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Memo To: All Lawyers
File: All Research Memo (Public)
Research ID: 400015274d4ba0
Jurisdiction: Ontario, Canada
Date: March 25, 2020
Regarding: COVID-19 & Commercial Rent Payments

Issue

If a business has been temporarily shut down by the government, is that business obligated to continue to pay rent for their commercial premises?

Facts

No additional facts were supplied.

Conclusion

The relationship of a landlord and tenant involves an interest in land created by a contract, express or implied, by which one person who is possessed of an interest in real property confers on another person the right to exclusive possession of the real property or some part of it for a period of time which is definite or can be made definite, usually in consideration for a periodic payment of rent. At common law, a lease has long been viewed as creating a property relationship between the lessor and the lessee once the lessee goes into possession. A lease does not simply create a licence to occupy property, rather it conveys a legal interest in the property. A commercial lease is not only a conveyance, but also a contract (*V Hazelton Limited v. Perfect Smile Dental Inc.*).

A commercial lease, as a contract, must be read according to the proper principles of contractual interpretation. The overriding concern is to determine the intent of the parties and the scope of their understanding. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. In conjunction with these principles, a commercial contract must also be interpreted in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity. It is well-established that in interpreting a contract, the court may

consider the 'factual matrix' surrounding the contract, even where there is no ambiguity. Where there is ambiguity, the rule of contra proferentum applies (*Bryfam Enterprises Inc. v. Harbour Carrick Holdings Inc.*).

An act of God clause, or force majeure clause in a contract may operate to discharge a contracting party when a supervening, sometimes supernatural, event beyond control of either party makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. The effect of the clause is determined based on its wording (*Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*). In *Atlantic Paper Stock Ltd*, in light of the wording of the clause in the contract before the court, and reading the clause ejusdem generis, the Court held that "nonavailability of markets", as a discharging condition, had to be limited to an event over which the respondent exercised no control, whereas the primary cause of failure was lack of an effective marketing plan.

If the contracting parties have not turned their minds to "the possibility of such a disaster", then the doctrine of frustration may apply instead. The absence of such consideration from the contracting parties' minds is the essence of the doctrine of frustration (*Pennington's Stores Ltd., Re*). Frustration occurs when a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes a “thing radically different from that which was undertaken by the contract”. The doctrine is flexible and ought not to be restricted by any arbitrary formula (*224981 Ontario Inc. v Intact Insurance Company*)

In the case of a lease, the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. The traditional view is that so long as the interest remains in the tenant there is no frustration although particular uses may be prevented. Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Where it does arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition. But the temporary interruption of a tenant's use and occupation does not affect the covenants or the chattel interest. A tenant's covenant to pay rent is not affected by casualties which interfere with his enjoyment of the demised land. Even where fire destroys the property, whenever a lessee covenants to pay rent at stated periods without any exceptions in case of fire, he is bound to pay it though the house be burned down; for the land remains and he might have provided to the contrary by express stipulation if both parties had so intended (*Foster v. Caldwell*).

Because a lease is the conveyance by contract of a legal interest in land, the doctrine of frustration is capable of applying to a lease of land, although in exceedingly rare circumstances (*Turner v. Clark*). As the tenant retains an estate in land, it has been held there can never be a "total failure of consideration" as the tenant is in receipt of what he bargained for - an estate in land. It is for this reason that a tenant remains obligated at common law to pay rent even though the leased premises are destroyed by fire through no fault of the tenant. This is true even if the premises are located on the top floor of a 15 story building. Although, as held by the Supreme Court in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., 1971 CanLII 123 (SCC)*, 'it is no longer sensible to pretend that a commercial lease is simply a conveyance and not also a contract', and there is a growing tendency to apply contractual remedies in a leasing context (*Raymond v. Byrapaneni*).

More recently, the Divisional Court has held that the doctrine of frustration is a flexible doctrine, and is not restricted to any formula; it can be applied to all types of contract, including contracts involving the leasing of land. An event is not a frustrating event if it is foreseen or provided for in the contract, or if the frustrating event was caused by the fault of a party to the contract. The decision as to when the doctrine of frustration applies turns on the question “if it reasonable to place the risk of non-performance in the events which have happened on one party or the other or neither?” If it is not reasonable to place the risk on either party, the contract is frustrated. If, however, it is reasonable to place the risk on a particular party, that party must perform and if he fails to do so, he will be liable in damages. A contract is not to be construed as absolute, if the contracting parties from the beginning must have known that its fulfilment depended upon the continued existence of some particular thing (*Dhillon v. PM Management Systems Inc.*).

Law

The relationship in a commercial tenancy was recently discussed by the Court of Appeal in *V Hazelton Limited v. Perfect Smile Dental Inc.*, 2019 ONCA 423 (CanLII). In *Hazelton*, the appellant leased commercial premises from the respondent. Pursuant to the lease he had a right to renew for an additional 5 years on the expiry of the initial 7-year term. The appellant sublet the premises but did not reserve the last day of the head lease to itself. As a result, the landlord asserted that the tenant no longer had the option of exercising the option to renew the lease. The Court considered the nature of a commercial lease.

The relationship of a landlord and tenant is an interest in land created by a contract, express or implied, by which one person who is possessed of an interest in real property confers on another person the right to exclusive possession of the real property or some part of it for a period of time which is definite or can be made definite, usually in consideration for a periodic payment of rent. At common law, a lease has long been viewed as creating a property relationship between the lessor and the lessee once the lessee goes into possession. A lease does not simply create a licence to occupy property, rather it conveys a legal interest in the property. Despite the property origins of leases, it is important to understand that a commercial lease also has contractual

elements. It is no longer sensible to pretend that a commercial lease is simply a conveyance and not also a contract:

> [27] Professor Anne Warner La Forest describes the nature of a landlord and tenant relationship at common law and some of the relevant terminology in Anger & Honsberger Law of Real Property, vol. 1, 3d ed. loose-leaf (consulted on 7 May, 2019) (Toronto: Canada Law Book, 2006) at §7:10:
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> The relationship of landlord and tenant is an interest in land created by a contract, express or implied, by which one person who is possessed of an interest in real property, and who is called the "landlord" or "lessor", confers on another person, called the "tenant" or "lessee", the right to exclusive possession of the real property or some part of it for a period of time which is definite or can be made definite by either party, usually in consideration for a periodic payment of "rent" in either money or its equivalent. The interest in the property remaining in the landlord, being the interest which is not disposed, is called the "reversion". The interest or estate which the tenant has in the land is known as the "term". [Citations omitted; emphasis added.]
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> [28] At common law, a lease has long been viewed as creating a property relationship between the lessor and lessee once the lessee goes into possession. A lease does not simply create a licence to occupy property; rather, it conveys a legal interest in the property: Jason Brock & Jim Phillips, "The Commercial Lease: Property or Contract?" (2001), 38 Alta. L. Rev. 989, at p. 990.
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> [29] Despite the property origins of leases, it is important to understand that a commercial lease also has contractual elements. The leading case on the dual nature of a commercial lease is the judgment of Justice Bora Laskin in *Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd., 1971 CanLII 123 (SCC)*, [1971] SCR 562. Justice Laskin considered the issue of the availability of contractual remedies in a commercial lease. He took a practical approach to the issue, finding it "no longer sensible to pretend that a commercial lease … is simply a conveyance and not also a contract": Highway Properties, at p. 576.
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> A commercial lease is not only a conveyance, but also a contract:
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> [68] Reading s. 3 in context, I interpret it to mean that there may be a sublease even if the last day in the head lease is not reserved, but only when there is sufficient evidence to show that the objective intention of the parties, as reflected in the sublease, was not to create an assignment. Recognizing that a commercial lease is not only a conveyance but also a contract, courts should be permitted to consider the objective intentions of the parties to a purported sublease in order to determine the nature of the impact on the subletting party vis-à-vis its rights under the head lease. In other words, a party may demonstrate that, notwithstanding a failure to reserve the last day of the head lease term, an assignment was not intended by the parties.

Further relevant defences possible in questions of contract can be found in *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited, [1976] 1 SCR 580*, 1975 CanLII 170 (SCC). In *Atlantic Paper*, the litigation arose out of a contract for the sale of 10,000 tons of waste paper to be used as secondary fibre in the manufacture of corrugating medium. After 14-months, the buyer advised it would not accept any more, and the seller sued for damages. The buyer pleaded non-availability of markets, pursuant to an 'act of God' clause in the contract.

The Court held that an act of God clause, or force majeure clause, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event beyond control of either party makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. In light of the wording of the clause in the contract before the court, and reading the clause ejusdem generis, the Court held that "nonavailability of markets", as a discharging condition, had to be limited to an event over which the respondent exercised no control, whereas the primary cause of failure was lack of an effective marketing plan:

> An act of God clause or force majeure clause, and it is within such a clause that the words “non-availability of markets” are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. If markets were unavailable to St. Anne, did they become so because of something unexpected happening after April 10, 1970? Was the change so radical as to strike at the root of the contract? Could the company, through the exercise of reasonable skill, have found markets in which to trade? Clause 2(a) contemplates the following frustrating events: an act of God, the Queen’s or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities. Reading the clause ejusdem generis, it seems to me that “nonavailability of markets” as a discharging condition must be limited to an event over which the respondent exercises no control.

The interpretation of commercial leases was recently commented upon by the Court in *Bryfam Enterprises Inc. v. Harbour Carrick Holdings Inc.*, 2018 ONSC 6623 (CanLII).

The Court held that the lease, as a contract, must be read according to the proper principles of contractual interpretation. The overriding concern is to determine the intent of the parties and the scope of their understanding. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. In conjunction with these principles, a commercial contract must also be interpreted in a fashion that accords with sound commercial principles and good business sense, and that

avoids a commercial absurdity. It is well-established that in interpreting a contract, the court may consider the 'factual matrix' surrounding the contract, even where there is no ambiguity. Where there is ambiguity, the rule of contra proferentum applies:

> Contractual Interpretation
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> (a) General Interpretive Principles
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> [22] The Lease, as a contract, must be read according to the proper principles of contractual interpretation. In *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53 (CanLII), at para. 47, the leading case from the Supreme Court of Canada, Rothstein J. notes:
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> ... the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" … To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
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> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (Reardon Smith Line, at p. 574, per Lord Wilberforce) [Emphasis added]
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> [23] In conjunction with the above noted principles, a commercial contract must also be interpreted "in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity:" *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205 (CanLII), 85 O.R. (3d) 254, at para. 24.
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> (b) The Factual Matrix
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> [24] Rothstein J.'s reference to the surrounding circumstances of the contract's formation is often referred to as the factual matrix. In *The Canada Trust Company v. Browne*, 2012 ONCA 862 (CanLII), at para. 67, Feldman J.A. notes that "it is well established that in interpreting a contract, the court may consider the 'factual matrix' surrounding the contract, even where there is no ambiguity." Later in *Primo Poloniato*, at para. 71, Feldman J.A. cautions that:

> While the scope of the factual matrix is broad, it excludes evidence of negotiations, except perhaps in the most general terms, and evidence of a contracting party's subjective intentions. As the cases above suggest, the factual matrix includes only objective facts known to the parties at or before the date of the agreement, and what is common to both parties. [W]hile the factual matrix can "be used to clarify the parties' intentions as expressed in a written agreement, it cannot be used to contradict that intention, create an ambiguity which otherwise does not exist in the written document, or have the effect of making a new agreement." Ultimately, the words of the agreement are paramount. [Citations ommitted.]
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> (c) Contra Proferentum
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> [25] In *2249778 Ontario Inc. v. Smith (Fratburger)*, 2014 ONCA 788 (CanLII), 247 A.C.W.S. (3d) 197, at para. 22, the Ontario Court of Appeal repeats the well-established principle that "the rule of contra proferentum applies in cases where the contractual terms are ambiguous: *Consolidated-Bathurst v. Mutual Boiler, [1980] 1 SCR 888*, 1979 CanLII 10 (SCC), at p. 900 and *Manulife Bank of Canada v. Conlin, [1996] 3 SCR 415*, 1996 CanLII 182 (SCC), at pp. 425-426."

In *Pennington's Stores Ltd., Re*, 1996 CanLII 8266 (ON SC) the Court, sitting in Bankruptcy, explored the interaction between the doctrine of frustration, and force majeure or act of God clauses. The Court held that the essence of the doctrine of frustration is the absence from the contracting parties' minds of "the possibility of such a disaster". Otherwise, an act of God or force majeure clause, and the attendant analysis apply:

> [6] The doctrine of frustration has received many judicial interpretations. They have as their fountainhead the decision of the Queen's Bench Division in *Taylor v. Caldwell* (1863), 122 E.R. 309 (Q.B.). In that case a concert hall had been destroyed by fire, thereby preventing the performance of a series of concerts at the hall for which the plaintiffs had agreed to pay rent. The court in considering the respective liabilities of the parties concluded that:
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> The music hall having ceased to exist, without the fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and the gardens and other things.
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> [7] Justice Blackburn at p. 312 said:
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> The parties when framing their agreements evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

…

…and there are authorities which, as we think, establish the principal that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exists, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a position contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

[8] At p. 314 he says:

The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel, [emphasis mine]

[9] From the above, it appears that the essence of the doctrine of frustration is the absence from the contracting parties' minds of "the possibility of such a disaster".

[10] The Supreme Court of Canada considered the doctrine in the case of Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp & Paper Co. (1975), 1975 CanLII 170 (SCC), [1976] 1 S.C.R. 580. In that case Dickson J. said at p. 583:

An act of God clause ox force majeure clause, and it is within such a clause that the words "non-availability of markets" are found, generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill. [Emphasis added]

In *Foster v. Caldwell*, 1948 CarswellNB 9 a tenant rented a farm. A number of buildings of the farm were destroyed by fire, and the kitchen adjoining the dwelling house was damaged too. The main house was damaged but habitable. The lessee argued he was not liable to pay because of

the destruction and damage by fire of part of the property leased, which he argued constituted frustration.

In the case of a lease, the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented. Even where fire destroys the property, whenever a lessee covenants to pay rent at stated periods without any exceptions in case of fire, he is bound to pay it though the house be burned down; for the land remains and he might have provided to the contrary by express stipulation if both parties had so intended. Temporary interruption of a tenant's use and occupation does not affect the covenants or the chattel interest. A tenant's covenant to pay rent or repair or deliver up in repair are not affected by casualties which interfere with his enjoyment of the demised land. The lessor as a general rule gives no warranty in these respects in favour of the tenants:

> [5] This suit was brought to recover $225, the balance of the second year's rent. The appellant claims that he is not liable to pay this because of the destruction and damage by fire of part of the property leased. It is urged that by reason of this there was frustration. Reliance was placed on the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1942] 2 All E.R. 122, 111 L.J.K.B. 433.
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> [6] There are a number of English decisions which have held that the doctrine of frustration does not apply to a lease. Reading C.J. in *Whitehall Court (Ltd.) v. Ettlinger* (1920), 89 L.J.K.B. 126, held that the doctrine of frustration was not applicable to a contract which created and vested a term in a tenant. Lord Atkinson in *Matthey v. Curling* (1922), 91 L.J.K.B. 593, says he thinks this case was rightly decided. The question came directly before the House of Lords in *Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd*., [1945] 1 All E.R. 252, 114 L.J.K.B. 110. That case arose under a building lease dated May 12, 1936. By that lease the land in question was demised to the appellants for a term of 99 years. The appellants were to build shops on part of the land in question. They were to pay as rent a pepper corn for the first year and £35 per annum thereafter for each site from notification by the landlords that the erection of a shop thereon might proceed. On September 24, 1937 notification had been given that building might proceed. The respondents brought action to recover arrears of rent since September 1939. The appellants contended that the lessee had been frustrated owing to the restrictions which had been placed on building and the acquisition of materials therefor due to the war. The trial judge, Asquith J., held that the doctrine of frustration did not apply to a lease, but intimated that if it had applied he would have held there was frustration. The Court of Appeal held that frustration had no application to a lease. On appeal to the House of Lords the case was argued before five Lords. Two of them, Viscount Simon L.C., and Lord Wright, expressed the view that frustration could be applied to a lease although only rarely; Lord Russell of Killowen and Lord Goddard expressed the contrary view.

Lord Porter found it unnecessary to decide the point. All five held on the facts that the appellants were liable for rent.

[7] While the principle that frustration is not applicable to leases remains unsettled by the highest Court, the doctrine adopted by the lower Courts and the Court of Appeal has not been overruled. If that is correct, there can be no frustration of the lease and the present appeal must fail.

[8] But we can go further than that and examine the facts. In the Cricklewood case Viscount Simon L.C. gave a definition of frustration which should be useful in the case now before us. At p. 255 he said:

Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement. If, therefore, the intervening circumstance is one which the law would not regard as so fundamental as to destroy the basis of the agreement, there is no frustration. Equally, if the terms of the agreement show that the parties contemplated the possibility of such an intervening circumstance arising, frustration does not occur. Neither, of course, does it arise where one of the parties has deliberately brought about the supervening event by his own choice. (See the cases collected in J*oseph Constantine S.S. Line, Ltd. v. Imperial Smelting Corpn. Ltd.*) But where it does arise, frustration operates to bring the agreement to an end as regards both parties forthwith and quite apart from their volition.

[9] Lord Goddard speaking at p. 265 said:

Whatever be the true ground on which the doctrine is based, it is certain that it applies only where the foundation of the contract is destroyed so that performance or further performance is no longer possible. In the case of a lease the foundation of the agreement, in my opinion, is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant there is no frustration though particular use may be prevented.

[10] In Woodfall on Landlord and Tenant, 22 ed., p. 121, it is stated:

Whenever the lessee covenants to pay rent at stated periods (without any exception in case of fire) he is bound to pay it though the house be burned down; for the land remains and he might have provided to the contrary by express stipulation if both parties had so intended.

> [11] See also Williams' Canadian Law of Landlord and Tenant, 2nd ed., 182; 20 Halsbury 177.
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> [12] Under the lease in the present case the appellant covenants to pay the rent. There is no exception in the lease with respect to destruction of any of the buildings by fire. Lord Wright in the *Cricklewood* case, at p. 262, said:
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> It has been held over and over again that a temporary interruption of the tenant's use and occupation does not affect the covenants or the chattel interest. ... In England, since *Paradine v. Jane*, and earlier, the law has been that in general the tenant's covenant to pay rent or repair or deliver up in repair are not affected by casualties which interfere with his enjoyment of the demised land. The lessor as a general rule gives no warranty in these respects in favour of the tenants. The tenant must perform his covenants even though the demised house is destroyed by fire (*Monk v. Cooper*) quite irrespective of what covenants as to repairs there may be (*Loft v. Dennis*), or whether the loss of enjoyment is due to the landlord's failure to fulfil his obligations to repair (*Hart v. Rogers*).
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> [13] Under the terms of the lease in the present case appellant was bound to pay the rent. *Monk v. Cooper* (1727), 2 Strange 763. He could have stayed on as a tenant after the fire and made use of what was left of the property. If he did not wish to be liable to pay rent under such conditions he should have had a provision in the lease to provide for that. In fact, he did stay on the leased land until about February 12, 1947. He cleaned part of the dwelling house and lived in it until he left.
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> [14] Prima facie therefore the respondent was entitled to recover the $225 claimed. This amount would pay the rent to May 1, 1947.

However, Foster was not followed in *Turner v. Clark*, 1983 CarswellNB 60 , which also dealt with the purported frustration of a lease. The Court in Turner held that the doctrine of frustration was capable of applying to a lease of land, although in exceedingly rare circumstances. The case before the Court in Turner was one of a monthly lease for residential purposes only of an apartment in a building. In light of that, the Court held that the contract had been frustrated, and the appellant was entitled to recover rent for the period of time after the agreement was frustrated by the fire:

> [3] The trial Judge dismissed the appellant's claim for recovery of the rent paid on the ground that at common law there is no abatement of rent unless expressed in the lease or provided for by statute, none of which were present in this case. The trial Judge, however, did not, in his reasons for judgment, deal with the issue of frustration. Since the question is important, we would grant leave to appeal.
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> [4] In *Foster v. Caldwell,* 22 M.P.R. 16, [1948] 4 D.L.R. 70, the Supreme Court of New Brunswick, Appeal Division, debated whether frustration applied to a lease in

light of *Cricklewood Property & Invt. Trust Ltd. v. Leighton's Invt. Trust Ltd.*, [1945] A.C. 221, [1945] 1 AH E.R. 252 (H.L.), and found on the facts of the case before them that it did not apply. Hughes J. for the Court referring to the *Cricklewood* case said this at p. 20:

On appeal to the House of Lords the case was argued before five Lords. Two of them, Viscount Simon L.C., and Lord Wright, expressed the view that frustration could be applied to a lease although only rarely; Lord Russell of Killowen and Lord Goddard expressed the contrary view. Lord Porter found it unnecessary to decide the point. All five held on the facts that the appellants were liable for rent.

While the principle that frustration is not applicable to leases remains unsettled by the highest Court, the doctrine adopted by the lower Courts and the Court of Appeal has not been overruled. If that is correct, there can be no frustration of the lease and the present appeal must fail.

[5] Subsequently, in the case of *Highway Properties Ltd. v. Kelly, Douglas & Co.*, [1971] S.C.R. 562, [1972] 2 W.W.R. 28, 17 D.L.R. (3d) 710, the Supreme Court of Canada dealt with a commercial lease which involved issues under the law of property and the law of contract. Speaking for the Court, Laskin J. (as he then was) said at p. 721:

It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

[6] In *Nat. Carriers Ltd. v. Panalpina (Northern) Ltd.,* [1981] A.C. 675, [1981] 1 All E.R. 161, the House of Lords clearly determined that the doctrine of frustration was capable of applying to a lease of land although the circumstances in which the doctrine of frustration could apply to a lease of land were exceedingly rare.

[7] In the present case we have a monthly lease for residential purposes only of an apartment in a building. We think the appellant is entitled to recover on the basis of frustration. However, she is only entitled to recover that part of the rent covering the period of time after the agreement was frustrated by the fire, an amount of $260.

However, consider *Raymond v. Byrapaneni*, 2001 NBCA 8 (CanLII). In *Raymond*, the Court dealt with a tenant's abandonment of premises. While not on all-fours with frustration, the Court commented on its applicability nevertheless.

The concept of a lease as an estate in land precludes the application of other contractual principles. As a general proposition, the doctrine of frustration applies to all contracts except

leasing contracts. It is for this reason that a tenant remains obligated at common law to pay rent even though the leased premises are destroyed by fire through no fault of the tenant. This is true even if the premises are located on the top floor of a 15 story building. The legal rationale invoked to support that conclusion is tied to the understanding that the tenant retains an estate in land and thus there can never be a "total failure of consideration". In other words, the tenant is in receipt of what he bargained for - an estate in land. The Court acknowledged New Brunswick as the only province in which the doctrine of frustration had been applied to relieve a tenant of the obligation to pay rent. Although note that the Supreme Court has held that 'it is no longer sensible to pretend that a commercial lease is simply a conveyance and not also a contract', and there is a growing tendency to apply contractual remedies in a leasing context:

> [9] At common law, a lease is looked on as a conveyance of an estate in land as opposed to a bilateral contract involving a disposition of an interest in property. But, as the law of landlord and tenant developed long before classical principles of contract law took hold, the idea that a lease could also be labeled a contract is of little import. That being said, I would caution that in *Highway Properties Ltd. v. Kelly, Douglas and Company Limited*, 1971 CanLII 123 (SCC), [1971] S.C.R. 562, Laskin J. (as he then was) held at page 576 that, "It is no longer sensible to pretend that a commercial lease, such as the one before this Court, is simply a conveyance and not also a contract." Also in North Sound Ltd. v. Pic Realty Ltd. (1987), 80 N.B.R. (2d) 415 (C.A.) this Court noted the growing tendency to apply contractual remedies in a leasing context. Subject to those caveats, it is generally assumed that contractual principles do not apply in cases where there has been a material breach of a lease agreement by either party.
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> [11] The concept of lease as an estate in land precludes the application of other contractual principles. As a general proposition, the doctrine of "frustration" applies to all contracts, except leasing contracts. It is for this reason that a tenant remains obligated at common law to pay rent even though the leased premises are destroyed by fire through no fault of the tenant. This is true even if the premises are located on the top floor of a 15 story building. The legal rationale invoked to support that conclusion is tied to the understanding that as the tenant retains an estate in land there can never be a "total failure of consideration". In other words, the tenant is in receipt of what he bargained for - an estate in land.
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> [12] I must acknowledge that, as far as I am aware, New Brunswick is the only province in which the doctrine of frustration has been applied to relieve a tenant of the obligation to pay rent where premises have been destroyed by fire. The tenant is also entitled to recover that portion of prepaid rent that relates to the period that the premises were unavailable for occupation. See *Turner v. Clark* (1983), 49 N.B.R. (2d) 340, per LaForest J.A. (as he then was) declining the invitation to follow *Foster v.*

> *Caldwell* (1948-49), 22 M.P.R. 16 (N.B.C.A.) and see generally J.T. Robertson, "Frustrated Leases: No to Never - But Rarely If Ever" (1982) 60 Can. Bar Rev. 619.

The Ontario Court of Appeal has also held that the doctrine of frustration does not apply to a lease in *Merkur v. H. Shoom & Co. Ltd.*, 1953 CanLII 362 (ON CA). In *Merkur*, the defendant argued that the lease was made upon the express condition and warranty that the building would be occupied by dealers in fruit and produce as a summer market. This was the case, but adjoining premises caught fire, as a result of which the plaintiff's tenants moved out of the premises, which had been used as a summer market for years. The trial judge permitted an amendment pleading frustration, finding it in the contemplation of both parties that the particular stall leased by the defendant would be part of a summer market. However, the Court of Appeal disagreed.

The Court of Appeal held it was not enough that the parties had a particular use in contemplation, as the subject-matter of the contract never ceased to exist. The weight of judicial authority is that the doctrine of frustration does not apply to leases, particularly where the subject matter of the lease was in existence at the time the lease was entered into, and the tenant entered into possession thereof:

> The learned trial Judge permitted an amendment at the trial so that the defendant might raise a plea of frustration and after permitting that defence to be raised the learned trial Judge held that in the circumstances of this case the doctrine of frustration applied. He found that it was in the contemplation of both parties that the particular stall leased by the defendant was to be part of a summer market and that if anything occurred which defeated the object of the lease the doctrine of frustration came into play. In our opinion the doctrine of frustration does not apply in this case. It is not enough that the parties should have had in contemplation that the defendant and the plaintiff's other tenants would use the premises as a summer market. So far as the plaintiff was concerned there was nothing to prevent the tenants using their several stalls which they had rented from the plaintiff as a summer market. The subject-matter of the contract never ceased to exist. The learned trial Judge found against any warranty or agreement as to the existence of a summer market or the continuance of one. If the defendant company intended the contract to be dependent upon other tenants or producers being there or in the vicinity, so as to create a summer market, it should have so provided in the contract.
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> Many cases were cited to us, but we do not think we need discuss them. The weight of judicial authority is that the doctrine of frustration does not apply to leases, particularly where the subject-matter of the lease was in existence at the time the lease was entered into, and the tenant entered into possession thereof.

More recently, in *Dhillon v. PM Management Systems Inc.*, 2014 ONSC 5407 (CanLII) the Divisional Court held that the doctrine of frustration can apply to commercial leases.

The decision as to when the doctrine of frustration applies turns on the question “if it reasonable to place the risk of non-performance in the events which have happened on one party or the other or neither?” If it is not reasonable to place the risk on either party, the contract is frustrated. If, however, it is reasonable to place the risk on a particular party, that party must perform and if he fails to do so, he will be liable in damages. The doctrine of frustration is a flexible doctrine, and is not restricted to any formula; it can be applied to all types of contract, including contracts involving the leasing of land. An event is not a frustrating event if it is foreseen or provided for in the contract or if the frustrating event was caused by the fault of a party to the contract:

> [12] In *Focal Properties v. George Wimpey Canada Ltd*., supra Justice Houlden stated at p. 309:
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> [T]he decision as to when the doctrine of frustration applies turns on the question: "is it reasonable to place the risk of non-performance in the events which have happened on one party or the other or neither?" If it is not reasonable to place the risk on either party, the contract is frustrated. If, however, it is reasonable to place the risk on a particular party, that party must perform and if he fails to do so, he will be liable in damages.
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> [13] The doctrine of frustration is a flexible doctrine and is not restrictive to any formula and can be applied to all types of contracts including contracts involving the sale or leasing of land: *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, supra.
>
> [14] An event is not a frustrating event if it is foreseen or provided for in the contract or if the frustrating event was caused by the fault of a party to the contract: *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.*, supra; *Dinicola v. Huang & Danczkzy Properties,* supra.

Similarly, in *224981 Ontario Inc. v Intact Insurance Company*, 2016 ONSC 642 (CanLII) the Court also held that the doctrine of frustration can apply to commercial leases, relying on a somewhat older Court of Appeal case finding that the doctrine could apply to contracts for the sale of land, and finding that it may also apply to leases.

Frustration occurs when a situation has arisen for which the parties made no provision in the contract and the performance of the contract becomes a “thing radically different from that which was undertaken by the contract”. The doctrine is flexible and ought not to be restricted by any arbitrary formula. Indeed, even the destruction of premises by fire has resulted in findings of frustration:

> [17] However, Zurich’s position that a tenant must continue to pay rent for a building even though it is destroyed by fire is not the current state of the law in Ontario for the following reasons.

[18] First, the Court in *MSM Construction*, which referenced the lower Court's decision in *Dunkelman v. Lister*[3], does not appear to have had the benefit of the Ontario Supreme Court-Appellate Division's decision which upheld the lower Court's decision. In *Dunkelman*, the Plaintiff was one of the tenants in a building owned by the Defendant that had been destroyed by fire. There was no obligation in the lease for the landlord to re-build the building in the event that it was destroyed by fire, however, the lease provided that the tenant need not pay rent until the building was rebuilt. The landlord re-built the building, however, it had a different design than the old building with no store in the new building that corresponded to the premises that the tenant formerly occupied. The tenant brought a claim for damages based on an alleged right to occupy a portion of the new building. The Court dismissed the tenant's action and ordered that pre-paid rent be returned to the tenant. Justice Kelly opined that the lease came to an end after it was destroyed by fire in the absence of a covenant to repair. He stated:

The subject has been dealt with in many reported cases in Courts in the United States. In *Schmidt v. Pettit* (1873), 1 McArthur (District of Columbia) 179, a lease provided that if the premises should be destroyed by fire the rent should cease until the landlord put them in good order and condition but the landlord did not otherwise covenant to rebuild. The building was destroyed by fire during the term. It was held that the destruction of the premises by fire put an end to the lease.

Ainsworth v. Ritt (1869), 38 Cal. 89, was an action by a landlord to recover rent under a lease of part of a building or superstructure but not of the land on which the same rested. During the term the building was entirely demolished by a third party without the consent of either plaintiff or defendant. It was held that, in the absence of a covenant by the lessor to repair, the destruction of the building, the subject-matter of the lease, terminated the relation of landlord and tenant. That seems a sound principle. See also *Winton v. Cornish* (1832), 5 Hammond (Ohio) 477. [Emphasis added]

[19] Justice Kelly's view that a lease was terminated after a fire had destroyed a building, absence by a covenant by the lessor to repair, was upheld by the Ontario Supreme Court – Appellate Division. Mulock C.J.O., speaking for the appellate Court, stated:

Further, the defendants on the 19th July, 1923, notified the plaintiff that they did not intend to rebuild the destroyed buildings, and having carried out such intention by erecting the building above mentioned, and the plaintiff having availed himself of his right reserved to him by the lease to suspend payment of rent until the building should be restored, I am of opinion that these circumstances terminated the lease unless, for the reasons mentioned by the trial Judge, it was terminated by the complete destruction of the building.[4]

[20] Second, the approach taken by the Court in *Hart v. Windsor* (1844) 12 M & W 68, which is the foundation for the cases relied upon by *Zurich*, was overtaken by the doctrine of frustration which developed after that decision. In *Capital Quality Homes Ltd. v. Colwyn Construction Ltd.* 1975 CanLII 726 (ON CA), [1975] O.J. No. 2435, the Ontario Court of Appeal explained this development and held that the doctrine of frustration applies to leases. The Court stated:

16 English Courts, prior to *Taylor et al. v. Caldwell et al.* (1863), 3 B. & S. 826, 122 E.R. 309, followed the rule that impossibility of performance of a contract did not relieve the party unable to perform from liability in damages. Subsequently, that rigid rule was relaxed and contracts were held to be terminated and the parties discharged when the events which denied fulfilment of the contract were caused by some circumstance beyond the control of the contracting parties…The breakthrough by Blackburn, J., was accomplished by holding that a contract is not to be construed as absolute if the contracting parties from the beginning must have known that its fulfilment depended upon the continued existence of some peculiar thing and therefore must have realized that this continuing existence was the foundation of the bargain. He held that the contract is "subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor". He implied a term or condition into the contract. The doctrine of impossibility of performance or as it is now generally called, the doctrine of frustration, developed rapidly, particularly in commercial contracts and English Courts sought to do justice by holding that a contract was discharged when some catastrophic event occurred, the result of which was to destroy the very basis of the contract.

…

30 The doctrine of frustration has been applied to commercial contracts sinc*e Taylor et al. v. Caldwell* et al., supra. In *Cricklewood v. Leighton'*s, supra, Viscount Simon, L.C., and Lord Wright held against the accepted view that leases were outside the doctrine since a lease in addition to being a contract creates an estate in the land demised for the period of the agreed term. I adopt the reasoning of Viscount Simon, L.C., and his conclusion that there is no binding authority precluding the application of the doctrine of frustration to contracts involving the lease of lands. I am also in accord with his observations that the doctrine is flexible and ought not to be restricted by any arbitrary formula.

…

38 I adopt the reasoning of Lord Simon in *Cricklewood v. Leighton*'s, supra, and accept his conclusion that there is no binding authority in England precluding the application of the doctrine of frustration to contracts involving a lease of land. I believe the situation to be the same in Ontario and I am unable to distinguish any

difference between leases of land and agreements for the sale of land, so far as the application of the doctrine is concerned….[5]

[21] In *Naylor Group Inc. v. Ellis-Don Construction Ltd*, 2001 SCC 58, [2001] 2 S.C.R. 943, at paras. 53-55:

Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract"…The Court is asked to intervene…to relieve the parties of their bargain because a supervening event…has occurred without the fault of either party.

Authorities

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