

## **Frustration and Leases**

**HEADLINE: What is a Doctrine of Frustration?**

**SUB-HEADING: And how does it apply to leases?**

### **Who should read this article?**

Any party who has entered into a commercial property lease, who could be:

- affected by unforeseen circumstances relating to the property's continued use
- facing a legal challenge over the lease's ongoing validity.

### **Why is this important?**

Circumstances outside of your control happen, and these can impact the intended use of your property. It is vitally important to consider all future possibilities when negotiating a commercial property lease. Doing so can save significant stress and funds.

### **What is a Doctrine of Frustration?**

This is a common Law doctrine that has developed through the courts.

The test for whether or not a contract is frustrated is a common law one; the consequences of frustration are codified in s 60 of the Contract and Commercial Law Act 2017.

The common law doctrine of frustration applies in circumstances where a supervening event makes further performance of contractual obligations impossible or significantly different from what the parties intended when they entered the contract. Its effect is to bring the contract to an end, thereby relieving the parties of having to perform their contractual obligations any further.

A frustrating event requires:

- a radical change in circumstances compared to what the parties contemplated at the time of contracting
- impossibility of performance of an obligation that concerns the common object or purpose of the contract; and
- that neither party is at fault.

Historically this did not apply to leases, which are not simply contracts but involve the Lessor granting to the Lessee an estate in Land. However, in response to the Christchurch earthquakes, the courts have applied the doctrine to leases too. However...

### **The doctrine of frustration applied to leases is rare**

It's not impossible to challenge a lease based on this doctrine—there are precedents—but the terms of the lease are also considered, including:

- a. The permitted use of the premises or land under the lease;
- b. The remaining term of the lease;
- c. The ability for the premises or land to be used for any purpose permitted under the lease;
- d. The potential for alternative land or premises uses as authorised by the lease.

Doctrine of frustration does not need to be included in a lease to be up for debate. Whether it applies or not will be determined by the facts and the existing body of case law on the doctrine.

### **What about force majeure?**

Every force majeure clause is drafted differently. Terms of the lease which deal with “acts of God”, force majeure or other similar events such as flooding, earthquakes, fire, tempest, erosion, evulsion and the like are relevant. In these cases, a party may have the right to terminate the lease without having to rely on the doctrine of frustration.

However, a force majeure clause may oust the doctrine of frustration, on the basis that the parties turned their minds to how a particular event should be dealt with contractually.

### **Real life examples**

The question of whether a lease has been frustrated, has arisen in four cases in New Zealand: Stack Shelf Company Number 16 Limited v Larsen, Māori Trustee v Prentice, GP 96 Ltd v FM Custodians Ltd and The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership) (In Liquidation). In each the lease was held not to be frustrated on the particular facts.

In addition, the doctrine has been tested abroad. Notably, in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, a case about whether a ten-year lease of a warehouse was frustrated by the compulsory closure of the only vehicular access to it by the highway authority for a period of twenty months. The tenants were undoubtedly put to considerable expense and inconvenience. But that was deemed not enough under the doctrine of frustration.

### **The courts have been cautious in applying the doctrine of frustration**

The courts are careful not to allow a contract that has been entered into freely, to be easily overturned as soon as problems arise. Therefore the threshold for frustration is set very high.

### **If in doubt, reach out**

The best advice is to discuss any property lease contracts with your lawyer. Our Property law team at Carlile Dowling would be pleased to assist you. Connect with us by calling **06 561 0837** or emailing Teresa Mee at [teresa@cardow.co.nz](mailto:teresa@cardow.co.nz).