

Property Investment, Development & Projects during Covid-19

- Russell Sparke - Sparke Legal
- www.sparkelegal.com.au
- Experience, Insight, Results
- www.conveyancingforce.com.au
- Maximise opportunity - Minimise risk
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Disclaimer

- The information provided in this presentation is general in nature and does not address your particular circumstances. You should seek specific advice on your particular situation. The author accepts no responsibility for any loss or damage arising as the result of reliance on this information.

Existing Contracts

- Need extra time to satisfy Conditions or for Settlement?
- E.g. Consultants, Financiers, Isolation
- Time is of the essence!
- Force Majeure and Frustration?
- What are those concepts?
- Are they available to me?

Force Majeure “superior force”

- Normally used to keep contracts alive!
- Napoleonic Civil Code – Australian Courts don't recognise the term at common law
- Contract condition required, notice required, time limits
- Exhaustive or non-exhaustive
- Change, suspend or cancel due to unforeseen circumstances caused by forces beyond parties control
- Normally exclude obligations to pay Money!
- Extensions of time, Termination rights, damages
- Other agreements – need to look!

Frustration

- Common law doctrine of Frustration
- Situation – radically or fundamentally different
- Used as defence to claim for breach or basis for claiming restitution upon termination
- Threshold to establish is HIGH!
- Demonstrate performance of contract – IMPOSSIBLE!
- If established – terminates a contract AUTOMATICALLY!
- Excludes existing obligations
- Overlap between Force Majeure and Frustration – Can I allege Frustration if my Force Majeure clause contemplates Epidemics?

Contracts

- NEED TO LOOK at all commercial agreements?
- REIQ and ADL Forms contracts DO NOT have Force Majeure Clauses
- Even if they did – PEXA settlements available!
- Same for “Frustration”.
- So WHAT can you do?

REIQ Contract

- DOES NOT have a Force Majeure clause
- DOES HAVE Suspension of Time clause
- Settlement Obligation NOT Condition Obligation
- Buyer e.g. pay balance purchase price
- Seller e.g. Transfer documents, release of encumbrances (Mortgage), keys, tenancy documents, vacant possession and title to chattels
- HOWEVER Delay Event limited to natural disasters e.g. flood, cyclone, earthquake, bushfire – DOES NOT include PANDEMICS
- HOWEVER DOES include compliance lawful direction of a Government Agency

ADL Forms Contract

- DOES NOT have Force Majeure clause
- DOES Have – Unable perform Essential Obligations due to Materially Adverse Event
- Essential Obligations defined e.g. Deposit, pest and building, finance, transfer documents, remove rubbish and chattels, release of encumbrances, provide vacant possession, tenancy documents, keys and settlement
- Materially Adverse Event includes events in Disaster Management Act 2003 e.g. Infestations, plague or epidemic
- Plus HAS- Compliance order of a Government authority

Commercial Contracts Commercial Land and Buildings 8th Ed.

- DOES NOT have a Force Majeure clause
- DOES HAVE Suspension of Time clause cl 6.
- Settlement Obligation NOT Condition Obligation
- Buyer e.g. pay balance purchase price
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Commercial Lots in a Community Title Scheme 7th Ed.

- DOES NOT have a Force Majeure clause
- DOES HAVE Suspension of Time clause cl 6
- Settlement Obligation NOT Condition Obligation
- Buyer e.g. pay balance purchase price
- Seller e.g. Transfer documents, release of encumbrances (Mortgage), keys, tenancy documents, vacant possession and title to chattels
- HOWEVER Delay Event limited to natural disasters e.g. flood, cyclone, earthquake, bushfire – DOES NOT include PANDEMICS
- HOWEVER DOES include compliance lawful direction of a Government Agency

Compliance with lawful direction of Government Agency

- Recently Argued – Settlement Extension
- Settlement requires more than 2 people
- 29 January 2020 Minister declared a public health emergency – 19th May 2020
- 11 March 2020 WHO changed Covid19 from epidemic to pandemic
- 21st March, 29th March and 2nd April 2020 direction
- Home Confinement, movement and gathering
- Person not leave PPR except for work of essential business – cannot do from home
- Gatherings in non-residences – no more than 2 people
- However delay ONLY because PEXA available!

New Contracts

- Special Conditions
- Extra Definitions
- Include Covid-19 as Delay Event
- Include any disease caused by Sars Cov2 or any mutation thereof as a Delay Event.
- Suspend NOT ONLY Settlement Obligations BUT ALSO Condition Obligations
- Mechanics - set new dates for Condition and Settlement Obligations.
- Re-make time of the essence.

OffThe Plan Contact Sunset Dates

- Be aware of your “Sunset Dates” in your “Off the Plan” Contracts
- Negotiate with Buyers if necessary
- Units – default 3 ½ years for settlement but can be extended to 5 ½ years for settlement
- Land – default 18 months for settlement

Electronic Signatures

- E.g. Docusign, PandaDoc, Adobe Sign etc.
- Cth Electronic Transactions Act corresponding state statutes
- Electronic signature same as “wet ink”
- Counterparty needs to Consent
- HOWEVER Deeds problematic!
- REQUIRED to be on Paper
- witness required (need to be physically present)
- Except 22 April 2020 NSW Legislation for Video witnessing (only for 6 months)
- No such legislation in Qld
- Consider using Contract/Agreement NOT Deeds
- Section 127 Corporations Act
- Specifically excluded from ETA
- “One Document” signed by “Both Parties”
- Undertaking to both sign Paper Later!
- Note! - Titles Office Requires “Originals”

Commercial leases

- 3 April 2020 - Commercial leasing Code of Conduct
- Retail, office and industrial
- Tenant Turnover less than \$50 Million pa.
- Eligible for Jobkeeper program
- Landlord must NOT terminate leases
- Tenant also to remain committed to lease
- Up to 100% of rent waiver and deferral
- Waiver must be 50% or greater of relief
- Amortise – lease term – not less 24 months
- No deferred rent before end of Covid 19
- No rent increases
- Reduction in outgoings
- No draw on security bonds or personal guarantees
- No fees, interest or penalties

Commercial Leases – Agreements for Lease

- Agreements for lease
- Usually will contain Force Majeure clause
- Need to scrutinise
- Case by case basis
- Need to give Notice! – Sooner than later!

Building Contracts

- Residential Building Contracts
- HIA and QBCC Building Contracts do not have Force Majeure clauses
- HOWEVER HIA – Delay clause e.g. causes beyond builders control incl Act of God but not epidemics
- QBCC e.g. cause of delay not reasonably foreseeable and beyond control of builder
- Commercial Building Contracts
- AS2124 - e.g. an event beyond control of builder
- AS4000 – e.g. Qualifying cause of delay

Foreign Investment - FIRB

- NIL Threshold from 10.30pm on 29th March 2020
- all foreign investment into Australia now subject to FIRB screening
- Government - Prevent investment in distressed assets
- ensuring investment not contrary to the national interest.
- NB. Already applied to e.g. vacant commercial land and residential land
- Processing time frames now 6 months
- Also leases over 5 years will be caught

Land Tax

- Qld 9th April 2020 – Land tax relief -
- 2019/2020 2% foreign land tax surcharge waived
- 2019/2020 25% land tax reduction available from 14th April 2020
- 2020/2021 a 3 month deferral of land tax liability
- Other states have similar relief and deferral programs

SMSF

- Landlord offering rent relief to tenants
- 2019/2020 & 2020/2021 ATO will take no action if SMSF trustee offers temporary rent reduction to a related party entity e.g. LRBA.
- MUST be temporary
- Document with minute
- SMSF free to determine the amount with no market evidence required to justify
- No distinction is given between Residential and Commercial – so assume available to both
- BEWARE no legislative authority yet.

Tax issues


- Businesses – CAN defer tax amounts through BAS, income tax assessment and FBT for up to 6 months
- Penalties and interest may be waived if incurred after 23 January 2020
- Businesses CAN enter into low interest payment plans for their existing and ongoing tax liabilities

Powers of Attorney

- Consider signing a Power of Attorney
- Existing POA? – Consider appointing more attorneys!

Vendor Finance

- Difficult times require Creative Solutions
- Partial settlements – Consider deferral of balance of purchase price e.g. Loan and Second Mortgage arrangements

A silhouette of a person standing in front of a large window, looking out. The window has multiple panes. The scene is dimly lit, with light coming from the window. The person is wearing a dark jacket.

Thank You Stay Safe and Well

- With over 25 years experience in Property and Commercial law Russell Sparke can help you to minimise your risk and maximise your profit on your investment or development project.
- Sparke Legal
- Level 6,
- 420 George Street
- Brisbane Qld 4000
- Phone 07 3554 0135
- r.sparke@sparkedlegal.com.au
- www.sparkelegal.com.au
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