The arbitration hearing in this matter was heard April 30, 2020, by Zoom video. The
arbitrator has reviewed the briefs filed by the parties; the 24 amicus briefs, some supporting the
position of the student tenant and some supporting the position of the landlord; and the
statements made by the parties and their representatives at the hearing.

This matter is being reviewed solely on the facts and merits of this case. Because of the
Covid-19 virus and pandemic, this is a time of significant hardship worldwide. In this particular
circumstance I understand and could express that there are equities favoring the positions of each
of the parties. Yet, evaluating the facts in the light of the law does not allow for a decision and
award that is perfectly aligned to all competing equities. Rather, one party will prevail and the
other will face further hardship and financial loss. In today’s very difficult circumstances it is
truly unfortunate that there is not a middle ground. There is not.

Statement of Facts

1. (Tenant) is a tenant in a residential unit at apartment complex. Her tenancy under the lease runs until August 15, 2020, and requires monthly payment of rent.

2. (Landlord) is a BYU approved off campus housing provider.

3. Landlord is obligated under a contract with BYU Off Campus Housing Office which governs Landlord’s duties as a BYU approved housing provider.

4. In January 2020 the world watched as news hit of a coronavirus in Wuhan, China, and as hundreds, then thousands of Chinese citizens were reported to be infected. Images of a vigorous lockdown of millions of people in Wuhan were shown on tv. By late January the World Health Organization declared the virus a global health emergency. On January 31 the Trump administration declared the virus a public health emergency and issued an order quarantining Americans who had recently been in certain parts of China. By late February the virus was rampant in Italy and Italy entered stringent lockdown orders for people residing there. In late February a virus outbreak occurred in Kirkland, Washington and it was clear the virus now was in the US. On March 11, 2020, the World Health Organization declared the virus a worldwide pandemic. By March 12, 2020, more than 1200 cases of the virus had been diagnosed in the US and people were dying. On March 13, 2020, the Trump administration declared the virus a national emergency.

5. Subsequently the impact of the virus spread throughout the world. Governmental entities around the world and in the US entered stay-at-home and similar orders. Schools around the country were closed. The NCAA March Madness basketball tournament was cancelled.
Major League Baseball, the NBA and NHL Hockey each were cancelled. Restaurants, museums, amusement parks, swimming pools, workout facilities, spas, and hair salons all were closed. The virus, now named Covid-19, has been dominating the daily news since early March.

6. As this was unfolding across the world, BYU made decisions with respect to its students, classes and campus. On March 12, 2020, it announced that all classes were cancelled for several days, and that classes would resume on March 18 through remote instruction. Students were “strongly encouraged” to return home and BYU allowed all students in on campus housing to be released from their lease contracts with the university. At that time BYU closed the campus for essentially all activities.

7. On March 14, BYU 2020, the BYU Off Campus Housing Office (OCHO) issued a notice to all BYU approved housing providers responding to the question raised by many students of whether they would be let out of their off campus housing contracts. That notice advised:

The OHCO recognizes that the contract is a legally binding agreement between the landlord and the student. However, the OCHO strongly encourages landlords and their agents to consider the value of releasing students. BYU has encouraged students to consider leaving campus and return home to finish Winter semester through remote coursework.

8. In conjunction with the nationwide closures and stay-at-home directives, Tenant lost her part-time employment.

9. Tenant had a roommate with a serious respiratory infection and Tenant was seriously worried about her own personal health and safety.

10. Tenant’s mother is a nurse and at that time, given the fact of the roommate’s respiratory illness, was seriously and genuinely worried for the physical health, safety and well-being of her daughter.

11. Thus, on March 15, 2020, Tenant left Provo and returned to her home.

12. On March 18, 2020, Tenant notified Landlord that she was terminating her tenancy under Section 23B of the lease. She reported:

The pandemic of COVID-19 was an “unforeseen event” in which forced me to move from my apartment immediately. My roommate was showing symptoms of COVID-19, and she would not self-quarantine herself. I felt unsafe in my apartment, and moving out was absolutely necessary from my health.

13. Landlord responded that it would not let Tenant out of her lease.

14. Tenant had paid March rent and she subsequently paid April rent.
15. Tenant remained in contact with her roommate and with Landlord through its agent and monitored the health status of her roommate. She learned that another person with a serious infection moved into her apartment room. Subsequently, when she inquired of the Landlord about the health of the two girls in the apartment and whether the Landlord had been into the apartment to check on their health status, she was told that the Landlord could not enter the apartment because the roommate was quarantined.

16. In its efforts to assuage Tenant’s worries, Landlord offered to move Tenant to another room and other suggestions, all of which Tenant refused, remaining adamant that she had terminated her lease.

17. When she left her apartment (to which she has never returned) Tenant left some of her belongings in the apartment.

Legal Analysis

Tenant attempted to terminate her lease with Landlord under the provisions of paragraph 23B. Subsequently she asserted that Landlord also breached the lease under paragraph 23F. For the reasons set forth hereafter, we need not reach the claimed breach under 23F.

Landlord asserts that paragraph 23B does not apply because Tenant did not withdraw from enrollment at BYU and therefore does not meet the “leaves school” threshold; that paragraph 23B does not apply because Tenant’s reason for leaving does not meet the definition of “catastrophic loss;” that paragraph 23B does not apply because Tenant’s reason for leaving is to avoid the possibility of contracting Covid-19, not that Tenant has “actually contracted the virus” and therefore she “has not experienced serious illness or at least has not verified her illness;” and that paragraph 23B does not apply because even if Tenant had contracted the virus, Tenant “has not verified the serious illness, which [the Tenant] is required to do by the clear language of the contract.” Landlord also asserts that paragraph 23F cannot apply, citing factual examples of the Landlord’s care of the facility and its response to the pandemic and to Tenant’s personal situation. Finally, Landlord claims that “no legal doctrines excusing performance of contractual obligations” apply in this case.

Tenant does not raise any of these legal doctrines discussed in Landlord’s brief: impossibility, frustration of purpose, or adhesion. This case can be resolved without considering the applicability of any of these common law doctrines.

1. Tenant’s Right to Terminate under Paragraph 23B of the Contract

Paragraph 23B of the contract reads as follows, incorporating the beginning of section 23:

The Agreement may be automatically terminated, or terminated by the student, prior to its expiration, with all rental charges prorated through the last day of tenancy under the following circumstances and conditions…. If the student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness. In such instances, the termination of the Agreement is in effect after the
landlord receives acceptable verification. Student shall forfeit security deposit and legal deductions.

The lease form which the parties signed was drafted by or under the direction of the OCHO. Neither Tenant nor Landlord drafted the lease, so it should not be construed for or against either. (Landlord did draft a lengthy addendum, but since none of its language or provisions seem to have particular applicability, that fact will not govern interpretation of the lease.)

*Leaves School.*

In order for Tenant to terminate under paragraph 23B, she must “leave school.” She asserts she has done so. Landlord claims that this provision requires that the tenant withdraw from enrollment at the university, which Tenant has not done. Applying the usual meaning to the term “leave school”, in the context of the facts of this case, it is clear that what Tenant has done is leave school. The BYU campus is closed and Tenant cannot physically attend school on campus. Though she remained enrolled and was to participate in coursework by remote access, the physical campus was closed so Tenant could not be at school. When she left Provo for home she left school. Interestingly, the OCHO notice to landlords advised them that “BYU has encouraged students to consider leaving campus and return home . . . .” True that notice could have said “leave school” but instead said “leave campus”. The difference is without meaningful distinction. The school facility was closed and Tenant had to leave that facility and continue her schooling remotely. Yes, she could have done so from her apartment in Provo, yet, at the urging of the university, she left Provo and returned home and she left the school.

Tenant left school according to a plain reading of the contract as a whole. The two paragraphs following paragraph 23B of the contract support a reading of “leaves school” as leaving the area without withdrawing from enrollment at BYU. First, paragraph 23C of the contract references the Service Members Civil Relief Act of 2003, which contains a provision for any deployment of 90 days or more and does not expressly require withdrawal from enrollment at BYU. Second, paragraph 23D of the contract includes marriage, which also does not necessarily require withdrawal from enrollment at BYU.

*Serious Illness.*

For this paragraph of the lease to apply, Tenant must leave school “due to . . . a serious illness.” Landlord asserts that for this provision to apply the Tenant personally must be experiencing the illness and it denied Tenant’s purported termination on that basis. Obviously, that is one potential reading of the contract, though not the only possible interpretation.

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3. The existence of more than one potential or possible interpretation does not automatically trigger analysis of a contract under rules of interpretation that apply to ambiguous terms. See, e.g., *Fort Pierce Indus. Park Phases II, III & IV Owners’ Ass’n v. Shakespeare*, 379 P.3d 1218, 1225 n. 3 (Utah 2016) (“even if some specific terms may appear ambiguous when interpreted in isolation, that is not sufficient for a finding of ambiguity”) (internal citations omitted).
possible interpretation would be if an immediate family member had a serious illness – e.g., a parent diagnosed with terminal cancer. Yet another is when, as in this case, Tenant found herself: (1) in a dangerous respiratory illness pandemic that took the entire world by surprise and in which schools, including her school, were physically closing, governments were ordering stay-at-home provisions and the news was dominated with headlines about death worldwide, (2) with a roommate exhibiting symptoms of respiratory illness, a hallmark of the virus, and (3) a reasonable perception by the student and her parent at the time of her decision to leave that there was no safe alternative to leaving. “Looking at the terms of the contract as a whole, and giving meaning to each provision,” and given the broad language of “due to,” a tenant can leave due to the illness even if the tenant is not personally sick with the illness.

The world is experiencing a serious pandemic. The personal threat to Tenant from a very sick roommate who had Covid-19 like symptoms was terrifying to her and her mother. In the context of the knowledge of the pandemic in March 2020, the roommate’s serious illness is a serious illness that would make Paragraph 23B operative and justify Tenant’s termination of the contract. Simply put, for a tenant to take advantage of the serious illness provision of 23B, the illness must have a direct, personal effect on the tenant, not just a generalized pandemic as now afflicting the world.

Unforeseeable and Unexpected.

In this case there simply is no room to dispute that the Covid-19 pandemic and the resultant deaths worldwide and financial devastation to individuals, businesses and governments was both unforeseeable and unexpected. In January when Tenant began the winter semester at BYU neither her nor the Landlord had any idea that by March the world would be turned upside down by this terrible pandemic.

Verified.

Landlord asserts that Tenant did not verify the serious illness on which she bases her decision to terminate the lease. If it was looking for a doctor’s note about the illness, Tenant provided none. Yet it is a real stretch for Landlord to claim that the illness was not verified. The nature of the pandemic generally is a matter of serious, common knowledge. As noted, it has dominated the daily news for weeks. And as for the roommate’s illness, Landlord had several direct discussions with the roommate and was fully aware of that illness, though it did not share

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4 *Jones v. ERA Brokers Consol.*, 6 P.3d 1129, 1132 (Utah 2000) (citing *Plateau Mining Co*, 802 P.2d 720, 725 (Utah 1990)).


6 At the hearing the Landlord provided evidence that there were four individuals in the apartment, with two individuals per sleeping room and that all of the common spaces within the apartment, such as the kitchen, living area, dining area and bathrooms were shared with one or more of the other roommates. That the roommate’s illness was serious also is evidenced by the Landlord’s agent’s refusal, herself, to visit the roommate in the apartment because the roommate was quarantined. As well, it since developed that the Landlord knew the circumstances of the roommate’s illness but, apparently at the specific behest of the roommate, would not share those circumstances with Tenant.
all its knowledge with Tenant. Landlord cannot be heard to complain that it did not have verification of the serious illness which controls in this case.

Catastrophic loss.

The lease provides that Tenant may terminate the lease for a catastrophic loss. Yet in this case Tenant did not assert in her termination notice to Landlord that she suffered a catastrophic loss. In Utah, terms in a non-commercial lease such as this tend to be interpreted as to their plain meaning. Also, Tenant claimed she lost her part time employment. That, standing alone, fails to meet even a non-legal definition of a catastrophe.

2. Paragraph 23F and Breach of Contract by Landlord

Tenant asserts that the Landlord breached the contract under Paragraph 23F because the Landlord failed to make certain reasonable repairs and take reasonable care of the property, including failure with respect to two power outages which took undue time to remedy and it failed to ensure resident safety when the roommate was sick with Covid-19 like symptoms.

While she clearly discussed these issues in emails with the Landlord, Tenant did not raise these issues in her notice of termination. Further, while the evidence is conflicting, over 50% of all its tenants remain in the premises, even though the date of the hearing, and it appears that the care of the facility by Landlord has been at least adequate. I do not find any breach by Landlord under Paragraph 23F.

Summary, Conclusion and Ruling

Tenant terminated the lease under the provision of 23B allowing termination due to a verified unforeseeable and unexpected serious illness. The factors which govern this decision are that at the time of the notice on March 18, 2020, the pandemic was raging worldwide; Tenant (and her nurse/mother) had serious concern about her personal physical health, safety and well-being because she had a roommate with Covid-19 like symptoms who would not self-quarantine, constituting a direct and imminent threat to Tenant’s personal health; Tenant properly notified Landlord of her decision to terminate the lease; and, at the urging of BYU, Tenant in fact left school and returned home. In these specific circumstances Tenant’s lease was terminated as of March 18, 2020. The termination provision of paragraph 23B is broad and was drafted by BYU for the apparent purpose of allowing students who encounter certain serious changes in circumstance to be able to leave school and obtain release from their lease obligations. In that sense, when they agreed to the lease, the parties allocated the risk, if the 23B provision applies, to the landlord and not to the tenant.

While the lease was terminated as of that date, Tenant paid April’s rent. When she departed she did not take all of her property and belongings. Because she left the Landlord with significant uncertainty with respect to those belongings (which Tenant may reclaim), and in keeping with the provisions of paragraph 23B which provides that in a termination under 23B Tenant shall forfeit the security deposit and legal deductions, Landlord is awarded all the security deposit and all rent, fees and deposits that were both due and paid by Tenant through

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8 See, e.g., https://www.merriam-webster.com/dictionary/catastrophic
April 30, 2020. Tenant’s tenancy is terminated as of March 18, 2020, and she has no further obligation for rent payments after that date except as described here.

Dated: May 6, 2020

Anthony W. Schofield
Arbitrator