is assisted by affidavit evidence courts will often be assisted by the close-up examination of a witness.

61. An adjournment will be not be allowed simply for practitioners to conduct a hearing in a traditional form. Practitioners are expected to work around issues caused by working remotely to each other and the court. The court has become accustomed to and expects practitioners to work with technology to ensure the smooth running of a virtual hearing. These include counsel receiving instructions from solicitors or assistance from junior counsel through chat programs such as Slack and WhatsApp. The hearing can be run remotely through a variety of virtual platforms including the court preferred Microsoft Teams and utilising electronic court books and document sharing platforms such as Dropbox. In essence whilst a remote hearing is not ideal, it is seen as preferable to creating significant delays to other parties by adjourning hearings during an unpredictable period.

CONCLUSION

62. The COVID-19 pandemic has not only changed the commercial and legislative framework, but it has also changed the way in which hearings are run during these

[86] Ibid [8].

times and perhaps permanently. Commercial practitioners would be advised to be across these changes in advising and representing their clients in these volatile times.

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