

**THE DOCTRINE OF FRUSTRATION,
COMMERCIAL LEASES
AND THE
CANTERBURY EARTHQUAKES**

A thesis submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy
in the University of Canterbury

by

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2016

ACKNOWLEDGMENTS

I would like to extend my heartfelt thanks to a number of people who have assisted me with my thesis and made my dream of completing a PhD possible.

To all of the participants in this research who willingly gave of their time so that I might have a personal insight into their experiences after the earthquakes, I thank you. I hope that this thesis may instigate change to benefit you all.

To my wonderful supervisors, Professor Jeremy Finn and Professor Elizabeth Toomey, I cannot thank you enough for your never-ending wisdom, guidance, critique and support throughout this journey which has been so very much appreciated. I truly could not have achieved this result without you. I also wish to thank Professor Simon Kemp for his guidance and support with drafting the questionnaires.

To my fellow PhD and post-grad students Tracy, Cassandra, Bob, Josie, Leuatea, Dennis and Chat; thank you for the coffee breaks, interesting conversation and support you have provided during the marathon we have undergone together over the past four years.

To my father-in-law Nick Lindo (Ed), thank you for your editing services for which I am extremely grateful. Also to Karen Grant who helped with editing in the final stages.

To the School of Law at the University of Canterbury, thank you for the research grant to enable me to obtain the services of Vicinity Solutions, a geospatial consulting firm, to undertake a search of the Land Information New Zealand database to discover the number of registered leases within the central business district of Christchurch.

To my parents, Jenifer Alexander and Graham Collins and my sister and brother Ainslee and Tim, who have always shown an interest in my pursuits and supported me in them.

Last, but not least, I dedicate this thesis to my family; to my dearest husband Hugh and my wonderful children Charlotte, Hannah and Jack, who have provided unwavering support, understanding and patience from start to finish and unconditional love whether a good day or bad. I cannot thank you enough.

ABSTRACT

The Canterbury earthquakes in 2010 and 2011 had a significant impact on landlords and tenants of commercial buildings in the city of Christchurch. The devastation wrought on the city was so severe that in an unprecedented response to this disaster a cordon was erected around the central business district for nearly two and half years while demolition, repairs and rebuilding took place. Despite the destruction, not all buildings were damaged. Many could have been occupied and used immediately if they had not been within the cordoned area. Others had only minor damage but repairs to them could not be commenced, let alone completed, owing to restrictions on access caused by the cordon. Tenants were faced with a major problem in that they could not access their buildings and it was likely to be a long time before they would be allowed access again. The other problem was uncertainty about the legal position as neither the standard form leases in use, nor any statute, provided for issues arising from an inaccessible building. The parties were therefore uncertain about their legal rights and obligations in this situation. Landlords and tenants were unsure whether tenants were required to pay rent for a building that could not be accessed or whether they could terminate their leases on the basis that the building was inaccessible.

This thesis looks at whether the common law doctrine of frustration could apply to leases in these circumstances, where the lease had made no provision. It analyses the history of the doctrine and how it applies to a lease, the standard form leases in use at the time of the earthquakes and the unexpected and extraordinary nature of the earthquakes. It then reports on the findings of the qualitative empirical research undertaken to look at the experiences of landlords and tenants after the earthquakes. It is argued that the circumstances of landlords and tenants met the test for the doctrine of frustration. Therefore, the doctrine could have applied to leases to enable the parties to terminate them. It concludes with a suggestion for reform in the form of a new Act to govern the special relationship between commercial landlords and tenants, similar to legislation already in place covering other types of relationships like those in residential tenancies and employment. Such legislation could provide dispute resolution services to enable landlords and tenants to have access to justice to determine their legal rights at all times, and in particular, in times of crisis.

STATEMENT AS TO PRIOR PUBLICATIONS

During the course of my enrolment as a doctoral student the following parts of my thesis have been used as stated:

1. Parts of Chapter Five that deal with the meaning of the term “untenantable” and the Property Law legislation have been used in a Conference Paper:
Collins, T (2014) *The Interplay between Commercial Leases and the Property Law Acts in the aftermath of the Canterbury Earthquakes* Bond University, Gold Coast, Australia: 12th Australasian Property Law Teachers Conference: Pushing the Boundaries in Property Law, 17-19 July 2014.
2. Parts of Chapter Seven that reveal some of the problems that arose for commercial landlords and tenants after the earthquakes have been published in a Chapter of a Book:
Collins T “The Problems Encountered by Commercial Landlords and Tenants after the Canterbury Earthquakes” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015).
3. Parts of Chapter Four that deal with registered commercial leases have been used in a Conference Paper:
Collins, T (2016) *Registered Leases and the In Personam Claim* University of Canterbury, Christchurch, New Zealand: 13th Australasian Property Law Teachers Conference: Protecting Property through Legislative and Technological Change, 14-15 April 2016.

Except as stated above, the text of this thesis has not been published in any form prior to its submission for examination.

Except for materials quoted and attributed to their authors in footnotes or the Bibliography, this thesis is entirely my own work.

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*The law is stated as at 30 June 2016.

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Contract and Commercial Law Bill 2016.
Frustrated Contracts Bill 1944.
Land Transfer Bill 2016.

2 Australia

Frustrated Contracts Act 1959 (Vic).
Frustrated Contracts Act 1978 (NSW).

3 Canada

Commercial Tenancy Act [RSBC 1996] c 57.
Frustrated Contract Act [RSBC 1996] c 166.
Residential Tenancy Act [SBC 2002] c 78.

4 England

Law Reform (Frustrated Contracts) Act 1943.

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ACRONYMS

ADLS	Auckland District Law Society
BOMA	Building Owners & Managers Association
CBD	Central Business District
CEISMIC	The University of Canterbury's Digital Archive to preserve the memories and experiences of the people of the Canterbury region
CERA	Canterbury Earthquake Recovery Authority
DEE	Detailed Engineering Evaluation
EQC	Earthquake Commission
FQ999	Full Questionnaire; participant's allocated number
LTA	Land Transfer Act 1952
LTB	Land Transfer Bill 2016
NGO	Non-governmental Organisation
PCNZ	Property Council of New Zealand
PLA 1952	Property Law Act 1952
PLA 2007	Property Law Act 2007

CHAPTER ONE

INTRODUCTION

In September 2010 a major earthquake shook the Canterbury region of the South Island of New Zealand. It triggered a sequence of thousands of aftershocks that continued over the following years. The most significant aftershock occurred in February 2011. It was centred close to the city of Christchurch and had devastating consequences with the loss of 185 lives, the catastrophic collapse of two multi-storey buildings and extensive damage to other buildings and infrastructure throughout the city. Owing to this destruction, unprecedented action was taken by the authorities. A cordon was erected around the central business district (CBD) which had the effect of creating an inaccessible red zone. This cordon remained in place for nearly two and a half years.¹

Although the city was extensively damaged there were some buildings that came through the event relatively unharmed. The cordon, however, prevented access to them. Many tenants² of these buildings wanted to terminate their leases³ in order to relocate to new premises outside the city. There were other reasons too. The length of time it was to take for repairs or earthquake strengthening to be completed meant that tenants were unable to use their buildings for a prolonged period. They too, could not afford to wait. Although less common, some landlords would also have liked to terminate their leases. One example was where there was only one operational shop, in a block of shops, because the rest were irreparably damaged or uneconomic to repair. In other cases, landlords may have wanted to upgrade their buildings and sought to end leases to engage in these works.

There was a problem though. Landlords and tenants could not terminate their leases on the basis that the building was inaccessible. The law was uncertain because the leases did not provide for this situation and neither did the legislation.

¹ The cordon remained in place for two and a half years but decreased in size over time, as areas were made safe.

² This thesis is about commercial landlords and tenants in contrast to residential landlords and tenants. All references to landlords and tenants are to those with commercial leases unless otherwise stated.

³ This thesis examines commercial leases and the use of the word “lease” or “leases” refers to commercial leases in contrast to residential leases unless otherwise stated. The meaning of a commercial lease is covered in Chapter Three.

The aim of this thesis is to discover whether the doctrine of frustration could apply to leases of buildings that became inaccessible as a consequence of the Canterbury earthquakes. If it does apply, it would allow landlords and tenants to terminate their leases, thereby providing a solution for their problem of an inaccessible building.

The first three chapters examine the doctrine of frustration and its application to leases. Chapter Two looks at the genesis of the doctrine and why it was created. The chapter also looks at the development of the doctrine, the test for it and when it does not apply. Most importantly, it sets out the current law in New Zealand on frustration from the Supreme Court decision in *Planet Kids Ltd v Auckland Council*.⁴ Chapter Three looks at the application of the doctrine to a specific contract, a lease. It examines the House of Lords' decision in *National Carriers Ltd v Panalpina (Northern) Ltd*,⁵ which removed the doubt plaguing the courts until that time that the doctrine was applicable to leases. It also looks at the approach the New Zealand courts have taken. Chapter Four concludes this section by dealing with a particular problem for countries that have adopted the Torrens system of land registration. It looks at how the doctrine of frustration applies to a registered lease and the added complication of an indefeasible registered interest.

Chapter Five examines the leases that were used at the time of the Canterbury earthquakes and the law that was applicable. It is trite law the doctrine of frustration can only apply if the relevant contract has failed to provide for the problem that has affected it. Therefore, this chapter examines the standard form leases to ascertain what they covered. It also looks at the relevant provisions in the Property Law Act 2007, and its predecessor the Property Law Act 1952, to determine what the legislation provided in relation to leases of inaccessible buildings.

Chapters Six and Seven provide the background to the problems that beset landlords and tenants after the earthquakes. Chapter Six details the sequence of earthquakes, how they affected the city of Christchurch and consequently how landlords and tenants were affected. The chapter also looks at the specific features of the earthquakes that made them extraordinary, to determine whether, as a supervening event, they meet the test for frustration. Chapter Seven then details the research that was undertaken into the experiences of landlords, tenants and lawyers after the earthquakes. It sets out the methodology and the results of the findings.

⁴ *Planet Kids Ltd v Auckland Council* [2013] NZSC 147.

⁵ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675 (HL).

Chapter Eight is the chapter at the crux of the thesis. Here the findings from the research are analysed and the test for the doctrine of frustration is applied. Do the circumstances of landlords and tenants meet the test? The chapter concludes that they do and the doctrine should apply to leases of inaccessible buildings after the Canterbury earthquakes.

Finally, Chapter Nine concludes the thesis by advocating a case for reform. If the doctrine of frustration provides a solution, it is a hollow victory if the parties have no affordable and accessible way to determine this when needed. In this chapter it is argued there needs to be new legislation specific to the needs of landlords and tenants. It details what the legislation should contain, and in particular, recommends an informal, low cost dispute resolution service to assist landlords and tenants in determining their legal rights in times of crisis.

This research records the problems that arose for an important sector in our society. It is hoped that in highlighting the plight of landlords and tenants in Christchurch after the Canterbury earthquakes, lessons can be learned and change brought about, to alleviate the problems faced by these parties after a significant natural disaster, before another strikes.

CHAPTER TWO

THE COMMON LAW DOCTRINE OF FRUSTRATION

I Introduction

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. The doctrine was created to address the hardship caused to the parties when the contract had not provided for the event that affected it.

This chapter examines the doctrine of frustration. It looks at the genesis of the doctrine and the theories expounded as the basis for it, together with specific examples of situations where the doctrine has been held to apply. It also looks at the consequences of invoking the doctrine which involves a consideration of the Frustrated Contracts Act 1944 and the limitations of the doctrine.

The final part of this chapter considers a specific clause often used in contracts to cover “acts of God” called a force majeure clause. This clause is designed to set out the rights and obligations of the parties if a natural disaster or other extraordinary event¹ should interrupt the contract. The reason for its inclusion in this chapter is to consider the extent that such a clause may preclude the operation of the doctrine of frustration.

II The Historical Development of the Doctrine of Frustration

A The Rule as to Absolute Contracts

For hundreds of years the law preserved the sanctity of contract by upholding the rule that a party who enters a contract must fulfil his or her obligations under it even if it is affected by a supervening event. The rationale for this approach was that parties have the ability to

¹ Including such things as acts of terrorism, civil unrest, strikes and war.

protect themselves from the consequences of unforeseen circumstances by making provision in their contract. This is known as the rule as to absolute contracts.

The rule as to absolute contracts was established in 1647 in the case of *Paradine v Jane*.² A lessee was deprived of his leasehold property by an enemy alien who took possession of it during wartime. He was therefore prevented from obtaining income from the land which he needed and had used to pay his rent. The lessee argued he should not have to pay rent in these circumstances. The court, however, was unsympathetic to his plea:³

... when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

In other words, because the lease contract had not provided for the event that affected it, the lessee was bound by the contract he had made. The rationale for the rule as to absolute contracts was that it provided clarity in the law because it upheld the terms upon which the parties had contracted. If parties failed to provide for a supervening event which affected their contract they had to bear the consequences.

Over time the application of this rule produced many harsh results. For example, in one case where a property was destroyed, the court held the tenant liable for the ongoing rent.⁴ In another similar case the tenant remained liable for the rent even though the landlord had received insurance money for the ruined property.⁵ As a consequence of many decisions like these, the courts were motivated to look for ways to achieve fairer outcomes.

B The Creation of the Doctrine of Frustration

Over the 17th and 18th centuries courts initiated change by creating a number of exceptions to the rule as to absolute contracts to temper a growing dissatisfaction with the rule. The exceptions were developed for situations in which the terms of the contract could no longer be fulfilled.⁶ For example: contracts requiring personal service by a party who had died or

² *Paradine v Jane* (1647) Aleyn 26.

³ At 27.

⁴ *Carter v Cumming* (1666) 1 Cas in Ch 84.

⁵ *Belfour v Weston* (1786) 1 TR 650.

⁶ In *Taylor v Caldwell* (1863) 3 B&S 826, Blackburn J discusses the exceptions at 836-837. Also see E Peel *The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011) at 921 where Peel argues the rule as to absolute contracts may never have applied to these types of contracts in any event.

was incapacitated, contracts affected by supervening illegality or contracts involving the destruction of specific goods. However, there were only a limited number of exceptions.

The turning point came in 1863 when the “doctrine of discharge by supervening events” or the “doctrine of frustration” was first applied in *Taylor v Caldwell*.⁷ The plaintiff contracted with the defendant to use the Surrey Gardens and Music Hall for the purpose of giving four concerts over a period of three months. Six days before the first concert the Music Hall was destroyed by fire through no fault of either party, however there was no express provision in the contract to cover what had happened. If the rule as to absolute contracts had been applied, the plaintiffs would have been liable for the rental of the Hall even though it had been destroyed. Instead the Court held there was an implied condition that the fulfilment of the contract depended upon the continuing existence of the Hall, as this was essential to the contract. With the Hall destroyed, the contract came to an end and the parties were discharged from their obligations under it. Blackburn J explained:⁸

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 this case the application of the doctrine of frustration provided a fairer solution and corrected the obvious injustice that would have arisen had the rule as to absolute contracts been applied. However, in deciding *Taylor v Caldwell*⁹ Blackburn J did not distinguish *Paradine v Jane*.¹⁰ Instead he got around the decision by creating another exception to the rule as to absolute contracts, so that in certain circumstances a term could be implied into a contract to bring it to an end. This approach has been criticised.¹¹ Nevertheless, Treitel argues *Taylor v Caldwell*¹² is a significant decision because the formulation of this exception to the rule as to absolute contracts has enabled subsequent judges to extend the scope of the doctrine of frustration so that over time it has become the general rule.¹³ The doctrine is now firmly established in the armoury of contractual remedies available to contracting parties.

⁷ *Taylor v Caldwell*, above n 6.

⁸ At 833.

⁹ *Taylor v Caldwell* above n 6.

¹⁰ *Paradine v Jane*, above n 2.

¹¹ The criticisms are discussed under the heading “The implied term theory” at page 19.

¹² *Taylor v Caldwell* (1863) above n 6.

¹³ G Treitel *Frustration and Force Majeure* (2nd ed, Sweet & Maxwell, London, 2004) at 46.

III The Application of the Doctrine of Frustration

A The Theories for the Doctrine of Frustration

Over time the courts have grappled with the issue of how to justify the use of the doctrine of frustration and the departure from a rule that encompassed the very foundation of contract law.¹⁴ A number of different theories have been proposed and an analysis of them is important to gain an understanding of the juristic basis of the court decisions. In *National Carriers Ltd v Panalpina (Northern) Ltd*,¹⁵ a House of Lords decision on the doctrine of frustration as it applies to leases, Lord Hailsham LC highlighted five theories for frustration: the implied term theory, a total failure of consideration theory, the just outcome theory, the frustration of the “adventure” or “foundation” of the contract theory and the construction theory.¹⁶ Each of these is considered in turn.

1 The implied term theory

The implied term theory was the first of the theories to be used to justify the application of the doctrine of frustration.¹⁷ This theory requires the court to ascertain what the parties would have intended to happen following the supervening event, had they turned their minds to it at the time they made their contract. By implying a term it has been said “the law is only doing what the parties really (though subconsciously) meant to do themselves”.¹⁸

The implied term theory has been applied in numerous cases.¹⁹ In *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Co*,²⁰ Lord Loreburn expressed his support for the

¹⁴ The rule as to absolute contracts.

¹⁵ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675. This case is discussed in more detail in Chapter Three in relation to the doctrine of frustration and its application to leases.

¹⁶ At 687-688.

¹⁷ *Taylor v Caldwell* above n 6.

¹⁸ *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 at 504 per Lord Sumner.

¹⁹ See Burrows Finn and Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at 785 for cases. In the latest edition, Burrows Finn and Todd *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 760 the implied term theory is only touched on briefly, the focus being on the New Zealand Supreme Court decision in *Planet Kids Limited v Auckland Council* [2013] NZSC 147 which put forward the construction theory as part of a multi-factorial approach to determining frustration.

²⁰ *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Co* [1916] 2 AC 397.

theory by asserting that the use of an implied condition to release parties from performance of a contract is the true principle upon which the courts have proceeded when finding a contract frustrated.²¹ In *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*,²² Lord Pearson was more reserved. He said that an unexpressed term could only be implied if the court finds the parties must have intended the term to form part of their contract:²³

... it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.

Despite attempts to justify the use of the implied term theory it has always had its critics.²⁴ One objection is that the theory is too far of a departure from the rule as to absolute contracts in that it essentially enables the court to rewrite the contract. Another objection is that the theory suggests the court can put itself in the position of the parties and decide what they would have intended had they known what was ahead of them. In *James Scott & Sons Ltd v Del Sel*,²⁵ Lord Sands said:²⁶

It does seem to me to be somewhat far-fetched to hold that the non-occurrence of some event, which was not within the contemplation or even the imagination of the parties, was an implied term of the contract.

This approach has also been criticised by James Gordley.²⁷ He argues the court cannot know what the parties would have agreed had they known about the supervening event.²⁸ Gordley further argues that the court cannot strive to obtain a just result by implying what

²¹ At 403-404.

²² *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601.

²³ At 609.

²⁴ R G McElroy & Glanville Williams "The Coronation Cases-I" (1941) IV (4) *The Modern Law Review* 241.

²⁵ *James Scott & Sons Ltd v Del Sel* (1922) SC 592 (OH).

²⁶ At 596.

²⁷ James Gordley *The Philosophical Origins of Modern Contract Doctrine* (Clarendon Press, Oxford, 1991).

²⁸ At 185.

is fair or reasonable because that is not an interpretation of the will of the parties; it is the expression of a purely subjective opinion.²⁹

In *Denny Mott and Dickson Ltd v James B Fraser and Co Ltd*³⁰ Lord Wright submitted that if the parties had known about the supervening event prior to entering the contract, they “would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations”.³¹ Or they may not have entered the contract at all! It is also likely the parties would have had different views on what should happen if the contract was frustrated.³²

The use of implied terms was scrutinised in *Attorney General of Belize v Belize Telecom Ltd.*³³ In the Privy Council, Lord Hoffmann confirmed “the court has no power to improve upon the instrument which it is called upon to construe”.³⁴ In other words it is not the court’s role to make the contract fairer or more reasonable by introducing terms to this effect; the court’s only function is to discern the meaning of the contract. Lord Hoffmann went on to say that in some cases it is clear that even though there is no provision in the document, the event will affect the rights of the parties. In this situation a term can be implied but only to spell out what the instrument means.³⁵

The *Belize Telecom* case has been discussed recently by courts in the United Kingdom and New Zealand. In *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another*,³⁶ the Supreme Court of the United Kingdom referred to Lord Hoffman’s suggestion about the process of implying terms into a contract being part of the exercise of construction, or interpretation, of the contract and questioned his analysis. The Court agreed that the factors to be taken into account on the issue of construction in relation to the implication of a term include the words used, the surrounding circumstances known

²⁹ At 186.

³⁰ *Denny Mott and Dickson Ltd v James B Fraser and Co Ltd* [1944] AC 265.

³¹ At 275.

³² *Liverpool City Council v Irwin* [1977] AC 239 at 253-254 per Lord Wilberforce; *Davis Contractors Ltd v Fareham Urban District Council* [1956] 1 AC 696 at 719-720 where Lord Reid said frustration does not depend on the adding of an implied term.

³³ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10. This was not a case on frustration but is recent case law on the use of implied terms which is relevant to the implied term theory for the doctrine of frustration.

³⁴ At [16].

³⁵ At [16].

³⁶ *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] UKSC 72.

to both parties at the time of the contract, commercial common sense and reasonable parties. However, it then explained that when the court is implying a term it is not construing words because implication and interpretation are “different processes governed by different rules”.³⁷ Therefore, the Court qualified Lord Hoffmann’s interpretation approach by saying a term should not be implied into a contract until after the process of construing the express words is complete.³⁸ In *Mobile Oil NZ Ltd v Development Auckland Ltd (formerly Auckland Waterfront Development Agency Ltd)*,³⁹ the Supreme Court of New Zealand said the Supreme Court of the United Kingdom’s decision had significantly qualified Lord Hoffman’s approach so that there is now scope for argument as to whether his interpretation approach is appropriate.⁴⁰

It seems clear that the courts are still willing to make use of the implied term theory in specific circumstances in answer to the call for business efficacy and thus it has not fallen out of favour altogether.⁴¹ However, the approach that should be taken to the implication of terms, continues to be uncertain and problematic.

2 *The total failure of consideration theory*

The second theory often cited as the basis for the doctrine of frustration is the “total failure of consideration” theory. In the United States it has been used to explain cases where the supervening event renders the performance of one party’s obligations impossible but both parties are discharged from further performance; for example, where a seller cannot deliver the goods but the buyer is still able to make payment for them. In this situation it has been argued that there is a failure of consideration because the buyer does not receive the performance for which he bargained.⁴²

The total failure of consideration theory has one major drawback. A number of the frustration cases involve contracts that have been partly performed, such as leases, where there cannot be a *total* failure of consideration. In *National Carriers Ltd v Panalpina (Northern) Ltd*,⁴³ Lord Simon said that, of all the theories, the total failure of consideration

³⁷ At [26].

³⁸ At [28].

³⁹ *Mobile Oil NZ Ltd v Development Auckland Ltd (formerly Auckland Waterfront Development Agency Ltd)* [2016] NZSC 89.

⁴⁰ At [81].

⁴¹ *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2012] NZHC 2954 at [75].

⁴² G Treitel *Frustration and Force Majeure* (2nd ed, Sweet & Maxwell, London 2004) at 647.

⁴³ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

is incompatible with the application of the doctrine of frustration to a lease precisely because the lease will be partly executed at the time of the supervening event.⁴⁴ For this reason and also because it is not the strongest or the most convincing of the theories, the total failure of consideration theory has been rejected by the House of Lords.⁴⁵

3 *The just outcome theory*

In *Hirji Mulji v Cheong Yue Steamship Co Ltd*,⁴⁶ the facts of which are set out under the next heading,⁴⁷ Lord Sumner said that the doctrine of frustration is a “device by which the rules as to absolute contracts are reconciled with a special exception which justice demands”.⁴⁸ This statement has been quoted with approval many times⁴⁹ and, as such, forms the basis for the just outcome theory.⁵⁰ Under this theory the contract is discharged in order to avoid the perceived injustice that would otherwise result from compelling the parties to undertake something totally different from what they originally promised to do.

The just outcome theory stems from the courts’ endeavours to ensure that decisions are fair, but is also not immune from criticism. Since it is essential the law is based on sound principles this theory should not, Peel contends, be considered to mean the courts should apply the doctrine every time a supervening event causes hardship to a party.⁵¹ The overarching justification for the doctrine of frustration is to achieve a fair outcome, but the process by which it does this cannot bypass the body of rules that has developed defining the scope of the doctrine. The better approach is not to view the just outcome theory as a theory that stands alone, but rather as a principle embodied in all the theories. This approach has recently been confirmed by the New Zealand Supreme Court in *Planet Kids Ltd v Auckland Council*⁵² by the adoption of a multi-factorial approach to the test for the doctrine

⁴⁴ At 702.

⁴⁵ At 687 and 702.

⁴⁶ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18.

⁴⁷ The facts are set out under “The frustration of the adventure or foundation of the contract theory” on page 23.

⁴⁸ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18, at 510.

⁴⁹ Lord Wright preferred this theory in *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* above n 30, at 275. See also *Joseph Constantine SS Line v Imperial Smelting Corp Ltd* [1942] AC 154 at 186.

⁵⁰ It is sometimes called the “just and reasonable outcome” theory.

⁵¹ Peel above n 6, at 982.

⁵² *Planet Kids Ltd v Auckland Council* [2013] NZSC 147 at [62] per Glazebrook J delivering the majority judgment.

which includes a consideration of the demands of justice. This case is discussed in more detail at the end of this section.

4 *The frustration of the adventure or foundation of the contract theory*

The fourth theoretical basis for the doctrine of frustration is that the adventure or foundation of the contract has been frustrated.⁵³ An example of the application of this theory is the case of *Hirji Mulji v Cheong Yue Steamship Co Ltd*.⁵⁴ By a charter party agreement, the appellants agreed to use the respondents' steamship for 10 months from the date the ship was delivered to them after 1 March 1917. The ship was requisitioned by the Government before the delivery date and not released until February 1919, at which time the appellants refused to take delivery of the ship. The appellants argued that the charter party agreement had been frustrated. The Privy Council agreed and said:⁵⁵

... whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention or their opinions, or even knowledge, as to the event which has brought this about, but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure.

Another example is a case that occurred during the Spanish Civil War.⁵⁶ A ship was chartered to evacuate civilians from Spain to France for a period of 30 days at a highly inflated rate. After one voyage the ship was seized, detained and not released until nearly six weeks after the end date of the contract. The contract was held to be frustrated. Goddard J said:⁵⁷

If the foundation of the contract goes, either by the destruction of the subject matter or by reason of such long interruption or delay that the performance is really in effect that of a different contract, and the parties have not provided what in that event is to happen, the performance of the contract is to be regarded as frustrated.

⁵³ This theory is thought to have originated in the case of *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125. Also see Lord Haldane's dissenting speech in *Tamplin case* [1916] 2 AC 397 at 406; *Bank Line Ltd v Arthur Capel* [1919] AC 435 at 441 and *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132 at 138 per Goddard J.

⁵⁴ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18.

⁵⁵ At 509.

⁵⁶ *Tatem Ltd v Gamboa* above n 53.

⁵⁷ At 139.

However, in *National Carriers Ltd v Panalpina (Northern) Ltd*,⁵⁸ Lord Hailsham said the problem with the frustration of the adventure or foundation of the contract theory is that it presumes the court knows or can ascertain what the “adventure” or “foundation” of the contract is. That may not always be straight forward.⁵⁹

5 The construction theory

In more recent times the construction theory has been favoured as the proper basis for the doctrine of frustration and there has been much support for it.⁶⁰ In *Davis Contractors Ltd v Fareham Urban District Council*,⁶¹ Lord Reid said frustration depends on the construction of the terms of the contract which should be read in light of the nature of the contract and the relevant surrounding circumstances when the contract was made.⁶² He said:⁶³

The question is whether the contract ... is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

To answer this question a comparison is made between the circumstances as they are when the contract is made and the new circumstances that exist when the contract is due to be performed.⁶⁴ In *British Movietonews Ltd v London & District Cinemas Ltd*, Lord Simon put it another way saying:⁶⁵

[I]f ... a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound *in a fundamentally different situation* which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but *because on its true construction it does not apply in that situation*”.

⁵⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

⁵⁹ At 688.

⁶⁰ *Davis Contractors Ltd v Fareham Urban District Council* above n 32; *Ocean Tramp Tankers Corporation v Soyfracht (“The Eugenia”)* [1964] 2 QB 226 (CA).

⁶¹ *Davis Contractors Ltd v Fareham Urban District Council* above n 32.

⁶² Also see *F A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Co* [1916] 2 AC 397 at 404. See also *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 (TCC), All ER (D) 216.

⁶³ At 720-721.

⁶⁴ *J Lauritzen AS v Wijsmuller BV (The Super Servant II)* [1990] 1 Lloyd’s Rep 1 at 8.

⁶⁵ *British Movietonews Ltd v London & District Cinemas Ltd* [1956] AC 166 at 185 (emphasis added). Note that Lord Simon goes on to say that the result is arrived at by putting a just construction on the contract in accordance with the implied term theory, but the implied term theory has now been discounted by *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

In *National Carriers Ltd v Panalpina (Northern) Ltd*,⁶⁶ Lord Roskill approved the construction theory saying there was little difference between it and Lord Radcliffe's definition of frustration in *Davis Contractors Ltd v Fareham Urban District Council*,⁶⁷ which he considered to be the most satisfactory explanation for the doctrine.⁶⁸

Ward too, supports the use of the construction theory because it removes the subjective element.⁶⁹ She says that in cases where it is reasonably foreseeable that supervening events could make performance of the contract more onerous, the effect of the construction theory will be to make the parties more responsible for making clear provision in their contracts.

6 Which theory?

There is no indication in the cases that the courts feel the need to be guided by one particular theory.⁷⁰ In *Denny, Mott and Dickson Ltd v James B Fraser*,⁷¹ Lord Porter said it is not necessary to decide which theory should be applied because it is the contract as a whole that must be considered.⁷² In *National Carriers Ltd v Panalpina (Northern) Ltd*,⁷³ Lord Wilberforce said no one theory is the true basis for the doctrine. He went on to say, "... they shade into one another and ... a choice between them is a choice of what is most appropriate to the particular contract under consideration ...".⁷⁴ The fact that it is difficult to discern any practical differences between the various theories may be a reason for the courts' lack of concern about choosing one over another.⁷⁵

The New Zealand courts have also failed to provide an answer to the question of which theory underpins the doctrine of frustration. For example in *Wilkins and Davies*

⁶⁶ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

⁶⁷ *Davis Contractors Ltd v Fareham Urban District Council* above n 32, at 728. Lord Radcliffe's definition is set out on page 34 and the case considered in the context of when the doctrine of frustration has been held to apply.

⁶⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

⁶⁹ Julie Ward "Frustration of Contract" (1981) 9(2) Syd LR 461.

⁷⁰ *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA) at 552 where the Court said that the precise limits of the doctrine of frustration have been the subject of considerable debate; *Oggi Advertising Ltd v Harrington & Anor* [2010] NZAR 577 (HC) at [27]; *Planet Kids Ltd v Auckland Council* above n 52, at [34].

⁷¹ *Denny Mott and Dickson Ltd v James B Fraser & Co Ltd* above n 30.

⁷² At 281.

⁷³ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

⁷⁴ At 693.

⁷⁵ HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London, 2012) vol 1 at [23-018].

Construction Company Ltd v Geraldine Borough,⁷⁶ Henry J considered the implied term theory and the just outcome theory but found on the evidence the case did not fall under either. In the leading case on frustration, *Planet Kids Ltd v Auckland Council*,⁷⁷ the Supreme Court acknowledged there have been a number of justifications and tests put forward,⁷⁸ the most widely accepted being the construction theory.⁷⁹ It did not, however, decide which theory was the basis for the doctrine. Instead the Court approved a multi-factorial approach to the test for frustration signifying the construction of the contract was only one of a number of different factors to be considered.⁸⁰

In *Planet Kids Ltd v Auckland Council*,⁸¹ Planet Kids operated a childcare business from a building leased from Auckland Council. The Council required the land for roading purposes and gave Planet Kids notice of its desire to acquire the leasehold interest under the Public Works Act 1981. Planet Kids objected which resulted in negotiations and consequently the parties reaching a settlement agreement. In this agreement the Council agreed to pay Planet Kids compensation for the loss of goodwill resulting from the closure of their business⁸² and to forgo a disputed rent claim. Planet Kids agreed to provide the Council with a surrender of the lease, vacant possession, a restraint of trade and the chattels and plant in the building. The Council then paid a deposit under the agreement with settlement due to take place at a later date. Two months before settlement the building was destroyed by fire.

In the settlement agreement there were various clauses that were relevant to the action. Clause 8 set out that the business was to remain at the sole risk of Planet Kids until settlement date. Clause 9 confirmed the Council was not purchasing the business but merely compensating Planet Kids for the closure of their business. Clause 40.1 provided that the lease would terminate with immediate effect if the building was destroyed.

Auckland Council argued the settlement agreement had been frustrated as a result of the lease being terminated owing to the fire. It refused to pay the balance of the compensation

⁷⁶ *Wilkins and Davies Construction Company Ltd v Geraldine Borough* [1958] NZLR 985.

⁷⁷ *Planet Kids Ltd v Auckland Council* above n 52.

⁷⁸ At [49], per Glazebrook J.

⁷⁹ At [50], per Glazebrook J.

⁸⁰ At [62], per Glazebrook J.

⁸¹ *Planet Kids Ltd v Auckland Council* above n 52.

⁸² It was accepted that Planet Kids Ltd could not move their business and therefore had to close.

owing under the agreement. Planet Kids argued the agreement was still in force and sought judgment for the balance of the monies owed under it.

In the High Court Peters J held the settlement agreement was frustrated.⁸³ Planet Kids appealed. The Court of Appeal agreed with the High Court and held termination of the lease had frustrated the contract.⁸⁴ Planet Kids appealed to the Supreme Court, asking it to determine whether the courts below were correct to hold the settlement agreement had been discharged by frustration.

In the Supreme Court the case was heard by five judges who were unanimous in their decision that the settlement agreement had not been frustrated. The majority decision of McGrath, Glazebrook and Gault JJ was delivered by Glazebrook J. The judgments of Elias CJ and William Young J were given separately, as they gave differing views on certain issues.⁸⁵

To begin the Court examined the law on the doctrine of frustration. It acknowledged three distinct features of the doctrine: the threshold for its application is high; it applies automatically and it operates to bring the contract to an end at the time of the frustrating event. The most important aspect of the judgment however, is that it clarified the approach the courts should take when determining whether frustration has occurred. The Court said the test for frustration is inherently imprecise as to the degree or extent that an event affects the foundation on which the parties contracted and that means an exercise of judgment is called for.⁸⁶ Therefore, the approach to be taken is a multi-factorial one which requires the following factors to be taken into account:⁸⁷

- the terms of the contract, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the

⁸³ *Planet Kids Limited v Auckland Council* HC Auckland CIV-2011-404-1741, 16 December 2011.

⁸⁴ *Planet Kids Limited v Auckland Council* [2012] NZCA 562.

⁸⁵ Elias CJ took a different view on the question of allocation of risk saying it is only one of the factors to be considered and in some cases may not prevent a contract from being frustrated if the event within the type of risk is of a scale that is outside the reasonable contemplation of the parties; at [15]. William Young J took a different view from the majority on the interplay between the doctrine of frustration and the Contractual Remedies Act 1979, suggesting that frustration need not be addressed ahead, or independently of, the position under that Act; *Planet Kids Ltd v Auckland Council* above n 52, at [175].

⁸⁶ At [59]. These comments were taken from *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 at 162-163 per Stephen J.

⁸⁷ At [62] per Glazebrook J.

time of the contract, at least to the extent that these can be ascribed mutually and objectively, the nature of the supervening event and the parties' reasonable expectations and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances;⁸⁸

- the demands of justice;⁸⁹
- the tests including the construction of contract theory by Lord Reid,⁹⁰ Lord Radcliffe's "radically different" test,⁹¹ Lord Simon's "significant change" test⁹² and, as set out below, Lord Sumner's "common object" test.⁹³

An event occurs, not contemplated by the parties and therefore not expressly dealt with in their contract which, when it happens, frustrates their object. Evidently it is their common object that has to be frustrated, not merely the individual advantage which one party or the other might have gained from the contract. If so, what the law provides must be a common relief from this common disappointment and an immediate termination of the obligations as regards future performance. This is necessary, because otherwise the parties would be bound to a contract, which is one that they did not really make.

In addition the Court said that in construing a contract, an objective test will be applied and the court must identify and take into consideration the circumstances in which the parties intended the contract to operate.⁹⁴

Lastly, when all aspects of the test for frustration have been determined there is a final overarching consideration that must be considered, the "demands of justice". Elias CJ said,

⁸⁸ At [60]. These factors were taken from *Edwinton Commercial Corp v Tsaviris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547 at [111] per Rix LJ [*The Sea Angel*]. Rix LJ delivered the judgment for the Court of Appeal of England and Wales on behalf of Wall and Hooper LJ.

⁸⁹ *Planet Kids Ltd v Auckland Council* above n 52, at [61]. This factor was also taken from *The Sea Angel* above n 88 at [112] per Rix LJ.

⁹⁰ *Davis Contractors Ltd v Fareham Urban District Council* above n 32, at 720-721. The test is set out at page 24.

⁹¹ *Davis Contractors Ltd v Fareham Urban District Council* above n 32, at 729. The test is set out at page 34.

⁹² *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15, at 700. This test is set out at page 34.

⁹³ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18, at 507.

⁹⁴ At [52] per Glazebrook J. This factor was taken from Treitel, above n 42, at [16-016], and the majority agreed with the analysis taken.

“The need to remedy injustice to the parties is the ultimate measure in assessing frustration”.⁹⁵

The Court then applied the multi-factorial approach to the facts of the case. A number of findings were made: First, the supervening event did not render performance of the contract impossible or radically different because it was a case of partial impossibility only. Second, the supervening event did not defeat the main purpose of the settlement agreement which, the Court found, was to achieve certainty of outcome, timing and the amount of compensation.⁹⁶ This purpose was fulfilled before the fire, the formal surrender of the lease being a mere technicality.⁹⁷ Third, it was not a fundamental assumption of the parties, or at least not by Planet Kids, that a leasehold interest would subsist at settlement date. Fourth, Planet Kids would suffer hardship if the lease was found to be frustrated whereas the Council would not. Fifth, the risk of fire was a risk not likely to occur, but the lease termination was foreseeable should the premises have been rendered untenable. These findings resulted in the conclusion that the settlement agreement was not frustrated. The case was referred back to the High Court to decide on the orders sought by Planet Kids.

The Supreme Court’s re-examination of the approach to determine whether frustration has occurred has provided New Zealand’s courts with guidelines going forward. It has already been used in the High Court in a recent case on frustration arising from the Canterbury earthquakes, *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)*.⁹⁸ The facts of this case are discussed in the next chapter covering frustration and leases.⁹⁹

B Situations in which the doctrine of frustration has been held to apply

Since its creation, the courts have been cautious in applying the doctrine of frustration. They 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

⁹⁵ At [9] following *The Sea Angel*, at [111]. Glazebrook J also referred to *The Sea Angel* above n 18, at [112] where Rix LJ said the demands of justice are a consideration when deciding whether to apply the doctrine of frustration; *Planet Kids Ltd v Auckland Council* above n 52, at [61].

⁹⁶ At [95] per Glazebrook J.

⁹⁷ At [97] per Glazebrook J.

⁹⁸ *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)* [2015] NZHC 2647 at [60] to [63] per Davidson J.

⁹⁹ The facts of this case are discussed in Chapter Three.

high. Nevertheless, the limited cases in which the doctrine has been applied have had the effect of extending it and providing established categories of situations where the doctrine may be invoked. These are: where contractual obligations become impossible to perform, where the purpose of the contract is frustrated, where there is government intervention or the contract becomes illegal, where the contractual obligations become radically different and where the supervening event strikes at the root of the arrangement. Each of these categories is considered.

1 Contractual obligations become impossible to perform

Contracts can become frustrated when contractual obligations become impossible to perform. These are the obvious cases of frustration. Examples include the destruction of the subject-matter as in *Taylor v Caldwell*,¹⁰⁰ the death or incapacity of a person¹⁰¹, the unavailability of the subject-matter,¹⁰² and where the manner of performance becomes impossible.¹⁰³

2 The purpose of the contract is frustrated

Frustration has also been held to occur when the supervening event prevents the purpose of the contract being fulfilled as the parties intended, even though performance may have been possible. The most commonly cited case is *Krell v Henry*.¹⁰⁴ The plaintiff agreed to let a room to the defendant for an inflated rental to view the coronation procession for Edward VII. There was circumstantial evidence of a mutual understanding that the contract for the room was to enable the defendant to view the procession, although this was never actually expressed in the contract itself.¹⁰⁵ Unfortunately, Edward VII fell ill and the procession was cancelled. The Court of Appeal held that the view of the procession was

¹⁰⁰ *Taylor v Caldwell*, above n 6.

¹⁰¹ See examples given in Burrows Finn and Todd, above n 19, at 755.

¹⁰² For example the ship required for performance of the contract is requisitioned as in *Bank Line Ltd v Arthur Capel & Co* above n 53.

¹⁰³ *Nickoll & Knight v Ashton Edridge & Co* [1901] 2 KB 126.

¹⁰⁴ *Krell v Henry* [1903] 2 KB 740.

¹⁰⁵ Extrinsic evidence was admitted that showed the defendant, having noticed an announcement to the effect that there would be windows with views of the procession to let, interviewed the housekeeper and they had talked about the good view of the procession that would be obtained from the rooms. It was also important that the rooms were only to be let during the day. Nevertheless, the letters confirming the contract did not refer to the reason the rooms were for hire.

the foundation of the contract and the effect of its cancellation was to cause the contract to be frustrated, thereby discharging the parties from further performance of their obligations.

The extension of the doctrine of frustration to cases where the purpose of the contract is frustrated has been controversial. The contract in *Krell v Henry*¹⁰⁶ had not been frustrated in the usual sense that the contract had become impossible to perform as in the cases of *Paradine v Jane*¹⁰⁷ and *Taylor v Caldwell*.¹⁰⁸ The plaintiff was still ready, willing and able to lease the room to the defendant and the rent was capable of being paid. There was nothing that the parties had contracted to do that had become impossible. McElroy and Williams were critical of the decision.¹⁰⁹

By invoking a theory of implied condition which was nothing else than a legal fiction, and by purporting to enlarge and extend its application to the “non-existence of a state of things,” even where such “state of things” was not even mentioned in the contract, the Court, in *Krell v Henry*, extended the doctrine of *Taylor v Caldwell* to the point where a literal application of it must inevitably undermine the sanctity of contract.

It is undeniable the defendant would have suffered great hardship had the decision been in favour of the plaintiff and this may have coloured the Court’s assessment of the situation. The Court chose to view the contract as a whole instead of judging it on a literal reading of its terms. It determined that the defendant was buying a view of the procession and when that could not be provided, it went to the very heart of the agreement.¹¹⁰

In another case also affected by the cancellation of the coronation festivities, the Court did not find the contract frustrated. In *Herne Bay Steamboat Co v Hutton*,¹¹¹ the contract was for a ship to take passengers to observe a naval review as part of the Coronation celebrations and for a day’s cruise around the fleet. When the Coronation was cancelled, so was the review. The Court held that the cancellation of the review did not frustrate the contract because the passengers were still able to observe the fleet and partake in the cruise. Although hard to distinguish from *Krell v Henry*, Burrows suggests that the decision can

¹⁰⁶ *Krell v Henry* above n 104.

¹⁰⁷ *Paradine v Jane* above n 2.

¹⁰⁸ *Taylor v Caldwell* above n 6.

¹⁰⁹ McElroy above n 24, at 255.

¹¹⁰ It is interesting to note that this case has hardly ever been followed in England; see Peel above n 6, at 943.

¹¹¹ *Herne Bay Steamboat Co v Hutton* [1903] 2 KB 683.

be explained on the basis that the viewing of the naval review was not the “sole adventure contemplated”.¹¹²

In *Planet Kids Ltd v Auckland Council*,¹¹³ the Supreme Court looked at the purpose of the agreement as part of the determination into whether frustration had occurred. It held the main common purpose of both parties in entering the settlement agreement was not the Council acquiring the leasehold estate, but rather for certainty of outcome, timing and compensation required to settle the Public Works Act dispute. This purpose was not frustrated by the fire but fulfilled when the agreement was concluded.¹¹⁴

3 Government intervention or illegality

It is clear that government intervention or a change in the law rendering the performance of a once legal contract, illegal, is a cause of frustration.¹¹⁵ The following cases provide good examples. In *Metropolitan Water Board v Dick, Kerr & Co*,¹¹⁶ the contract was for construction of an extensive reservoir. Work began just after war broke out, but 18 months later the Minister of Munitions ordered the work be stopped and the plant sold. The House of Lords held that the sale of the plant prevented the contract from ever being the same as it was and therefore it was frustrated.

Another example is the case of *Fibrosa Societe Anonyme v Fairbairn Lawson Combe Barbour Ltd*.¹¹⁷ After Great Britain declared war on Germany the British respondent company could not lawfully deliver its textile machinery to Poland and therefore the contract was held to be frustrated. In *Denny, Mott and Dickson Ltd v James B Fraser and Co Ltd*,¹¹⁸ the contract was for the sale and purchase of timber. After war broke out wartime regulations rendered it illegal to import timber from an enemy. The appellants argued that the contract did not provide for this disruption and the Government Orders therefore operated to frustrate it. The House of Lords agreed. Lord MacMillan said:¹¹⁹

¹¹² Burrows Finn and Todd above n 19, at 756.

¹¹³ *Planet Kids Ltd v Auckland Council* above n 52.

¹¹⁴ At [95]-[96].

¹¹⁵ *Twentieth Century Fox Film Corporation v British Telecommunications Plc (No 2)* [2011] EWHC 2714 (Ch) at [47]; *Rayneon (NZ) Ltd v Fraser* [1940] NZLR 825.

¹¹⁶ *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119.

¹¹⁷ *Fibrosa Societe Anonyme v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

¹¹⁸ *Denny Mott and Dickson Ltd v James B Fraser and Co Ltd* above n 30.

¹¹⁹ At 272.

It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done.

Cases involving supervening illegality may also involve issues of public interest.¹²⁰ The difficulty is deciding whether or not the application of the doctrine of frustration is the best way to resolve these troubled contracts.

A change in local body laws could also cause frustration. In *Kirkland v Jaco's Timber Co Ltd*,¹²¹ it was argued that a change in zoning requirements amounted to frustration of a building contract that had been entered into prior to the change. In an application for summary judgment, the Judge at first instance decided that frustration was an arguable defence.¹²² However, in the substantive hearing Young J found that the legal requirements to establish frustration had not been met.

4 *The contractual obligations become "radically different"*

When a supervening event affects a contract and causes the parties' obligations to become radically different from those originally contracted for, the doctrine of frustration will be invoked. In *Davis Contractors Ltd v Fareham UDC*,¹²³ a building company contracted with a District Council to build 78 houses within a period of eight months for a specified sum. Owing mainly to a lack of skilled labour and materials, the work took 22 months to complete and the costs were higher than anticipated. The building contractors argued that the delay amounted to frustration of the contract. The House of Lords disagreed. Hardship, inconvenience or material loss was not enough to frustrate a contract; there must be such a change in the significance of the obligation that the performance of the contract would be different than that contracted for.¹²⁴ Lord Radcliffe set out his definition of frustration in a now famous and often quoted statement:¹²⁵

¹²⁰ *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep 195 at [100].

¹²¹ *Kirkland v Jaco's Timber Co Ltd* HC Dunedin CP45/97, 15 July 1999.

¹²² *Kirkland v Jaco's Timber Co Ltd* HC Dunedin CP45/97, 5 November 1997. Also see *Hay v Laurent Construction Ltd* (1990) 1 NZ ConvC 190,387, another case where the contract was affected by a change in the law. Here Smellie J was not required to decide whether the contract was frustrated because the case was decided on other grounds. However, he said had he been required to, he would have adjusted the rights and obligations of the parties pursuant to the Frustrated Contracts Act 1944 thereby indicating he would have found the contract to be frustrated.

¹²³ *Davis Contractors Ltd v Fareham UDC* above n 32.

¹²⁴ At 728-729 per Lord Radcliffe.

¹²⁵ At 729.

... frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation 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 contract. *Non haec in foedera veni*. It was not this I promised to do.

Applying this principle, the House of Lords determined that the supervening event had caused disappointed expectations rather than a true frustrated contract. The building contract had not become radically different from that intended by the parties; it had just taken a lot longer to complete than anticipated.

On the face of it Lord Radcliffe's definition seems clear. After a closer examination, aspects of the definition create doubt about how easy it is to apply. The term "radically different" is vague because it is incapable of a clear definition. This leads to problems drawing the line between a contract that is radically different and one that is not.

In *National Carriers Limited v Panalpina (Northern) Limited*,¹²⁶ the leading House of Lords case on the doctrine of frustration as it applies to leases, Lord Radcliffe's definition was approved and expanded upon by Lord Simon.¹²⁷ He said:¹²⁸

Frustration of a contract takes place where there supervenes an event (without the default of either party and for which the contract makes no provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution, that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such cases the law declares both parties to be discharged from further performance.

Lord Simon's definition is not a mere repeat of Lord Radcliffe's. There is a deliberate change in the terminology used. Instead of the changes to the contractual obligations being required to be radically different, they must be significant. Whether this difference points to a lowering of the threshold for frustration is as yet uncertain. It is arguable that the word *radically* means a more profound or fundamental change, compared to the word *significant*,

¹²⁶ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15.

¹²⁷ The facts of this case are set out in Chapter Three where the doctrine of frustration is examined in relation to leases.

¹²⁸ At 700.

which implies a substantial change but something less than radical. There is also the problem of defining a *significant* change and where to draw the line between a change that is significant and one that is insignificant.

Notwithstanding the uncertainty that has arisen from these tests for the doctrine, it is clear that the change in contractual obligations must be considerable to the extent that it would be unfair to hold the parties to the contract in the new circumstances.

5 *The supervening event strikes at the root of the contract*

The doctrine of frustration has also been held to apply where the supervening event is regarded as “striking at the root” of the contract. In *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd*,¹²⁹ the appellants, under a 99 year building lease, contracted to build shops and houses on an area of land by specified dates. When action was taken against them for unpaid rent, the appellants contended that the lease had been frustrated owing to wartime restrictions on building and the acquisition of the required materials. The House of Lords, however, held the lease was not frustrated. The wartime restrictions suspending building were not sufficient to “strike at the root of the arrangement” because the terms of the lease contemplated that rent would still be payable even though no building was being undertaken. The Court did not regard the interruption to be sufficient to destroy the identity of the arrangement in the lease or to make it unreasonable to carry out its terms when the interruption came to an end. Viscount Simon expressed his definition of frustration:¹³⁰

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.

This definition focuses on the need for the change of circumstances to affect the “root of the agreement”. In the same case Lord Goddard expressed a similar opinion:¹³¹

¹²⁹ *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd* [1945] AC 221.

¹³⁰ At 228 (emphasis added).

¹³¹ At 245 (emphasis added).

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.

This is a broad approach to frustration, looking at the overall purpose or foundation of the contract. If applied it would explain most, if not all, of the cases in which contracts have been held to be frustrated. The definitions put forward in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*,¹³² are similar in their effect to the decision in *Krell v Henry*,¹³³ where the Court said that the change in circumstances affected the foundation or purpose of the contract. As there seems to be no real distinction between the two, they could be categorised together with the case of *Cricklewood*,¹³⁴ providing affirmation of the principle of law developed in *Krell v Henry*.¹³⁵

6 A case by case assessment

Over the last century, few contracts have been held to be frustrated. A number of cases on frustration occurred in the United Kingdom during the Second World War owing to supervening illegality.¹³⁶ Others have been based on the closure of the Suez Canal at various times, but only a small number have been successful.¹³⁷

Today, the doctrine of frustration continues to be applied with caution for a number of reasons. It is clear that a party will not be permitted to use the doctrine to overcome an “imprudent commercial bargain”.¹³⁸ Nor will the doctrine be used in an ad hoc way, as it is “... no arbitrary dispensing power to be exercised at the subjective whim of the judge”.¹³⁹ Yet, the House of Lords has said that the doctrine of frustration must be modern and

¹³² *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* above n 129.

¹³³ *Krell v Henry* above n 104.

¹³⁴ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* above n 129.

¹³⁵ *Krell v Henry* above n 104.

¹³⁶ *Fibrosa Societe Anonyme v Fairbairn Lawson Combe Barbour Ltd* above n 117; *Denny, Mott and Dickson Ltd v James B Fraser and Co Ltd* above n 30; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* above n 129.

¹³⁷ For example *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93; *Ocean Tramp Tankers Corporation v Soyfracht ("The Eugenia")* [1964] 2 QB 226 (CA) the [The Eugenia] and see Peel above n 6, at 923 and 935 for a discussion on more cases relating to the Suez Canal closure.

¹³⁸ *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 at 752 [The Nema]; *The Sea Angel* above n 88 at [111]; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 at [68].

¹³⁹ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15, at 712 per Lord Roskill.

flexible.¹⁴⁰ The problem seems to be in trying to apply a doctrine to cases where the facts of each can vary so greatly. In the High Court of Australia, Stephen J noted this problem:¹⁴¹

It is no doubt true, as critics complain that the various expositions of the true basis of the doctrine of frustration leave imprecise its actual operation when applied to the facts of particular cases. How dramatic must be the impact of an allegedly frustrating event? To what degree or extent must such an event overturn expectations, or affect the foundation upon which the parties have contracted, or again how unjust and unreasonable a result must flow or how radically different from that originally undertaken must a contract become ... before it is to be regarded as frustrated? The cases provide little more than single instances of solutions to these questions ... They are perhaps inevitable in questions of degree arising when a broad principle must be applied to infinitely variable factual situations.

In the absence of a definitive test for the doctrine the courts are able to retain a tight grasp on their freedom to apply it. For example, as recently as 2010, in the New South Wales Supreme Court, Barrett J stated obiter in a minority decision, that “A contract will be regarded as discharged by frustration if some supervening event makes performance of the contract impossible or pointless”.¹⁴² A definition such as this could encompass contracts made meaningless or worthless by supervening events in a way akin to the United States’ doctrine of impracticability which is much broader in its application.¹⁴³ This is a far wider expression of the doctrine than has ever before been expressed in any Commonwealth country. It is unlikely that Barrett J’s approach will be followed by courts in the United Kingdom or New Zealand because historically they have taken a more cautious approach to the development of the doctrine. The problem is though, the cases provide a range of definitions and tests that allow uncertainty to creep in about the true test for frustration.

IV The Consequences of Applying the Doctrine of Frustration

The consequences that flow from a frustrated contract are serious and drastic. In effect frustration kills the contract. It is for this reason it has been suggested that the doctrine

¹⁴⁰ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 15, at 701 per Lord Simon.

¹⁴¹ *Brisbane City Council v Group Projects Pty Ltd* [1979] HCA 54 at [29]. McGrath J expressed similar sentiments in *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43 at [60].

¹⁴² *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWSC 29 at [221].

¹⁴³ The United States doctrine of “impracticability” is covered in more detail in Chapter Three.

should not be lightly invoked, should be kept within very narrow limits and ought not to be extended.¹⁴⁴

A What happens when a contract is frustrated?

When a contract is frustrated there are several consequences. The first, and most significant, is that upon the occurrence of the supervening event the contract immediately comes to an end and the parties are discharged from any future performance or liability under it.¹⁴⁵ This is a drastic result because it is the antithesis of the general tendency of contract law to keep contracts in force.

The second consequence is that discharge of the contract is automatic and not dependent upon the election of either party.¹⁴⁶ In *Hirji Mulji v Cheong Yue Steamship Co Ltd*,¹⁴⁷ Lord Sumner said:¹⁴⁸

Whatever the consequences of frustration may be upon the conduct of the parties, the legal effect does not depend on their intention, or their opinions or even knowledge as to the event which has brought this about but on its occurrence in such circumstances as show it to be inconsistent with further prosecution of the adventure ... [Frustration] is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances.

The response is quite black and white. It means that if the party most affected wishes to continue with the contract, he or she cannot do so without the agreement of the other party.

The third consequence is that the parties are still liable to perform their contractual obligations up to the time of the supervening event, even if they are discharged from further performance thereafter.¹⁴⁹ This has the potential to result in unfair outcomes. If one party has made a payment or incurred expense in terms of labour, materials or time in performing

¹⁴⁴ *The Super Servant Two* above n 64, at 8 per Lord Bingham.

¹⁴⁵ At 8, per Lord Bingham; *Denny, Mott & Dickson Ltd v James B Fraser & Co Ltd* above n 30, at 274 per Lord Wright.

¹⁴⁶ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18, at 510; *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* above n 30, at 274 per Lord Wright.

¹⁴⁷ *Hirji Mulji v Cheong Yue Steamship Co Ltd* above n 18.

¹⁴⁸ At 510.

¹⁴⁹ At 510.

their obligations prior to the supervening event, any such part performance will be detrimental to that party when the contract is eventually frustrated. This has now been covered by the Frustrated Contracts Act 1944.

Before the frustrated contracts legislation was enacted in the United Kingdom the case of *Fibrosa Spolka Akcyjna Anonyme v Fairbairn Lawson Combe Barbour Ltd*¹⁵⁰ was a good example of the consequences that could flow from a frustrated contract. In this case, British respondents contracted to supply textile machinery to the appellants in Poland. The appellants paid a deposit of £1000. Soon after, Great Britain declared war on Germany and the appellants requested the return of their deposit because the contract could no longer be performed. The respondents refused. They argued that work had already been undertaken on the machines and suggested the matter be reconsidered after the war. The British Government subsequently passed legislation making it illegal to trade with businesses in enemy countries, including Poland. The contract was frustrated. The deposit paid could not be recovered by an action under the contract because at the time it was paid it was contractually due. The House of Lords thought this unfair so decided that the deposit was recoverable in quasi-contract. It held that money paid in these circumstances was recoverable on the basis that it would prevent a party who had received a benefit under the contract from retaining what they were not entitled to.¹⁵¹ The House of Lords called upon Parliament to change the law¹⁵² claiming that in cases of frustration it was often difficult to “effect an ideally just distribution of the burden of loss”.¹⁵³

While the House of Lords in *Fibrosa*¹⁵⁴ found a fairer way to allocate loss, it did not resolve all problems in this area of the law. There still existed the problem that money paid could only be recovered where there was a total failure of consideration.¹⁵⁵ Furthermore, there was no ability for a party to set off any expenditure incurred against money to be repaid.¹⁵⁶ The British Government took heed of the plea for legislative action and the Law

¹⁵⁰ *Fibrosa Spolka Akcyjna Anonyme v Fairbairn Lawson Combe Barbour Ltd* above n 117.

¹⁵¹ The House of Lords rejected the proposition that a total failure of consideration could only arise when a contract was set aside *ab initio*, and instead held that it arose whenever money was paid on a basis which wholly failed.

¹⁵² At 49 per Viscount Simon LC.

¹⁵³ At 76 per Lord Roche.

¹⁵⁴ *Fibrosa Spolka Akcyjna Anonyme v Fairbairn Lawson Combe Barbour Ltd* above n 117.

¹⁵⁵ *Whincup v Hughes* (1871) LR 6 CP 78; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* above n 117, at 54 and 56.

¹⁵⁶ Ewan McKendrick “The Consequences of Frustration-The Law Reform (Frustrated Contracts) Act 1943” in Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (2nd ed, Lloyd’s of

Reform (Frustrated Contracts) Act 1943 was enacted. It provided for adjustments to be made to the rights and liabilities of parties to a frustrated contract. New Zealand followed suit a year later with the Frustrated Contracts Act 1944.

B The Frustrated Contracts Act 1944

The Frustrated Contracts Act 1944¹⁵⁷ was enacted in New Zealand in materially identical terms to the United Kingdom's statute. The reason for its enactment was more to do with New Zealand's ties to the United Kingdom than as a response to an abundance of litigation involving the doctrine of frustration in local courts. The positive aspect of this legislation is that it has addressed the problems raised in the *Fibrosa* case.¹⁵⁸ What it has failed to do is to provide a definition of frustration. In the Parliamentary Debates the Frustrated Contracts Bill 1944 was described as "adjectival" rather than "substantive"¹⁵⁹ for exactly this reason.

The Act is short, consisting of only four sections. Section 4 states that the Act applies to all contracts¹⁶⁰ except a charter party contract,¹⁶¹ any contract for the carriage of goods by sea, contracts of insurance, contracts which are covered by s 9 of the Sale of Goods Act 1908 or contracts for the sale, or sale and delivery, of specific goods where the contract is frustrated because the goods have perished. Importantly, the Act does not apply where the frustrating event is provided for in the contract. Therefore the terms of a contract will override the provisions in the Act.¹⁶²

Section 3 sets out how the court will adjust the rights and liabilities of parties to frustrated contracts. It begins by stating that the Act covers contracts that have become impossible to

London Press Ltd, London, 1995) 223 at 226; *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* above n 117, at 49 per Viscount Simon LC.

¹⁵⁷ The Frustrated Contracts Act 1944 is set out in Appendix A.

¹⁵⁸ *Fibrosa Spolka Akcyjna Anonyme v Fairbairn Lawson Combe Barbour Ltd* above n 117.

¹⁵⁹ (23 November 1944) 267 NZPD 293 at 294 by Matthew Oram MP.

¹⁶⁰ Including contracts with the Crown.

¹⁶¹ Although a time charter or a charter party by way of demise are still covered by the Act.

¹⁶² Section 4(1), (2) and (3).

perform or been otherwise frustrated.¹⁶³ A critical feature of this section is that it does not define a frustrated contract yet requires a finding of frustration to already have been made.

Once frustration has been established, s 3(2) of the Act governs the right to recover money paid or payable prior to the frustrating event and the right to offset any expenses incurred prior to the frustrating event. The Court has a discretion to allow the party to retain or recover the expenses if it considers it just to do so, in all the circumstances of the case.¹⁶⁴

The Act also enables parties to recover for partial performance of the contract.¹⁶⁵ The reason for this provision is to ensure neither party obtains a valuable benefit at the expense of the other. The benefit must be something other than the payment of money and must have been obtained before the occurrence of the frustrating event.¹⁶⁶

In the United Kingdom, the nearly identical Law Reform (Frustrated Contracts) Act 1943 (UK) has come under fire for failing to go far enough in allocating loss between parties to a frustrated contract. Robert Goff J stated judicially that the purpose of the Act was not to apportion loss between the parties but rather to prevent a party being unjustly enriched at the other's expense.¹⁶⁷ McKendrick disagrees.¹⁶⁸ He suggests that a comprehensive solution must take into account both benefits obtained and losses incurred and this is an important deficiency in the legislation.¹⁶⁹ Burrows has also pointed out, that the Frustrated Contracts Act 1944 (NZ) does not provide for the recovery of money paid out by a party pursuant to a contract that they may not be aware is frustrated.¹⁷⁰

¹⁶³ Section 3(1). It will not apply where the contract is discharged by breach rather than frustration *Litherland & Anor (t/a Parelli Fashions) v John D Stackpole Ltd & Ors* DC Otahuhu NP528-94, 6 December 1994.

¹⁶⁴ Section 3(2). In *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 it was held that the section gives the Court a discretion, so it is up to the party claiming such expenses to provide evidence of their claim.

¹⁶⁵ Section 3(3).

¹⁶⁶ Section 3(2).

¹⁶⁷ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 (QB) at 799.

¹⁶⁸ McKendrick disagrees because he says that as the Act does not use the language of the law of restitution it cannot be said with complete certainty that its purpose is the prevention of unjust enrichment; Ewan McKendrick "Frustration, Restitution and Loss Apportionment" in Andrew Burrows (ed) *Essays on the Law of Restitution* (Clarendon Press, Oxford, 1991), 147 at 154.

¹⁶⁹ At 170.

¹⁷⁰ Law Commission *Contract Statutes Review* (NZLC R25, 1993) at 283. Burrows' comments are about the New Zealand Act but, as it is nearly identical to the United Kingdom Act, his comments are relevant to both.

There is little evidence of the Frustrated Contracts Act 1944 having been used much in New Zealand. Therefore, the courts have not had the opportunity to visit the criticisms of the Law Reform (Frustrated Contracts) Act 1943 or consider how they affect New Zealand's legislation.

A new Bill has recently been introduced to Parliament called the Contract and Commercial Law Bill.¹⁷¹ Its purpose is to re-enact, in an up-to-date and accessible form, certain legislation including the Frustrated Contracts Act 1944.¹⁷² The Bill incorporates a number of contract and commercial statutes into one piece of legislation. The provisions of the Frustrated Contracts Act 1944, despite having been “modernised,” remain largely the same.

V The Doctrine of Frustration - Its Limitations

There are clear situations in which the doctrine of frustration will not apply. These include where there is provision in the contract, where changes to a contract cause mere hardship or inconvenience to a party,¹⁷³ where changes to a contract make it somewhat more burdensome or expensive¹⁷⁴ and where the frustration is self-induced. In other situations it is not as clear cut. Delay in the performance of a contract has been held to cause frustration in some cases but not in others. The issue of whether a contract can be frustrated if a supervening event was foreseeable or foreseen by one or both parties has also been problematic. Each of these limitations is considered.

¹⁷¹ It was introduced to Parliament on 19 May 2016.

¹⁷² Contract and Commercial Law Bill, cl 3.

¹⁷³ Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC* above n 32 at 729 followed by Henry J in *Wilkins and Davies Construction Company Ltd v Geraldine Borough* [1958] NZLR 985; For example *Zwarst v Saxton* [2013] NZHC 386.

¹⁷⁴ *The Power Company Limited v Gore District Council* [1997] 1 NZLR 537 where the impact of inflation was not enough to have changed the contract to such a fundamental extent as to amount to frustration; *Māori Trustee v Prentice* [1992] 3 NZLR 344; *Pacific Energy Ltd v Electricity Corp* (1999) 9 TCLR 227; *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40, All ER (D) 111; *Discount Liquor Blenheim Road Ltd v Malstrom Holdings Ltd* HC Christchurch CP66/01, 10 October 2001; *Waterfront Capital Trustee 1 Ltd & Ors v Hanover Finance Ltd* HC Auckland CIV-2009-404-006241, 10 August 2010; *The Roofing Specialists Ltd v BLM Engineering Company Ltd* [2012] NZHC 3391.

A *Provision in Contract*

The general rule is that the doctrine of frustration does not apply where parties have made provision in their contract to cover the frustrating event.¹⁷⁵ Where provision is made, the court's function is to interpret and apply the contract, not rewrite or improve it.¹⁷⁶

Nevertheless, there are situations where an express provision in the contract will not exclude the doctrine of frustration. An example is where the relevant clause does not cover the actual situation that occurs. Another example is where the clause does not cover all legal issues arising from the event.¹⁷⁷ In *Chitty on Contracts*,¹⁷⁸ it is suggested the courts are likely to construe such clauses narrowly and insist that the provision completely covers the situation before the doctrine of frustration will be excluded.¹⁷⁹ Additionally, the more catastrophic the event, the clearer the words in the express provision must be.¹⁸⁰

In *Jackson v Union Marine Insurance Co Ltd*,¹⁸¹ an action was brought by ship owners against their insurance company on their policy of insurance covering damage to the ship and loss of the value of the charter. A charter-party contract had been entered into between the ship owner and the charterer, the terms being that the ship was to proceed with all possible dispatch (dangers and accidents of navigation excepted) from Liverpool to Newport and there collect iron rails to take to San Francisco. On the second day of the voyage to collect the freight the ship ran aground. The ship was recovered and the repairs took over seven months to complete. In the meantime, the charterers commissioned another ship to transfer the freight to San Francisco.

In the first instance, the Court by a majority held that the charterers were, by reason of delay, not bound to supply the freight and therefore the ship owner had lost his power to

¹⁷⁵ *Joseph Constantine SS Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 163. In *Maestro's Developments Ltd v United Civil Ltd* HC Wellington CIV-2004-485-1364, 13 August 2004, the parties had expressly provided for the consequences of their contract being terminated through frustration.

¹⁷⁶ *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at 609; *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at [16] and [19]. In *Māori Trustee v Prentice* above n 174, at 355, Williams J said that to apply the doctrine of frustration in this case would be in effect to rewrite the contract and he refused to do that.

¹⁷⁷ *Bank Line Ltd v Arthur Capel & Co* above n 53 at 455-456.

¹⁷⁸ Beale above n 75.

¹⁷⁹ Vol 1 at [23-058].

¹⁸⁰ Vol 1 at [23-058]; *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119.

¹⁸¹ *Jackson v Union Marine Insurance Co Ltd* (1873) LR 8 CP 572.

earn the fee for chartering the freight. The cause of the loss was the damage done to the ship by a peril insured against under the policy and therefore the plaintiff was able to claim a total loss. Brett J said:¹⁸²

These authorities seem to support the proposition ... that, where a contract is made with reference to certain anticipated circumstances, and where without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have *any* application; it cannot be applied to other circumstances which could not have been in contemplation of the parties when the contract was made.

On appeal, in a majority decision of five to one, the Court affirmed the decision of the Court below, stating that there was a condition precedent that the vessel would arrive in a reasonable time. When this condition failed to be met the contract came to an end and the charterers discharged. The charterers did not have a cause of action against the ship owner because the failure arose from an excepted peril. Bramwell B said that the weight of authority was on the side of reason and convenience.¹⁸³ The minority dissenting judgment was given by Cleasby B, who warned that too much weight was given to the apparent injustice that would occur in a case of extreme delay. He believed a contract should not be defeated by reasons derived from considerations of interest and the contract should have been construed as it was without the addition of any implied terms to provide certainty.¹⁸⁴

B Delay

In some cases a supervening event causes delay in the performance of the contract and parties allege that the contract is frustrated because it will not be performed in the intended timeframe. There are many examples of contracts affected by delay: the blocking of the Suez Canal, strike action, an inability to obtain materials, war time restrictions and government requisitioning.¹⁸⁵ What is clear from decided cases is that the delay must be “over and above” what was contemplated by the parties at the time they entered their contract. It must be more than just mere delay - it must be “... abnormal in its cause, its effects or its expected duration”.¹⁸⁶ The court should also ask whether the delay will make performance of the contract “fundamentally different” from that contemplated by the

¹⁸² At 581.

¹⁸³ At 148.

¹⁸⁴ At 132.

¹⁸⁵ See Beale above n 75, vol 1 at [23-035] for cases on delay.

¹⁸⁶ HG Beale above n 75, vol 1 at [23-035].

parties. In *Davis Contractors Ltd v Fareham UDC*,¹⁸⁷ where delay was alleged to have frustrated the contract, Lord Reid said, although the delay was greater than was to be expected, it did not make the job a different kind from that contemplated by the contract.¹⁸⁸

There are difficulties with alleging that a contract has become frustrated by delay. One is deciding the point at which the delay serves to frustrate the contract. It could be the time when the parties became aware of the delay or it could be the time when the length of the delay was able to be quantified. This was of concern to Lord Sumner. In *Bank Line Ltd v Arthur Capel & Co* he said:¹⁸⁹

Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing what the probabilities really were, if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances as to raise a presumption of inordinate delay, the time has arrived at which the fact of the contract falls to be decided.

Another difficulty is determining how long the delay must be before it will be considered an obstacle to the performance of the contract. The Courts have not provided a conclusive answer to this question, as they tend to approach it on a case by case basis.

If provision is made in the contract for the effects of a certain kind of delay, the contract may still be frustrated if a supervening event causes delay that is different. Delay caused by the events of war is a good example. The Lord Chancellor in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*¹⁹⁰ said:¹⁹¹

The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption.

¹⁸⁷ *Davis Contractors Ltd v Fareham UDC* above n 60. The facts of this case are set out at pages 33-34.

¹⁸⁸ At 724.

¹⁸⁹ *Bank Line Ltd v Arthur Capel & Co* above n 53, at 454.

¹⁹⁰ *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* above n 117.

¹⁹¹ At 40.

Whether or not the delay is sufficient to cause a frustrated contract involves a consideration of all the facts, including what has occurred and what is likely to occur. In *Pioneer Shipping Ltd v BTP Tioxide Ltd (the Nema)*,¹⁹² Lord Roskill summed it up well.¹⁹³

... where the effect of that event is to cause delay in the performance of contractual obligations, it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations “radically different,” to borrow Lord Radcliffe's phrase, from that which was undertaken under the contract.

Although it might seem sensible to take time to consider the implications of the delay, the real question is whether it is fair to make parties wait, and for how long. Lord Wright said:¹⁹⁴

... the real principle which applies in these cases is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are [open] to them, and to be free from commitments which are struck with sterility for an uncertain future period.

In executory contracts,¹⁹⁵ the courts will consider the effect of the delay on the contract by assessing the length of the contract and the amount of time left to run when the delay has ceased to prevent performance. It is unlikely that delay in performance will be held to frustrate a contract if the length of the delay was within the commercial risks undertaken by the parties.¹⁹⁶

C *Self-Induced Frustration*

Self-induced frustration occurs when one party causes a contract to become frustrated. The courts have made it very clear the doctrine of frustration will not apply in these

¹⁹² *The Nema* above n 138.

¹⁹³ At 752. The other Lords agreed with Lord Roskill's speech.

¹⁹⁴ *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd* above n 30, at 278.

¹⁹⁵ Executory contracts are those where the performance of the terms of the contract are an ongoing obligation, such as building contracts, charter-party contracts and leases.

¹⁹⁶ Beale above n 75, vol 1 at [23-035]. Also see *Davis Contractors Ltd v Fareham UDC* above n 32.

circumstances.¹⁹⁷ For example a charterer who, in breach of contract, orders a ship into a war zone causing the ship to be detained cannot allege the contract has been frustrated.¹⁹⁸ Moreover, the doctrine will not apply in cases where both parties are liable for breaches that have made the contract impossible to perform.¹⁹⁹

There have also been frustration cases involving one party and multiple contracts. In this situation a party's conduct in relation to one contract affects the performance of the other contracts. The question for the court in these circumstances is whether the contracts alleged to be frustrated are actually frustrated. In *Maritime National Fish Ltd v Ocean Trawlers Ltd*,²⁰⁰ the defendant was only able to obtain three licences for its fleet of five trawlers. When it elected which trawlers were to receive the licences, it chose not to give one to the trawler the plaintiffs had contracted to hire and then claimed the contract was frustrated. The Privy Council held the frustration was self-induced. The defendant took the risk it would not get all the licences it required having known the licencing requirements at the time it contracted with the plaintiff.

In *J Lauritzen AS v Wijsmuller BV (The Super Servant II)*,²⁰¹ the contract was for a drilling rig to be carried in one of two ships at the carrier's option. When one ship was lost and the other unavailable for use owing to another contract, the carrier claimed the contract was frustrated. The court held the decision to use one ship over the other for the purposes of this contract amounted to an election by the carrier. It was therefore unable to invoke the doctrine of frustration.

The rationale behind these decisions is that it is the promisor who should bear the risk that the contract cannot be fulfilled because he or she has control over the number of contracts entered.²⁰² However, Peel argues the doctrine of frustration should still apply in this

¹⁹⁷ *Bank Line Ltd v Arthur Capel Ltd* above n 53, at 452; *Joseph Constantine SS Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154; *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 497.

¹⁹⁸ *The Eugenia* above n 60; *Uni-Ocean Lines Pte v C-Trade SA, The Lucille* [1984] 1 Lloyd's Rep 244.

¹⁹⁹ *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal, The Hannah Blumenthal* [1983] 1 AC 854.

²⁰⁰ *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524.

²⁰¹ *J Lauritzen AS v Wijsmuller BV (The Super Servant II)* [1990] 1 Lloyd's Rep 1.

²⁰² *J Lauritzen AS v Wijsmuller BV (The Super Servant II)* [1989] 1 Lloyd's Rep 148 at 158. This was the decision at first instance but was approved on appeal in *The Super Servant II* above n 201.

situation, where a party is without fault and a supervening event has made it impossible for him or her to perform all of the contracts.²⁰³

D Foreseeability

In some cases it has been held that the doctrine of frustration cannot be invoked where the supervening event was, or should have been, foreseeable,²⁰⁴ the reason being that if it was, provision should have been made for it in the contract. In *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australia) Ltd*,²⁰⁵ a contract for the supply of electricity was affected by the Napier earthquake. The Court found that statements in the contract showed at least one of the parties had considered the possibility of an event interfering with the continuity of the electricity supply and therefore provision should have been made. Blair J said if the parties made no express provision in their contract for earthquakes, the inference must be they accepted the risk:²⁰⁶

I believe it would be true to say that among businessmen in charge of larger business premises the question of loss by earthquake is at one time or another seriously considered and a decision come to as to whether the risk will or will not be taken by the business itself. I mention this point because in a place like New Zealand where earthquakes are not by any means unknown, it cannot be said that the fact that there is such a risk is not present in the minds of most business men.

Blair J also doubted the parties would have considered the contract to have been at an end had they been asked, when negotiating the contract, what should happen if the premises were to be damaged by an earthquake to the extent that it would take a whole season to rebuild. In light of all of these circumstances, the Court held the doctrine of frustration did not apply.

As there are few cases on the doctrine of frustration in New Zealand, Blair J's view that earthquakes are a foreseeable risk and thereby exclude the doctrine is important. However, the precedent value of this case may be limited because the decision is based on the construction of the particular contract.

²⁰³ Peel above n 6.

²⁰⁴ *Paal Wilson & Co v Partenreederei Hannah Blumenthal* above n 199 at 909; *Oggi Advertising Ltd v Harrington & Anor* [2010] NZAR 577 (HC) at [44].

²⁰⁵ *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australia) Ltd* [1933] NZLR 873.

²⁰⁶ At 883.

A different approach has been taken in other cases. In *Societe Franco-Tunisienne d'Armement-Tunis v Sidermar SpA*,²⁰⁷ Pearson J did not believe the doctrine of frustration was precluded because the supervening event was within the contemplation of the parties when they made the contract.²⁰⁸ In *Ocean Tramp Tankers Corporation v Soyfracht ("The Eugenia")*,²⁰⁹ both parties knew there was a risk that the Suez Canal might close during the performance of the contract. They discussed the possibility, suggested terms to cover it, but in the end did not reach agreement and concluded the contract without any provision to cover the risk. Lord Denning took this conduct to mean that if the canal did close the parties intended to leave it to their lawyers to sort out.²¹⁰ He did not believe a foreseeable event precluded the application of the doctrine either.²¹¹

It has frequently been said that the doctrine of frustration only applies when the new situation is "unforeseen" or "unexpected" or "uncontemplated", as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract.

There are many reasons why parties do not make provision in their contract for a foreseeable event. In some cases it is because provision cannot be made for every possible event that might affect the contract. In other cases a particular event may appear highly unlikely to happen. In yet other cases it could be that the parties cannot work out what should happen if the event does occur or agree on the provision to cover it. Or the parties are prepared to take the chance that nothing will happen to affect the contract. Burrows submits that a supervening event that should have been foreseen or was foreseen by the parties should not prevent a finding of frustration in all cases.²¹² He says the circumstances of the case must be closely examined and suggests asking the question; can an inference be drawn that the parties entered the contract understanding they would take the risk the event would not happen, but if it did, they would accept the general law to govern the contract?

²⁰⁷ *Societe Franco-Tunisienne d'Armement-Tunis v Sidermar SpA* [1961] 2 QB 278.

²⁰⁸ At 299; *Bank Line Ltd v A Capel & Co* above n 53 where the parties in this case had clearly considered the possibility of the supervening event occurring as there was provision in the contract.

²⁰⁹ *The Eugenia* above n 60.

²¹⁰ At 234.

²¹¹ At 239.

²¹² Burrows, Finn & Todd above n 19, at 770.

In circumstances where the supervening event is foreseeable but not foreseen, it is likely the doctrine of frustration will still be applicable.²¹³ The issue will be determined by the *extent* to which the event was foreseeable, that being a question of degree dependant on the facts of the particular case. It will also be determined on whether one or both parties assumed the risk of the occurrence of the event.²¹⁴ In *Edwinton Commercial Corp v Tsaviris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*,²¹⁵ Rix LJ said:²¹⁶

In a sense, most events are to a greater or lesser degree foreseeable. That does not mean that they cannot lead to frustration. Even events which are not merely foreseen but made the subject of express contractual provision may lead to frustration: as occurs when an event such as a strike, or a restraint of princes, lasts for so long as to go beyond the risk assumed under the contract and to render performance radically different from that contracted for. However, as Treitel shows through his analysis of the cases, and as Chitty summarises, the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration.

In *Planet Kids Ltd v Auckland Council*,²¹⁷ the Supreme Court confirmed that when an event is foreseeable but not foreseen by the parties, it is less likely the doctrine of frustration will be held to be inapplicable. Clarification of that point is important. However, the Court also emphasised that the consequences of the supervening event must also be foreseeable to exclude the doctrine. Glazebrook J said:²¹⁸

The degree of foreseeability required to exclude frustration is high. The supervening event must be one which any person of ordinary intelligence would regard as likely to occur. Further, not only must the supervening event be foreseeable but its consequences or effects on the contract must also be foreseeable. The inference that an event that is foreseeable may exclude frustration can also be displaced by evidence of contrary intention.

The fact the consequences of the supervening event must be foreseeable to exclude the doctrine is a very important point. It means the issue of foreseeability is not based solely

²¹³ Beale above n 75, vol 1 at [23-060]. See *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 at [142] where it was held the supervening event was foreseeable and foreseen.

²¹⁴ *The Sea Angel* above n 88, at 909 per Lord Justice Rix citing Beale, above n 75, vol 1 at [23-060].

²¹⁵ *The Sea Angel* above n 88.

²¹⁶ At 915.

²¹⁷ *Planet Kids Ltd v Auckland Council* above n 52.

²¹⁸ At [158].

on the supervening event itself; it is also based on the consequences of the supervening event or the effect it has on the contract.

Clearly the issue of foreseeability is but one of a number of factors that will be taken into account in the multi-factorial approach to determining frustration. The fact a supervening event is foreseeable does not automatically exclude the application of the doctrine.

VI *Force Majeure Clauses*

The term force majeure originated in French law. The translation is **force** force /**majeure** superior force.²¹⁹ Under French civil law force majeure is “an unforeseeable, insurmountable and extraneous event”²²⁰ that makes performance of a contract impossible. There are three requirements to prove for a force majeure event. The event must be:²²¹

1. Extérieur - external - outside the control of the parties and not of the party's own making;
2. Imprévisible – unforeseeable – if the event could be foreseen then the party should have taken all necessary steps to prevent it;
3. Irrésistible – unable to guard against/ unpreventable.

The doctrine of frustration is a similar legal concept to that of force majeure. However they are not the same. The doctrine of force majeure applies where performance of the contract has become impossible. The doctrine of frustration applies, not only when performance of a contract has become impossible, but also when the contract becomes something different from that originally contemplated by the parties at the outset.²²² Thus the doctrine of frustration can apply even though performance of the contract has not become impossible.²²³ The doctrine of frustration is therefore broader in scope than the French concept of force majeure.²²⁴

²¹⁹ BA Garner (ed) *Black's Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014).

²²⁰ Mahmoud Reza Firoozmand “Changed Circumstances and Immutability of Contract: a Comparative Analysis of Force Majeure and Related Doctrines” (2007) 8 (2) B.L.I. 161 at 164.

²²¹ *General Construction Ltd v Chue Wing & Co Ltd and Anor* [2013] UKPC 30 at [12].

²²² Marel Katsivela “Contracts: Force Majeure Concept or Force Majeure Clauses?” (2007) 12 Unif. L. Rev. 101 at 109.

²²³ For example *Krell v Henry* above n 104 .

²²⁴ AH Puelinckx “Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances” (1986) 3(2) J.Int'l Arb. 47 at 50.

Force majeure is defined in the legal sense as:²²⁵

[A]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do.

Force majeure events are generally natural events, for example, hurricanes, cyclones, tsunamis, severe storms, flooding, volcanoes and earthquakes; force majeure events can also be caused by acts of people; war, terrorism, strikes and civil unrest.

A “force majeure clause” is defined in *Black’s Law Dictionary* as:²²⁶

[A] contractual provision allocating the risk of loss if performance becomes impossible or impracticable, esp. as a result of an event or effect that the parties could not have anticipated or controlled.

This definition is more akin to a definition of frustration because it covers impracticability, which indicates that the clause could provide for situations that are wider than those covered under the concept of force majeure. Typical force majeure clauses have four key components:

- a description of events that can trigger the operation of the clause;
- terms that define the duration of the clause;
- a notice provision describing how a declaration of force majeure is to be communicated;
- a description of the effects that a force majeure event will have on the contractual obligations of the parties.

If a force majeure clause is called into operation, then, depending of the wording of the particular clause, the parties are not required to perform their obligations under the lease and in doing so are not in breach of the terms of the lease. A force majeure clause may suspend performance of the lease or terminate the lease altogether. Katsivela says:²²⁷

Force majeure clauses obey the principle of freedom of contract avoiding, in this way, the rigidity of civil law and common law excuse doctrines.

²²⁵ Bryan A Garner (ed) *Black’s Law Dictionary* (10th ed, Thomson Reuters, St Paul MN, 2004) at 761.

²²⁶ At 761.

²²⁷ Marel Katsivela “Contracts: Force Majeure Concept or Force Majeure Clauses?” (2007) 12 Unif. L. Rev. 101 at 119.

Nevertheless, a force majeure clause in a lease does not of itself exclude the operation of the doctrine of frustration.²²⁸ The doctrine may still apply where the courts subject the force majeure clauses to a restrictive interpretation and insist that it must cover the supervening event exactly to apply.²²⁹ McKendrick says “the mere fact that the contract deals with events of the same general nature as the alleged frustrating event does not mean that the contract deals with every event in that class”.²³⁰ In *Metropolitan Water Board v Dick Kerr and Co*,²³¹ the House of Lords held that a contract was frustrated owing to a delay caused by war, even though there was provision in the contract for delay “whatsoever and howsoever occasioned”. The Court said the clause was intended to cover temporary delays. It was not intended to cover an interruption that was of such a character and duration that it vitally and fundamentally changed the conditions of the contract and could not have been contemplated by the parties when it was made.²³²

The restrictive approach could also apply to allow the doctrine of frustration to operate where there is a large and unusual supervening event because this type is less likely to be covered by a general clause.²³³ McKendrick suggests that, in light of the authorities, it is extremely difficult, if not impossible, to draft a force majeure clause that will exclude the operation of the doctrine of frustration completely.

There is also another interpretation issue that might allow the doctrine of frustration to apply even if a lease contains a force majeure clause. Generally, leases are commissioned by landlords. Under the rules of interpretation the courts will generally construe contracts against the party who drafted it. Therefore, a force majeure clause may be construed against a landlord who seeks to rely on it or may not apply at all. Furthermore the court will assess the relative bargaining powers of the landlord and tenant and apply a standard of interpretation to the clauses in the lease that reflects it.²³⁴

In the United States, commentators have noted the courts strict approach to interpretation of force majeure clauses since recent catastrophic events such as the September 11 2001

²²⁸ Ewan McKendrick (ed) *Force Majeure and Frustration of Contract* (2nd ed, Lloyd's of London Press, London, 1995) at 34. McKendrick refers to the example of *The Super Servant Two* above n 201.

²²⁹ Beale above n 75, vol 1 at [23-058]; Ewan McKendrick above n 228, at 35.

²³⁰ At 35.

²³¹ *Metropolitan Water Board v Dick Kerr and Co* [1918] AC 119.

²³² At 126 per Lord Finlay LC.

²³³ See *The Playa Larga* [1983] 2 Lloyd's Rep 171.

²³⁴ Jessica S Hoppe and William S Wright “Force Majeure Clauses in Leases” (2007) 21 Prob. & Prop. 8 at 9-10.

terrorist attacks and Hurricane Katrina.²³⁵ In New York, the courts have made it clear that for a force majeure clause to apply it must explicitly state the event or act that will prevent a party's performance under the lease.²³⁶ For example, force majeure clauses that cover acts of war may not cover terrorist attacks.²³⁷ Other states with a less restrictive approach to interpretation still require evidence of the parties' intention as to the events that will excuse performance, in the form of a list of specific examples. However, any catchall phrase is likely to be limited by the *ejusdem generis* rule of interpretation and this could also restrict the interpretation of the clause.²³⁸

In conclusion, while there is potential for a force majeure clause to exclude the application of the doctrine of frustration, it is not a foregone conclusion. Each case will be decided on the particular clause used and the approach to interpretation of the clause that is taken by the court.

²³⁵ Jessica S Hoppe and William S Wright above n 234.

²³⁶ *One World Trade Ctr., LLC v Cantor Fitzgerald Sec.*, 789 NYS 2d 652 (2004) New York Supreme Court.

²³⁷ Jessica S Hoppe and William S Wright above n 234, at 9.

²³⁸ Jessica S Hoppe and William S Wright above n 234 at 9.

CHAPTER THREE

THE DOCTRINE OF FRUSTRATION AND ITS APPLICATION TO COMMERCIAL LEASES

*Tenant for term of years is where a man letteth lands or tenements to another for term of certain years, after the number of years that is accorded between the lessor and the lessee. And when the lessee entereth by force of the lease, then is he tenant for term of years; and if the lessor in such case reserve to him a yearly rent upon such lease, he may choose for to distrain for the rent in the tenements letten, or else he may have an action of debt for the arrearages against the lessee ...*¹

I Introduction

The doctrine of frustration is a principle of law that may be applied when a supervening event makes a contract impossible to perform or significantly changes the contractual obligations to which the parties initially agreed. Chapter Two looked at the genesis of the doctrine and how the courts have applied it in a variety of situations. This chapter will consider how the doctrine applies to a specific contract – a commercial lease.

A lease is created when a landlord grants to a tenant the legal right to an interest in premises conferring exclusive possession for a certain period of time. In New Zealand, leases of residential property are called residential tenancies and are governed by the Residential Tenancies Act 1986, a statute specific to the “greater personal, emotional and social stake in the premises as a home”.² A commercial lease is defined as “a lease for business purposes”³ and used for property that is not residential, for example, offices, shops and warehouses.⁴ Unlike residential tenancies, commercial leases are not governed by a

¹ Kenelm Edward Digby *An Introduction to the History of the Law of Real Property* (3rd ed, London, Clarendon Press, 1884)(reprint Florida, Gaunt Inc, 2001 at 203, Sir E Coke’s translation of Littleton’s Tenures chapter vii, s 58).

² Jack Effron “The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities” (1988) 14 MonLR 83 at 93.

³ BA Garner (ed) *Black’s Law Dictionary* (10th ed, Thomson Reuters, Minnesota, 2014).

⁴ “Commercial premises” are also defined in the Residential Tenancies Act 1986, s 2 as “premises that are not residential premises”.

specific statute. Instead, parties must ascertain their legal rights and obligations from the lease document. Where the lease is silent, some rights and obligations are found in the provisions of the Property Law Act 2007, other legislation⁵ and from the common law.

Specific types of leases are governed by their own legislation. For example, leases of Crown land are governed by the Land Act 1948 and the Crown and Pastoral Land Act 1998; leases of Māori land are governed by Te Ture Whenua Māori Act 1993, Māori Land Act 1993 and leases granted by public bodies are governed by the Public Bodies Leases Act 1969. Moreover, local authorities have the power to lease council land and buildings under a power of general competence conferred by the Local Government Act 2002.⁶ The power to lease may also be granted to a party who has a particular role. For example, an executor, administrator or trustee of an estate may be granted powers in a Will or in a Trust document to lease estate property; a mortgagee in possession can exercise powers to lease mortgaged land under the Property Law Act 2007,⁷ and a life tenant can lease land which is vested in him or her by virtue of the Trustee Act 1956.⁸ The focus of this thesis is, however, on commercial leases.

The lease originated as a contract. In feudal times, land-owners contracted with tenants to allow tenants use of the land for farming. In return tenants provided the land-owners with goods and/or services. Over many centuries, the law developed to provide tenants with security over the land they leased, until the lease eventually conferred a vested interest in the land. The law at this time recognised the lease as a property law concept. Today a lease is considered to be comprised of two parts; a lease-contract that governs the rights and obligations of the parties to it and an interest in land that is capable of registration under the Land Transfer Act 1952. The courts have expressed it as a lease having a dual nature, being both a contract and a conveyance.⁹ Consequently, leases are governed by both property and contract law.

⁵ For example registration of leases is covered by the Land Transfer Act 1952 and tenants have rights of cancellation under the Contractual Remedies Act 1979.

⁶ The Public Works Act 1981, s 45(1) also confers on local authorities the power to grant leases of land acquired under the Act.

⁷ Property Law Act 2007, ss 142-147.

⁸ Trustee Act 1956, s 88.

⁹ C Harpum, S Bridge, M Dixon (eds) *Megarry and Wade The Law of Real Property* (London, Sweet & Maxwell, 2008) at [17-003]; *Highway Properties Ltd v Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710 at 721 (SC of Canada) per Laskin J; *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 51-52; 57 ALR 609 at 634 per Deane J; *Cash Handling Systems Ltd v Augustus Terrace Developments Ltd* (1996) 3 NZ ConvC 192,398 at 192,415 per Elias CJ.

This chapter looks at the genesis of the lease. It then examines the doctrine of frustration and its application to leases because for many years the courts held the contractual doctrine did not apply. This chapter considers the current position in the United Kingdom, Australia, Canada and the United States. It then looks at the current state of the law in New Zealand.

II The History of the Lease

A The Genesis of the Lease

Leases of land have been used for centuries. In English law the first recorded landlord and tenant relationship was the laenland in the Saxon period which existed from the 5th to the 11th century. The holder of the laenland had a right to enjoy the land but did not acquire an estate in it. In the latter part of the 12th century a form of landlord and tenant relationship developed called a term of years.¹⁰ This type of tenancy was originally developed as security for money borrowed. The borrower (tenant) would use the lender's (landlord's) land for the time needed to make money from it to repay the loan.¹¹ Like the laenland the tenant had the right to enjoy the land but did not obtain any rights in it; the tenant's interest was in the money he or she would make from the land rather than in the land itself. This type of arrangement was seen as contractual and the tenant's interest classed as a chattel which could be bought, sold and passed to personal representatives upon the tenant's death.

Under a "term of years" tenants had limited possession and rights to the land. Their contract to use the land did not amount to the landlord's seisin,¹² or legal possession.¹³ Consequently they had limited protection under the law. If the land was sold, the new owners were not bound by the personal covenants between the former landlord and the tenants which meant

¹⁰ AWB Simpson *A History of the Land Law* (2nd ed, Clarendon Press, Oxford, 1986) at 71. During the Dark Ages, the period from the sixth to the 14th century, leases tended to be for lengthy periods, usually for the tenant's whole life. For tenants the land was their livelihood and they had to secure leases for a long time because any shorter term would leave them reliant on the generosity of a Lord; F Pollock and FW Maitland *The History of English Law* (2nd ed, Cambridge University Press, London, 1923) vol II at 111.

¹¹ Rather than interest being charged on the loan there was usually a provision for payment of a penalty to avoid the church's ban on usury.

¹² Seisin as a term used in feudal times meant having possession of land in a way akin to ownership in fee simple or full title to real property. In Black's Law Dictionary it is defined as "Completion of the ceremony of feudal investiture, by which the tenant was admitted into freehold"; BA Garner, above n 3.

¹³ JH Baker *An Introduction to English Legal History* (4th ed, Butterworths LexisNexis, Bath, 2002) at 299.

they could evict them. Tenants also had little protection against third parties because any right of action was the landlord's as the owner of the land, not the tenant's. Their only real protection was from actions by their landlord against them.

It was not until the 13th century that tenants had a remedy against ejectment by a new owner of the land after sale by the landlord.¹⁴ The development of a form of trespass soon followed which allowed an action to be brought for any wrongful ejection.¹⁵ It was not until 1360 that tenants could use the action of ejectment against their landlords.

At this time, the leasehold interest was still regarded as a personal contract between the landlord and tenant and therefore regarded as a chattel, or a "chattel real" owing to its link with the land.¹⁶ The practical implication of classifying leaseholds as personal property was that the tenant was only able to bring an action for trespass and obtain damages for any ejectment. The tenant was unable to recover the land.

Over the next two centuries the "term of years" declined. By the 15th century the typical tenant was a farmer who did not have the means to own an estate but needed land to grow food for the family and crops to sell or trade. In the late 15th century there was a new development whereby the courts started to recognise that, through the grant of a lease, a tenant acquired an estate in the land. This meant a tenant was now able to recover possession of the land and had a fully protected interest in it.¹⁷

By the 16th century the lease was inextricably linked to the land, the land being of utmost importance to the farmer tenant. Buildings or structures on the land at this time were not considered essential to the lease, being secondary in importance to the land itself. Hicks explains:¹⁸

The heart of the lease involved the possession of the land so that crops could be planted, cultivated and harvested. Rarely would there be any structural improvements placed on the land; those that were erected were simple and rather unimportant compared to the land itself and its use. Out of this situation arose the

¹⁴ Simpson above n 10, at 74-75. In 1230 the writ of *quare ejecit infra terminum* gave the tenant the remedy against ejectment.

¹⁵ AWB Simpson, above n 10, at 75. This action was called *eiectione firmæ*. See also Peter Butt *Land Law* (6th ed, Thomson Reuters (Professional) Australia Ltd, Sydney, 2010) at 102.

¹⁶ Peter Butt, above n 15, at 102.

¹⁷ AWB Simpson, above n 10, at 75.

¹⁸ J F Hicks "The Contractual Nature of Real Property Leases" (1972) 24 *Baylor L R* 443 at 450.

concept that the rent, the consideration for the lease, issued out of the land itself and so long as the lessee had possession of the land, the consideration would not fail.

In the latter part of the 18th century there was a huge shift in the geography of the population from rural to urban. Tenants leased buildings in towns and cities for their businesses.¹⁹ The purpose of urban leases was to provide the tenant with exclusive possession of a building from which they could work. Consequently the rights and obligations of the parties contained in the lease-contract became increasingly important.

Despite the significant change in the way leases were now being used, the law still treated them as property concepts. The courts continued to focus on the fact that a lease created an estate in land and therefore considered it to be governed by property law. It was for this reason the courts determined the doctrine of frustration could not apply to leases, being as it was a contractual remedy.²⁰ As long as the land remained intact, the tenant retained his or her interest in it whether or not the buildings were still standing or destroyed.²¹

A number of other reasons were also given to justify the courts' stand that the doctrine of frustration did not apply to leases.²² First, it was argued the foundation of a lease could never be frustrated. The transfer of the landlord's right to possession of the property for a term of years in return for rent was the foundation of the lease. The landlord was always able to give possession to the tenant even if the property could not be used. Therefore, the foundation of the lease could never be frustrated. Second, the contractual obligations in a lease were merely incidental to the relationship of landlord and tenant because it was the land that was important. As the land could never be destroyed, the lease could never be frustrated. Third, a lease was an executory contract. It could not be frustrated because landlords and tenants had continuing rights and obligations under it that could endure for many years. Finally, the tenant should bear the risks associated with a lease as a purchaser did upon the conveyance of land. Under a lease a tenant obtained a property asset and a bundle of rights over land that is similar to what an owner of a fee simple obtained. Therefore, they too should carry the risk.

¹⁹ Although in London, leasing of buildings would have become common at a much earlier time.

²⁰ Refer to *London and Northern Estates Co v Schlesinger* [1916] 1 KB 20 at 24 per Lush J.

²¹ *Belfour v Weston* (1786) 1 TR 650.

²² S Bright and G Gilbert *Landlord and Tenant Law The Nature of Tenancies* (Clarendon Press, Oxford 1995) at 69; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 703 per Lord Simon; Annette O'Hara "The Frustrated Tenant – Towards a Just Solution" (1994) APLJ 1 at 11; Margaret L Debenham "Contract Law and Real Property Leases" (1995) APLJ 52 at 52-53.

B *The Doctrine of Frustration and Leases*

Over time there was growing dissatisfaction with the courts' insistence the doctrine did not apply to leases. There was evidence of this as early as 1922 in *Matthey v Curling*.²³ In a majority decision it was held that the doctrine did not apply to leases and in this case did not apply to terminate the lease of a building that had been destroyed by fire. However, in a strong dissenting judgment Atkin LJ challenged the view that a lease could never be frustrated. He said:

... it does not appear to me conclusive against the application to a lease of the doctrine of frustration that the lease, in addition to containing contractual terms, grants a term of years. Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events – namely, those which in an ordinary contract work a frustration.

Atkin LJ's judgment is important in that it marked a turning point in the law relating to frustration and leases. The passage above has been quoted with approval in two subsequent cases in the House of Lords that have been significant in the development of the law; *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*,²⁴ and *National Carriers Ltd v Panalpina (Northern) Ltd*,²⁵ discussed below.

The next significant case came before an Australian court in 1926, *Halloran v Firth*.²⁶ The plaintiff leased 20 acres of land to the defendant with a right to mine over a further 857 acres. During the course of the lease an amendment to the Mining Act 1906 allowed a third party to obtain an authority to enter the land to prospect for minerals. The defendant tenant stopped paying rent. She argued the object of the lease had been frustrated because she could no longer mine the land. If she had done so, she would have interfered with the statutory rights of the third party. The Full Court of the Supreme Court of New South Wales held the lease was not frustrated. It accepted the doctrine of frustration could apply to a lease. However, the Court said, it would not apply unless "the real gist of the contract is

²³ *Matthey v Curling* [1922] 2 AC 180.

²⁴ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 230.

²⁵ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22 at 691.

²⁶ *Halloran v Firth* (1926) 26 SR (NSW) 183.

destroyed”.²⁷ In this case the gist of the lease was the tenant’s right to mine and the Act had not destroyed that; it had just rendered the lease less beneficial to the tenant.

On appeal to the High Court of Australia²⁸ the decision of the lower Court was affirmed, but the High Court took a different view on the question of whether the doctrine of frustration applied to leases. The majority, Knox CJ and Gavan Duffy J, held the doctrine of frustration did not apply. The third judge Isaacs J, however, had a different view. He said:²⁹

The nature of the relation of landlord and tenant, the history of the doctrine of frustration, its inherent meaning and the judicial determination of relevant cases would lead me to reject so sweeping a rule. Nor do I think the consequences of terminating the relation of landlord and tenant any more extraordinary than that of terminating any other legal relation which by hypothesis is expressly and impliedly created on a mutual and fundamental basis of existence or continuance which fails at a given point. In a matter resting on covenant it is “the contract ... and not the estate ... which is the determining factor” (*Hallen v Spaeth*).³⁰

Nevertheless, the Australian courts continued to adhere to the view that the doctrine of frustration did not apply to leases. In *Re Equity Trustees Executors and Agency Co Ltd and Considine’s Contract*,³¹ it was held the doctrine did not apply to terminate a lease of land used for a race course when racing became a prohibited use under new legislation. In *Minister of State for the Army v Dalziel*,³² Williams J followed the House of Lords decision in *Matthey v Curling*³³ and said the doctrine of frustration did not apply to leases.

In 1935 one of the first cases in Canada to address the issue of whether the doctrine applied to leases, held the doctrine did apply. In *Cooke v Moore*,³⁴ there was a lease of farm premises and equipment, with the rent being a half share of the crop to be grown on the land. In one year there were extraordinary weather conditions and a plague of insects which damaged the soil to the point that it was useless. This meant the tenant’s attempt to operate the farm completely failed. The Court held the lease to be frustrated. The circumstances

²⁷ At 187.

²⁸ *Firth v Halloran* (1926) 38 CLR 261 (HCA).

²⁹ At 269.

³⁰ *Hallen v Spaeth* (1923) AC 684 at 690.

³¹ *Re Equity Trustees Executors and Agency Co Ltd and Considine’s Contract* [1932] VLR 137.

³² *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 302.

³³ *Matthey v Curling* above n 23.

³⁴ *Cooke v Moore* [1935] 1 WWR 374 (Sask KB); affirmed [1935] 3 WWR 256 (Sask CA).

which were the basis of, and essential to, the fulfilment of the agreements made between the parties, ceased to exist and performance became impossible.³⁵ Taylor J said:³⁶

The visitation of the country by recurring periods of drought, high winds, dust storms and a plague of grasshoppers, to such an extent that tillage of the soil became impracticable and valueless, as distinguished from the beneficial condition with which this province is usually blessed, surely ought to be held to be within this doctrine.

An interesting point to note about this decision is that all of the cases relied upon concerned frustrated contracts not leases. Taylor J did not directly answer the question about whether the doctrine applied to leases; it seems he just assumed it did.

In 1945, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*,³⁷ came before the House of Lords. The facts of this case are set out in Chapter Two,³⁸ but it is sufficient to say at this point, that one party argued the lease was frustrated. The House of Lords unanimously held, on the particular facts, that the lease was not frustrated. The importance of the case in this discussion, lies not in the decision, but in the fact that there was disagreement among the Lords about whether a lease could ever be a frustrated contract. Two said it could, two said it could not and one declined to express a view. This uncertainty in the law meant clarification was needed.³⁹

In Canada the position was no clearer.⁴⁰ In *Merkur v H Shoom & Co Ltd*,⁴¹ the Court of Appeal reversed a decision of the County Court in which the Judge had held a lease to be frustrated. The interesting part of this case is the editorial note which recorded that the case was the first reported judgment of the Ontario Court of Appeal on the issue of whether the

³⁵ The Court applied a number of the United Kingdom cases including *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497. The case was dismissed on appeal to the Saskatchewan Court of Appeal without written reasons.

³⁶ *Cooke v Moore* above n 34, at 375.

³⁷ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*, above n 24.

³⁸ The facts are set out in Chapter Two.

³⁹ The uncertainty in the law that came as a consequence of this decision almost certainly forced the House of Lords to deal with the issue when it next came up in 1981 in *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, which is discussed below.

⁴⁰ Annette O'Hara "The Frustrated Tenant – Towards a Just Solution" (1994) APLJ 1. O'Hara refers to two cases in which the Ontario Court of Appeal held the doctrine of frustration did not apply to leases. Refer to *Foster v Caldwell* [1948] 4 DLR 70; *Re Sells Tidy v Merkur & Merkur* (1956) 4 DLR (2d) 432.

⁴¹ *Merkur v H Shoom & Co Ltd* [1954] 1 DLR 85 (Ontario CA).

doctrine of frustration applied to leases since *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*.⁴² It then went on to say the case did not help to clarify the law. It was difficult to say from the decision whether the Court considered the doctrine was not applicable to leases at all or whether it was just not applicable in the circumstances of that particular case.

Finally, in 1981, the House of Lords was again confronted with the issue of frustration and leases. In *National Carriers Ltd v Panalpina (Northern) Ltd*,⁴³ the respondents leased a warehouse from the appellants for a term of 10 years. Under the terms of the lease they agreed the premises could only be used as a warehouse. The only vehicular access to the premises was by a single street. Five years after the start of the lease the local authority closed the street owing to the dangerous condition of a heritage building situated opposite the respondent's warehouse. The heritage building could not be demolished without the consent of the Secretary of State for the Environment.⁴⁴ This process was to take approximately 20 months to complete. During that time the respondents were unable to use the warehouse for the purposes they had leased it for, so they stopped paying rent. The appellants brought an action for recovery of the unpaid rent. In their defence the respondents claimed the lease had been frustrated by the closure of the road.

The House of Lords held that the doctrine of frustration does apply to leases. However, in a unanimous decision it held that on the facts of this case the lease was not frustrated. The Court did not consider the disruption of 20 months of a lease for 10 years to be sufficient to meet the test for frustration when the lease still had five years to run after the interruption to it.

The importance of this decision cannot be overstated. After many years of uncertainty in the law and a court divided on the issue in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*⁴⁵ it was necessary for the House of Lords to clarify the law in this area. This it did with a definitive decision that a lease, as a form of contract, can be frustrated.

⁴² *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*, above n 24.

⁴³ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22.

⁴⁴ Under English laws, if the demolition of a "listed building" was objected to by local conservationists, the consent of the Secretary of State for the Environment would not be granted without the holding of a public inquiry.

⁴⁵ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*, above n 24.

All of the Lords gave detailed judgments on the genesis of the doctrine and their analysis of it. Of the five judges, Lord Hailsham of St Marylebone LC, Lord Wilberforce, Lord Simon of Glaisdale and Lord Roskill were in agreement that the doctrine of frustration was applicable to leases. Lord Simon proposed a test for the doctrine⁴⁶ and went on to say “there is no class of lease to which the doctrine is inherently inapplicable”.⁴⁷ Lord Roskill said:⁴⁸

My Lords, it follows that on the question of principle I find it impossible to justify compartmentalisation of the law or to agree that the doctrine of frustration applies to every type of contract save a lease...In principle the doctrine should be equally capable of universal application in all contractual arrangements.

Having said the doctrine was applicable, the Lords were quick to caveat their views by saying the times when the doctrine would apply to a lease would be rare.⁴⁹ In other words there was no theoretical reason why the doctrine should not apply to leases, but in practice it rarely would.

Lord Russell of Killowen was the only one who did not agree. Instead he adhered to the views of the majority in the *Cricklewood* case,⁵⁰ his decision based partly on the allocation of risk. He said:⁵¹

If a principle of achieving justice be anywhere at the root of the principle of frustration, I ask myself why should justice require that a useless site be returned to the lessor rather than remain the property of the lessee?

Jeffrey Price says that the decision in *National Carriers Ltd v Panalpina (Northern) Ltd*⁵² has not necessarily clarified the law.⁵³ He believes the case falls short in a number of ways.⁵⁴ First, he criticises the case for not thoroughly dealing with previous relevant

⁴⁶ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, at 700. Lord Simon’s test for the doctrine of frustration is set out in Chapter Two at page 34.

⁴⁷ At 706.

⁴⁸ At 717.

⁴⁹ At 692 per Lord Hailsham, at 697 per Lord Wilberforce, at 709 per Lord Russell and at 715 per Lord Roskill.

⁵⁰ *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd*, above n 24.

⁵¹ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, at 709.

⁵² *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22.

⁵³ Jeffrey Price “The Doctrine of Frustration and Leases” (2007)10:1 JLH 90.

⁵⁴ At 102-103.

decisions and in particular the important decision of *Matthey v Curling*.⁵⁵ Second, he argues that although the Lords dealt with the issue of the application of the doctrine of frustration in principle, they failed to give any meaningful guidance as to the circumstances which might give rise to frustration of leases. Third, no mention was made of the significance of the presence or absence of compensation paid to a party to a lease, such as a policy of insurance.⁵⁶ Finally, some of the Lords indicated the Law Reform (Frustrated Contracts) Act 1943 (UK) would apply to frustrated leases but they failed to give any clear guidance as to how it would apply and the consequences of its application.

Price is a little harsh in his criticism. The House of Lords had already dealt with the facts of this particular case and reached a decision that the lease was not frustrated. It need not have gone further. However its definitive decision that a lease can be frustrated was helpful and clarified the law without limiting the application of the doctrine in any way.

Notwithstanding the current general acceptance that the doctrine applies to leases, it has rarely been used. There has only been one case in the United Kingdom where a lease has been held to be frustrated⁵⁷ and that was a decision before *National Carriers Ltd v Panalpina (Northern) Ltd*.⁵⁸

There are good reasons why the courts are cautious about applying the doctrine of frustration to leases. The effect of the application of the doctrine is to terminate the lease automatically. In some cases this will benefit a tenant. In others it could work to deprive a tenant of a valuable site before the end of the agreed term. This could be detrimental to a tenant at a time of rising land values and rents.⁵⁹ Ending a lease also works to deprive a landlord of the benefits of the lease.

The arguments in support of the doctrine being applied to leases are just as robust. Leases can be terminated and an estate in land divested in other ways,⁶⁰ so this should not be an argument against its application. Other contracts for lengthy terms have been held to be

⁵⁵ *Matthey v Curling* above n 23.

⁵⁶ As in *Matthey v Curling* above n 23.

⁵⁷ The doctrine of frustration was applied to a lease in an early Scottish case *Tay Salmon Fisheries Co v Speedie* 1929 SC 593 but has not been held to be applicable in any cases in England.

⁵⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22.

⁵⁹ Edwin Peel *Treitel The Law of Contract* (13th ed, Sweet & Maxwell, London, 2011) at 952.

⁶⁰ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, at 694 per Lord Wilberforce where he said a lease can be determined according to its terms, upon the happening of certain specified events or by the implication of a term.

frustrated.⁶¹ Considerable delay has been held to frustrate a charter-party contract. Price argues that the requisition or other occupation of leased premises which prevents use of the property by the tenant for a long period of time could, in the same way, frustrate a lease.⁶² Licences to occupy⁶³ have also been held to be frustrated contracts.⁶⁴ However, in New Zealand leases, unlike charter-party contracts and licences to occupy, confer an interest in land which is an important distinction.⁶⁵

One Australian commentator believes the doctrine should apply to leases.⁶⁶ Duncan says a strict application of the present law ignores the modern-day commercial reality of business dealings and can produce harsh results. He argues the courts should give consideration to releasing a tenant from liability under a lease where the entire commercial purpose of the lease is rendered worthless by some event the parties had not foreseen. In these cases, the tenant is receiving no consideration for the rent he or she pays because the premises cannot be used in any beneficial or profitable manner.⁶⁷

C The Contractualisation of Leases

Commercial leases have increased significantly in number over the past century. Leases are now used for a number of different purposes such as offices in multi-storey buildings, shops in malls, retail premises, commercial buildings and warehouses. Leases have changed too; they are now longer and more complex documents. They contain a large number of covenants that govern the rights and obligations of the parties and are also subject to implied covenants imposed by statutes and the common law. These covenants are contractual in nature. In essence leases have become more like contracts.

In Australia there was an early indication that contractual remedies might be applicable to leases when, in 1906, it was held that a landlord was entitled to claim damages for the

⁶¹ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, at 690 per Lord Hailsham, at 694 per Lord Wilberforce, at 701 per Lord Simon, at 717 per Lord Roskill.

⁶² Price, above n 53, at 104.

⁶³ Licences to occupy are agreements that grant a personal right of occupation.

⁶⁴ *Krell v Henry* [1903] 2 KB 740.

⁶⁵ Refer to Chapter Four where there is a more detailed discussion about registered leases and the effect of registration on the application of the doctrine of frustration.

⁶⁶ WD Duncan *Commercial Leases in Australia* (6th ed, Thomson Reuters, Sydney, 2011).

⁶⁷ Duncan believes this is the right approach despite the passing of risk and the estate in the land remaining unaffected; at 141.

unexpired portion of a lease when a tenant abandoned the premises.⁶⁸ There was further support for change in the way leases are viewed from the Supreme Court of Canada in *Highway Properties Ltd v Kelly, Douglas & Co Ltd*,⁶⁹ when Laskin J said:⁷⁰

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.

This statement has been quoted in many of the cases that have concerned leases and the doctrine of frustration or repudiation of a contract. It is a strong statement clearly supporting the application of contractual principles to leases.

In more recent times, courts have also started to acknowledge that tenants with commercial leases for the purpose of office space, for example, are more interested in their rights to the building than the land. In *National Carriers Ltd v Panalpina (Northern) Ltd*, Lord Roskill said:⁷¹

However much weight one may give to the fact that a lease creates an estate in land in favour of the lessee, in truth it is by no means always in that estate in land that the lessee is interested. In many cases he is interested only in the accompanying contractual right to use that which is demised to him by the lease and the estate in land which he acquires has little or no meaning for him.

Similar sentiments were expressed by Deane J in the High Court of Australia in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*.⁷² The Court held the tenant's conduct amounted to repudiation of the lease and the landlord was entitled to damages for the loss of the benefit. In reaching its decision the Court undertook an extensive analysis of earlier case law and came to the conclusion that the balance of authority in Australia and overseas supported

⁶⁸ *Buchanan v Byrnes* (1906) 3 CLR 704.

⁶⁹ *Highway Properties Ltd v Kelly, Douglas & Co Ltd* above n 9.

⁷⁰ At 721. Similar sentiments have been expressed by the courts in England in *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22 and in Australia in *Shevill v Builders Licensing Board* (1982) 149 CLR 620; 42 ALR 305.

⁷¹ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22 at 714.

⁷² *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* above n 9.

the proposition that ordinary principles of contract law apply to leases.⁷³ Two Judges acknowledged the difference between an ordinary contract and a lease, in that the latter vests an interest in land and therefore caution was needed. However, Deane J was clear about the need for change:⁷⁴

... the general trend in this century, particularly in relation to leases of urban premises, has been away from the type of lease which can realistically be so viewed [as analogous to a form of feudal tenure]. It has been towards the lease, at a commercial rental and for a shorter term, framed in the language of executory promises of widening content and diminishing relevance to the actual demise.

Deane J went on to say that the rules of property law regarding chattels real are inadequate as the exclusive determinant of rights and liabilities under modern leases. It is necessary for the courts to take a critical look at the rational basis and justification for the traditional assumption that leases are not subject to the law of contract. He emphasised this by saying that, apart from an exceptional case, a “leasehold estate cannot be divorced from its origins and basis in the law of contract”.⁷⁵

Deane J did, however, raise one important qualification. He said that, in a case where a tenant’s rights cannot be viewed as anything other than an estate or interest in land, it would be more difficult to establish that the lease has been terminated by frustration or fundamental breach. He gave the example of a 99 year lease of unimproved land on payment of a premium, without rent or only a nominal rent reserved. In these circumstances, he said, it would be unlikely that the conduct of the tenant, short of actual abandonment, would be held to constitute repudiation or fundamental breach and it would be very difficult to make a finding of frustration for anything less than a cataclysmic event such as the “vast convulsion” referred to by Viscount Simon LC.⁷⁶

Commentators have expressed mixed views on the contractualisation of leases. An Australian author, O’Hara, supports the idea. In her view the fact a lease creates an interest in land should not deprive a tenant of access to contractual remedies. She says “the estate created by a lease is co-extensive with the contractual principles of a lease and co-exists with them. The contractual terms are the foundation of the lease and serve to create the

⁷³ *Progressive Mailing House Pty Ltd v Tabali*, above n 9 at 618 per Mason J; at 626 per Brennan J; at 635 per Deane J.

⁷⁴ At 634-635.

⁷⁵ At 635.

⁷⁶ *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd*, above n 24, at 229.

legal estate”.⁷⁷ O’Hara disagrees with the suggestion that the “venture” or “foundation” of the lease cannot be frustrated because she says it is achieved upon execution of the lease. She argues that, for the majority of leases today, a tenant’s contractual rights to occupation and quiet enjoyment of the premises are of utmost importance and the acquisition of the leasehold estate is merely incidental to these rights.

Brock and Phillips take it a step further and argue for the complete contractualisation of leases.⁷⁸ They say there are a number of good reasons why the commercial lease should be governed by contract law. First, the lease is simply a “good” (the use of land for a period of time) like any other and the fact that title does not pass means it is not a conveyance. Second, the lease is a bundle of rights and obligations, in which the use of land forms but one part.⁷⁹ They argue that, today, a commercial tenant requires space in a building and the associated services including heating, lighting, lifts, cleaning, power and water and has little interest in the land itself. As the context and purpose of the lease has changed over time, the law should reflect this by treating commercial leases as contracts.

Brock and Phillips make some good points. In earlier times many leases of agricultural land were for lengthy terms; for example, leases for 99 years were not uncommon. As urbanisation has continued, the terms of leases have shortened and terms of six years or less (with rights of renewal) are now common.⁸⁰ Leases with shorter terms are more likely to meet the test for frustration if they are disrupted for a significant period compared to a lease with a longer term, such as 99 years, where even a lengthy disruption is unlikely to frustrate it.

Barr, on the other hand, warns about the hazards of contractualisation.⁸¹ He argues the doctrine of frustration should not be applied to leases because it is “limited by practice and principle, and the remedies it provides are clumsy and as capable of creating injustice as they are of achieving justice”.⁸² Barr believes there are better alternative remedies that can be developed through property law, for example, the development of a statutory right to enable a tenant to surrender the lease in the case of supervening events.

⁷⁷ Annette O’Hara “The Frustrated Tenant – Towards a Just Solution” (1994) APLJ 1 at 11.

⁷⁸ Jason Brock and Jim Phillips “The Commercial Lease: Property or Contract?” (2001) 38(4) Alta L.Rev 989 at 1025.

⁷⁹ At 1019.

⁸⁰ The commercial leases in Christchurch are generally for terms of six years or less; for evidence of this refer to Chapter Seven.

⁸¹ Warren Barr “Frustration of Leases – The Hazards of Contractualisation” (2001) 52(1) NILQ 82.

⁸² At 97.

The commentators make some good points. What is important today is the purpose for the lease and what the parties intended would happen should an unexpected event disrupt the lease-contract. Would they expect the lease to come to an end in these circumstances? If the parties said yes, then, on this analysis, the lease is more akin to a contract because the parties only want the lease to endure while the building is available for use, and the use of the building is governed by the rights and obligations in the lease contract. If they intended the lease to continue despite the supervening event disrupting the lease, this is a situation more akin to a traditional lease which endures for the term despite what happens to the property along the way. In this situation it is the interest in land that is important, not the structures on it which can be rebuilt. Here it is property law that is relevant. In today's business world it is likely that the first scenario is the correct analysis and the courts are recognising this by moving to contractualise leases.

III The Doctrine of Frustration and its application to Leases in Overseas Jurisdictions

A United Kingdom

There do not appear to have been any cases on the doctrine of frustration and leases in the United Kingdom since *National Carriers Ltd v Panalpina (Northern) Ltd*.⁸³

The United Kingdom has the Law Reform (Frustrated Contracts) Act 1943 (UK). It was enacted during World War II to resolve issues that arose when contracts were frustrated by legislation introduced during wartime. Its purpose is to equably apportion loss between the parties to a frustrated contract. The Act does not define a frustrated contract and therefore, any party wishing to apply the legislation has to first establish the lease is frustrated.

Price suggests that this legislation was never enacted with leases in mind.⁸⁴ At the time of enactment, the law was that the doctrine of frustration did not apply to leases. This contention is supported by the fact that the legislation is difficult to apply to a lease because a lease is an executory contract. Under this type of contract the parties have ongoing rights

⁸³ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22. This case is also discussed in Chapter Two.

⁸⁴ Price, above n 53, at 104.

and obligations which makes it different from, for example, a contract for services for a one off event.

B Australia

Since *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*,⁸⁵ it is now well established that the ordinary principles of contract law apply to leases in Australia. This has recently been confirmed by the High Court of Australia in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd*.⁸⁶ However, since *National Carriers Ltd v Panalpina (Northern) Ltd*,⁸⁷ there have been no decisions in the High Court of Australia on the doctrine of frustration and its application to leases.

In *City of Subiaco v Heytesbury Properties Pty Ltd*,⁸⁸ the Full Court of the Supreme Court of Western Australia Court of Appeal affirmed Lord Hailsham's principle of law from *National Carriers Ltd*,⁸⁹ that the doctrine could properly be applied to commercial leases, although it would be rare.⁹⁰ *City of Subiaco v Heytesbury Properties Pty Ltd*⁹¹ concerned four 99 year leases between the City of Subiaco as landlord and Heytesbury Properties Pty Ltd as tenant. The landlord brought an action for rent and other charges it claimed were owed by the tenant. The tenant, in its defence, alleged *inter alia* that the enactment of an amendment to the town planning legislation, preventing it from carrying on its manufacturing business on the leased premises, caused the leases to become frustrated. The Court held the leasehold estate conferred by the leases was both useable and saleable and therefore not frustrated. The Court relied on evidence of the parties' conduct after the allegedly frustrating event to show that the tenant had no intention to manufacture on the leased premises; rather it wished to maintain the leases for an anticipated redevelopment. Therefore, the leases were not frustrated by the legislation.

⁸⁵ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*, above n 9.

⁸⁶ *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10.

⁸⁷ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22. This case is also discussed in Chapter Two.

⁸⁸ *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 24 WASCA 140.

⁸⁹ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22, at 688-689.

⁹⁰ At [68] per Ipp J.

⁹¹ *City of Subiaco v Heytesbury Properties Pty Ltd*, above n 88.

In 2010 in *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd*,⁹² Barrett J said there was no established precedent in Australia about the application of the doctrine of frustration to leases. However, in light of the approach taken in the *City of Subiaco* case,⁹³ he said:⁹⁴

I am of the opinion that it cannot be said today, as an abstract proposition, that the doctrine of frustration has no application to leases, in the sense that a lease can in no circumstances whatsoever be discharged by frustration ... A contract will be regarded as discharged by frustration if some supervening event makes performance of the contract impossible or pointless.

Commentators have suggested that *National Carriers Ltd v Panalpina (Northern) Ltd*⁹⁵ will be followed in Australia, given the general support for the application of contractual principles to leases.⁹⁶

Only two states in Australia have Frustrated Contracts Acts: Victoria has the Frustrated Contracts Act 1959 (Vic) and New South Wales has the Frustrated Contracts Act 1978 (NSW). These statutes, like others in the Commonwealth, do not define a “frustrated contract”, but provide provisions to deal with the allocation of loss between parties to a frustrated contract. There do not appear to be any cases on the application of these statutes to frustrated leases.

C Canada

The most significant case in Canada was in 1971, being that of the Supreme Court in *Highway Properties Ltd v Kelly, Douglas & Co*⁹⁷ and, in particular, the judgment of Laskin

⁹² *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2010] NSWSC 29. In this case the Court did not accept that the lease was discharged by frustration.

⁹³ *City of Subiaco v Heytesbury Properties Pty Ltd* above n 88.

⁹⁴ At [220] and [221].

⁹⁵ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22.

⁹⁶ T Cockburn “Frustration of Commercial Leases” (1993) 13 QL 195 at 205-206; Duncan, above n 66, at 139. Margaret L Debenham “Contract Law and Real Property Leases” (1995) APLJ 52. The doctrine has also been applied in more recent times to an agreement to lease (*Liberty Investments Property Limited v Sakatik Property Limited* [1996] NSWSC 387) and a licence (*Smith Bros Trade and Transport Terminal Pty Ltd v Pacific Power* [1998] NSWSC 392) although these do not involve interests in land capable of being registered.

⁹⁷ *Highway Properties Ltd v Kelly, Douglas & Co* above n 9.

J. Although it concerned the doctrine of wrongful repudiation it had far reaching implications for the application of contractual remedies to leases.

In 1971 the courts in other jurisdictions had been grappling with the contractualisation of leases and their approach to it was one of caution. However, Laskin J, while acknowledging that a lease continues to confer an estate in land, recognised that it has been “transformed in its social and economic aspects by urban living conditions and commercial practice”.⁹⁸ He went on to say that, despite the changes in the contractual terms of leases and in legislation which had superseded the common law,⁹⁹ the courts had stopped short of applying contractual remedies to leases.¹⁰⁰ This had occurred even though the evidence was clear from modern commercial clauses that business considerations in a lease of land were paramount.

Canadian commentator Gordon Sustrik believes the way to remove many of the uncertainties in this area of law is to subject leases to all contractual doctrines to the extent that they are not inconsistent with the basic interest in land created by the lease.¹⁰¹

Fridman¹⁰² believes the Canadian courts will accept that the doctrine of frustration applies to leases because they are likely to follow the House of Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd*.¹⁰³ Some courts in Ontario have accepted the doctrine of frustration applies to contracts for the sale of land, so Fridman believes it would be surprising if a Canadian court did not follow the House of Lords decision in relation to leases.

This may be the case where the lease is unregistered, but Fridman fails to take into account the difference between registered leases and contracts for the sale of land. In some

⁹⁸ At 715.

⁹⁹ Some examples given were the provisions requiring payment of rent in advance; re-entry for non-payment of rent or breaches of covenants and modifying the absoluteness of covenants not to assign or sublet.

¹⁰⁰ For example, the principle of anticipatory breach and relief upon repudiation. Laskin J noted that the court had applied the doctrine of anticipatory breach to a contract for the sale of land and he argued it therefore should also apply to a lease even though a lease is partly executed; at 721.

¹⁰¹ Gordon Sustrik “Highway Properties – Look Both Ways Before Crossing” (1986) 24 Alta L.Rev 477 at 494.

¹⁰² GHL Fridman *The Law of Contract in Canada* (6th ed, Thomson Reuters, Toronto, 2011) at 637.

¹⁰³ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22. Particularly, Fridman says, in light of the decisions by the Courts in Ontario that the doctrine applies to contracts for the sale of land.

jurisdictions a registered lease provides a tenant with an indefeasible interest, whereas a contract for the sale of land does not. The reason Fridman does not take into account the difference registration makes to a lease may be because only parts of Canada operate under the Torrens system of registration. Therefore, how registration of a lease affects the application of the doctrine of frustration may not, for the most part, be an issue. It does not appear to have been addressed by Canadian commentators. However, it could be a problem for all countries which operate under the Torrens System of land registration, including New Zealand, and is discussed in more detail in Chapter Four.

Joseph Robertson¹⁰⁴ agrees with Fridman that the Canadian courts are likely to follow the decision in *National Carriers Ltd v Panalpina (Northern) Ltd*.¹⁰⁵ He does not believe this to be a startling development, given that most of the provincial legislatures have provisions in their residential tenancy statutes that allow residential tenancies to be frustrated. What he is critical of, though, is the fact that the common law has failed to provide definitive criteria by which the doctrine can be applied to commercial leases.¹⁰⁶

There are several reasons why it is likely that Canada will follow the lead of other jurisdictions and accept the doctrine of frustration is applicable to leases. The strong statement by Laskin J in *Highway Properties Ltd v Kelly, Douglas & Co*,¹⁰⁷ referred to in a number of significant court decisions¹⁰⁸ shows that leases are being treated more like contracts. Furthermore, some of the Canadian provinces have removed all doubt by categorically stating the doctrine applies to leases in residential tenancy legislation.

British Columbia is the only province to have a specific statute for commercial leases; the Commercial Tenancy Act [RSBC 1996]. It provides that the doctrine of frustration and the Frustrated Contracts Act, apply to leases.¹⁰⁹ In 2007, the British Columbia Law Institute

¹⁰⁴ Joseph T Robertson “Frustrated Leases: No to Never – But Rarely if Ever” (1982) 60 Can Bar Rev 619.

¹⁰⁵ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22.

¹⁰⁶ At 620 and 630. His article then goes on to set out a proposed framework for determining when a lease is frustrated.

¹⁰⁷ *Highway Properties Ltd v Kelly, Douglas & Co*, above n 9.

¹⁰⁸ In particular *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22.

¹⁰⁹ Commercial Tenancy Act, RSBC 1996, c 57, s 30. A number of provincial governments have also made specific provision for frustration in their Residential Tenancies legislation. Fridman says that provision in the legislation was made because the provincial legislatures were unhappy with the common law’s approach to frustration of leases. This legislation has caused confusion for some landlords and tenants as it only applies to residential tenancies and not commercial leases; Fridman, above n 102, at 635.

commissioned a report¹¹⁰ on proposals for a new Commercial Tenancy Act. The Commission noted that the changes heralded by *Highway Properties Ltd v Kelly, Douglas & Co*,¹¹¹ in viewing leases as contracts, seemed to have been stalled by later cases. Nevertheless, it was not prepared to completely restate the landlord-tenant relationship on a purely contractual basis. The Commission focused on three areas where the dual nature of a lease as a contract and conveyance has led to difficulties in the courts, one of these being the doctrine of frustration.¹¹² It noted that the question of whether the doctrine applies to leases is not completely free from doubt in most common law jurisdictions.¹¹³ However, in British Columbia, as a result of law reform in 1971,¹¹⁴ the Commercial Tenancy Act [RSBC 1996]¹¹⁵ has made provision for this and it is likely to be carried through to any new Act.

Most Canadian provinces have a Frustrated Contracts Act¹¹⁶ based on the United Kingdoms' Law Reform (Frustrated Contracts) Act 1943. The purpose of the legislation is to apportion liability under a contract that has previously been determined to be frustrated. However, a "frustrated contract" is not defined.

D United States

As in other jurisdictions, early law in the United States adhered to the principle of absolute contracts. Therefore the doctrine of frustration did not apply to leases of land.¹¹⁷ Since then, however, the courts have developed a considerable body of law in which the doctrine of

¹¹⁰ British Columbia Law Institute *Report on Proposals for a New Commercial Tenancy Act* (BCLI55, 2009).

¹¹¹ *Highway Properties Ltd v Kelly Douglas & Co Ltd*, above n 9.

¹¹² The other two were the independence of lease covenants and fundamental breach, and mitigation.

¹¹³ British Columbia Law Institute *Report on Proposals for a New Commercial Tenancy Act* (BCLI55, 2009) at 46.

¹¹⁴ Law Reform Commission of British Columbia *Report on the Need for Frustrated Contracts Legislation in British Columbia* (LRC3, Vancouver, 1971).

¹¹⁵ Commercial Tenancy Act [RSBC 1996] c 57, s 30.

¹¹⁶ In 1948 the Commissioners on Uniformity of Legislation drafted a model Frustrated Contracts Act which was adopted by all of the common law provinces except British Columbia, Nova Scotia and Saskatchewan. Today, however, Nova Scotia is the only province without this legislation.

¹¹⁷ *Cook v Anderson* 85 Ala. 9, 4 So. 713 (1887); *Warren v Wagner* 75 Ala. 188 (1883); *Bunting v Orendorf* 152 Miss 327, 120 So 2d 182 (1929); Also refer to James P Nehf *Corbin on Contracts* (LexisNexis, Newark, 2001), Volume 14, §77.4 at 261.

frustration has been applied to leases where there is frustration of purpose.¹¹⁸ The theory is that the parties could not have expected the situation that arose, and if they had they would have provided for it.¹¹⁹ In the leading case, *Lloyd v Murphy*,¹²⁰ the Court rejected the traditional view that the risk should fall on the tenant and instead confirmed that the doctrine of frustration was available as a defence.¹²¹

In a group of cases termed “the saloon cases”,¹²² the facts and outcomes were similar: leases for taverns and saloons were frustrated by the enactment of a law preventing the sale of alcohol in the area. A general rule was developed that if the lease contained a restriction on the use to which the premises could be put and that use became illegal, the lease came to an end; the tenant’s purpose for the lease was frustrated.¹²³ In other cases, though, if premises were not restricted in the use to which they could be put, the law prohibiting the sale of alcohol did not frustrate the tenant’s purpose because he or she could put the premises to an alternative use; in these circumstances the tenant continued to be liable for rent.¹²⁴ One judge did make the point, though, that a tenant should not be held to a lease just because he or she was permitted to do minor and unprofitable activities; the lease should be able to be terminated if the frustration of purpose goes to the essence of the contract.¹²⁵

¹¹⁸ Refer to the many cases listed in A James Casner (ed) *American Law of Property* (Little Brown and Company, Boston, 1952) vol 1 and for a more recent compilation in Nicholas R Weiskopf “Frustration of contractual purpose – doctrine or myth?” (1996) 70(2) St John’s L.Rev. 239. Also refer Arthur Anderson “Frustration of Contract – A Rejected Doctrine” (1953) 3(1) DePaul L. Rev 1 where he argues that the doctrine of frustration (frustration-in-fact) as it might apply where performance of the contract is possible but just undesirable, has been rejected by the courts in the United States.

¹¹⁹ Casner, above n 118, at 402.

¹²⁰ *Lloyd v Murphy* 153 P 2d 47 (Cal 1943).

¹²¹ Notwithstanding that principle the Court held the lease in this case was not frustrated because the premises could be used for another purpose. See also *Perry v Champlain Oil Co* 134 A 2d 65 (NH 1957) and *Food Corp. v Hub Bar Bldg Corp* 297 NYS 2d 762 (Sup Ct, Misc 1969).

¹²² For example *Levy v Johnston & Hunt* 224 Ill. App. 300 (1922).

¹²³ Casner, above n 118, at 3.104.

¹²⁴ *Standard Brewing Co v Weil* 129 Md. 487, 99 A. 661 (1916) – a lease of premises for a saloon and restaurant; *Goodman v Sullivan* 94 Ohio. App. 390, 114 N.E.2d 856 (1952) – application for a liquor license refused but tenant still held liable to pay rent on premises leased for the sale of liquor.

¹²⁵ *The Stratford v Seattle Brewing & Malting Co* 94 Wash. 125, 162 P. 31 (1916).

In the United States, the doctrine of frustration of purpose of contract and the doctrine of impracticability have been distinguished in the Restatement (Second) of Contracts.¹²⁶ Under this treatise a contract is defined as “a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognises as a duty”.¹²⁷ At the end of each clause there are comments about the clause and illustrations of how they apply. The two relevant provisions §265 Discharge by Supervening Frustration and §261 Discharge by Supervening Impracticability contain illustrations of situations involving commercial leases. They provide:

§265 Discharge by Supervening Frustration

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

§261 Discharge by Supervening Impracticability

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

The doctrines are closely related and the rules are similar. Discharge by supervening frustration covers the situation where a change in circumstances makes a party's performance of their obligations effectively worthless to the other party. The contract may not be impossible to perform or even difficult to perform.¹²⁸ The key factor is that the reason for the contract no longer exists. There are three requirements for this section to operate. First, the principal purpose for making the contract must have been frustrated. Second, the frustration must be substantial – in other words “so severe that it is not fairly to be regarded as within the risks he assumed under the contract”.¹²⁹ Third, the non-occurrence of the frustrating event must have been a basic assumption on which the

¹²⁶ The Restatement (Second) of Contracts is a legal treatise on the law of the United States. It is not legally binding but carries a great deal of weight because it is a consensus by law professors, judges and lawyers of what the law is or what the law should be.

¹²⁷ Restatement (Second) of Contracts, §1 Contract Defined.

¹²⁸ It has been said that “a contracting party who asserts frustration of purpose as a discharge from duty is seldom asserting impossibility of performance as a defense”; Nehf, above n 117, at 246.

¹²⁹ Nehf, above n 117, at 347.

contract was made. Foreseeability is a factor in this determination; however, even if the event was foreseeable it does not necessarily mean the parties assumed it would occur.

Discharge by supervening impracticability occurs when a supervening event makes the performance of a contract unexpectedly impracticable although the non-occurrence of the event must have been a “basic assumption” on which the parties made the contract. The fact that the event was foreseeable or foreseen does not necessarily mean that its non-occurrence was not a basic assumption. In *Transatlantic Financing Corp v United States*,¹³⁰ the court said “A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost”.¹³¹ The court went on to say that:¹³²

The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community’s interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.

The similarities in the tests for the two doctrines have caused confusion, especially because the type of event giving rise to an assertion of frustration of purpose, impossibility or impracticability can be the same and the courts have not always been careful to distinguish between them. It would appear that the doctrine of impracticability is wider than the doctrine of frustration of purpose because it deals with frustration of the purpose of the contract and economic hardship.¹³³

It has also been suggested¹³⁴ that it is generally tenants who assert frustration because the purpose for leasing the premises may no longer exist but the payment of rent is rarely impossible. Landlords are more likely to assert impossibility or impracticability because their ability to perform their obligations under the lease to provide premises have become impaired or impossible by events that have occurred during the lease, such as the destruction of the premises.

¹³⁰ *Transatlantic Financing Corp v United States* 363 F 2d 312 (DC Cir 1966).

¹³¹ At 315.

¹³² At 315.

¹³³ Mahmoud Reza Firoozmand “Changed Circumstances and Immutability of Contract: a Comparative Analysis of Force Majeure and Related Doctrines” (2007) 8 B.L.I. 161 at 179.

¹³⁴ Nehf, above n 117, at 244.

In summary, landlord and tenant law in the United States has developed differently to that in other countries. In the 19th and early 20th centuries, the law pertaining to commercial leases was similar to England's common law where the lease was governed by the principles of property law. However, throughout the 20th and 21st centuries, the courts have readily applied contractual principles to commercial leases including the doctrine of frustration of purpose.¹³⁵

IV The Doctrine of Frustration and its Application to Leases in New Zealand

The New Zealand courts have followed the lead of overseas jurisdictions in the contractualisation of leases. They have applied contractual remedies to leases.¹³⁶ They have implied terms into a lease in the same way they would for any other contract.¹³⁷ They have also approved the House of Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd*,¹³⁸ that the doctrine of frustration is applicable to leases.¹³⁹ In *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership) (In Liquidation)*,¹⁴⁰ the facts of which are discussed below, Davidson J said "It is settled law that leasehold interests are susceptible to frustration".¹⁴¹

Nevertheless, there have not been any cases in New Zealand in which a lease has been held to be frustrated. An agreement to lease was held to be frustrated in the District Court decision in *Fokerd & Ors v Plastic Retail Ltd & Anor*.¹⁴² But there is an important distinction between a lease and an agreement to lease; the former being capable of

¹³⁵ Jason Brock and Jim Phillips "The Commercial Lease: Property or Contract?" 38(4) *Alta L.Rev* 989 at 1013, 1015.

¹³⁶ *Ingram and Knee and others v Patcroft Properties Ltd* [2011] NZSC 49. In *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247 at 254 Anderson J confirmed that the Contractual Remedies Act 1979 applies to leases.

¹³⁷ GW Hinde *Hinde on Commercial Leases* (LexisNexis, Wellington, 2011) at 4 and note the other examples cited.

¹³⁸ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 22.

¹³⁹ *Gore District Council v Power Co Ltd* [1996] 1 NZLR 58 (HC); *Māori Trustee v Prentice* [1992] 3 NZLR 344 (HC); *GP 96 Ltd v FM Custodians Ltd* (2011) 12 NZCPR 489.

¹⁴⁰ *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)* [2015] NZHC 2647.

¹⁴¹ At [64].

¹⁴² *Fokerd & Ors v Plastic Retail Ltd & Anor* DC Wellington NP1300-95, 15 August 1996.

registration whereby the parties obtain an indefeasible interest in the property,¹⁴³ the latter not.

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*,¹⁴⁴ *Māori Trustee v Prentice*,¹⁴⁵ *GP 96 Ltd v FM Custodians Ltd*¹⁴⁶ and *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership) (In Liquidation)*.¹⁴⁷ In each the lease was held not to be frustrated on the particular facts.

In the first case *Stack Shelf Company Number 16 Limited v Larsen*¹⁴⁸ Fisher J held that a lease could be frustrated although in this case it was not. The landlords were the owners of a commercial building; the tenants ran a dairy business from it. The building was in a dilapidated condition and required repairs. Two years into the lease the local Council required repairs to be completed before it would issue a certificate of registration. Rather than repair the building, the landlord decided to build a new one. Agreement about various matters could not be reached with the tenants and the plans were delayed. The next year the Council, concerned at the delay in rebuilding, required reconstruction to commence within three months. When it had not, the Council issued a demolition order and the building was demolished. The landlord wrote to the tenant terminating the lease. The tenant claimed damages for cancellation of the lease. The landlord argued the lease had been frustrated.

The preliminary point for determination was the basis upon which the lease had come to an end. The relevant clause provided for automatic termination of the lease where “the premises shall be destroyed by fire or otherwise so damaged so as to render the same untenable”.¹⁴⁹ Fisher J was of the opinion that the clause applied and thereby precluded the operation of the doctrine of frustration.¹⁵⁰ However, he went on to discuss the possibility that the circumstances of the demolition may have amounted to frustration. He

¹⁴³ For a discussion on an indefeasible registered interest see Chapter Four.

¹⁴⁴ *Stack Shelf Company Number 16 Limited and Mathers v Larsen* HC Rotorua CP31/90, 6 March 1991.

¹⁴⁵ *Māori Trustee v Prentice*, above n 139.

¹⁴⁶ *GP 96 Ltd v FM Custodians Ltd*, above n 139.

¹⁴⁷ *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)*, above n 140.

¹⁴⁸ *Stack Shelf Company Number 16 Limited and Mathers v Larsen*, above n 144.

¹⁴⁹ At 5; cl 23.

¹⁵⁰ Refer to *GP 96 Ltd v FM Custodians Ltd*, above n 139, which is discussed below, where there was only minor damage to the premises and they could be repaired.

said loss of or damage to a building will not normally be sufficient to frustrate a lease, however, where the only valuable use of the site is the building wholly occupied by the business the doctrine of frustration may apply.¹⁵¹ He went on to say that it is the facts of the individual case that are relevant rather than an assumption that leases can never be frustrated by destruction or damage to a building.¹⁵²

In this case there is a respectable argument that inherent design and construction defects unforeseen by the parties meant that the building had been rendered unsafe, demolition was required by the local authority in circumstances beyond the control of the parties, demolition of the building removed the very subject-matter of the lease, to place the emphasis upon the bare land with or without the building is unrealistic and that the lease is therefore discharged by frustration.

What is important to note from this case is that, had the lease been silent, it is likely Fisher J would have found the lease to be frustrated.

The second case where the question of a frustrated lease has arisen is *Māori Trustee v Prentice*.¹⁵³ Williams J followed the English authorities¹⁵⁴ and accepted the doctrine of frustration can apply to leases. In this case, the Māori Trustee¹⁵⁵ leased farm land to the defendant for a term of 50 years. Unforeseen events substantially increased the government valuation of the land, which then caused the rent to increase by such an extent that it made the farming operation unviable. The defendant claimed the lease was frustrated. The important undisputed fact was that both parties entered the lease knowing it contained the rent review clause. The defendant, with legal advice, had taken on a commercial venture and had knowingly run the risk that the rent could be increased. Williams J held the lease was not frustrated. To do so in these circumstances would be in effect to rewrite the contract, which he was not prepared to do.

¹⁵¹ At 5.

¹⁵² At 5-6.

¹⁵³ *Māori Trustee v Prentice* above n 139.

¹⁵⁴ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* above n 24 and *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22.

¹⁵⁵ By order of the Māori Land Court the property was vested in the Māori Trustee to be held upon trust for the benefit of the owner with the Māori Trustee having the power to lease the property for a term of 50 years.

The last two cases concerned leases of buildings in Christchurch that were affected by the earthquakes. In *GP 96 Ltd v FM Custodians Ltd*,¹⁵⁶ Chisholm J held that the doctrine of frustration did not apply in the circumstances because the terms of the lease were applicable.¹⁵⁷ This case was an application for an interim injunction preventing the defendant from taking further steps in the purported termination of the lease after the building sustained damage in the earthquakes. The building was also inaccessible owing to its location within a cordon set up around the central business district (CBD) of Christchurch.¹⁵⁸ One of the defendant's arguments was that the lease was frustrated. The lease was for a term of six years and contained two rights of renewal, each for a further six years.

This case is discussed in more detail in Chapter Five, in relation to the meaning of the term "untenantable" in the lease and whether an inaccessible building comes within this meaning. However, what is important at this point, is that Chisholm J accepted the doctrine of frustration applies to leases. He did qualify this, however, by saying it would rarely be invoked in this context.¹⁵⁹

The building suffered minor cosmetic damage (which meant the damage provisions of the lease applied) and the repairs were expected to take approximately 16 weeks. The Judge considered this only a temporary or transitory disruption to the lease which seems a reasonable conclusion to draw. However, the important point is that once the repairs were completed, the ongoing problem was one of access because the building was behind the cordon. It was this problem the lease did not cover. It was this problem that arguably frustrated the lease.

At the time of the hearing the cordon was still in place and there was no publicised timeframe for its removal. Therefore, Chisholm J said he was unable to properly weigh the issue. However, he did suggest that restricted access for a further seven months on top of the interruption already experienced he would still consider a temporary delay in light of the term of the lease.¹⁶⁰ The term of the lease was six years but the judge claimed the rights

¹⁵⁶ *GP 96 Ltd v FM Custodians Ltd* above n 139.

¹⁵⁷ At [43]. Chisholm J determined that cl 26 of the ADLS lease sufficiently covered the earthquake-related lease issues. There is a full discussion of this clause in Chapter Five.

¹⁵⁸ Refer to Chapter Six for detailed information about the earthquakes and their consequences, including the cordon that was set up around the central business district of Christchurch.

¹⁵⁹ At [42].

¹⁶⁰ At [40].

of renewal were included in calculating the term and therefore the remaining time left to run was over 16 years. On that basis the lease would not be frustrated. The problems with this part of the judgment are dealt with in Chapter Five, where the case is discussed in more detail; suffice to say it seems Chisholm J's propositions were based on reasons of policy rather than the law. He was concerned that if he found the lease to be frustrated it might open the floodgates for claims from a number of landlords and tenants of inaccessible buildings after the earthquakes.¹⁶¹

In *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)*,¹⁶² the facts are detailed as they involve receivers and an insurance claim, however for the purposes of the argument on frustration the following sets the scene. The Roman Catholic Bishop of the Diocese of Christchurch was the registered tenant of unit titles which contained the Holy Cross Chapel ("the Chapel"), for a term of 999 years at a nominal annual rent.¹⁶³ The defendant company was the landlord and owner of the property. The Chapel was damaged in the Canterbury earthquakes. The Crown wished to purchase the property, including the Chapel, for land on which to build the new Christchurch Convention Centre.

The landlord argued the lease had been frustrated because the issuing of the notice of compulsory acquisition led to an inability to obtain permits and consents to repair the Chapel which rendered performance of the lease impossible or radically different. The landlord also argued the main purpose of the lease, which was to provide the Bishop with quiet enjoyment of a Chapel, had been defeated because the Chapel could not be repaired. The Bishop sought a declaration that his leasehold interest subsisted until the land and buildings were purchased by the Crown.¹⁶⁴

Davidson J held that the lease had not been frustrated. He rejected the suggestion that the purpose of the lease had been frustrated because the provision of the Chapel was only one of the purposes of the lease, not the entire purpose. The purpose of the lease was an interest

¹⁶¹ At [36].

¹⁶² *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)* above n 140.

¹⁶³ The reason for the nominal rent was that the Bishop originally owned the property. He then entered an agreement with a company (IHL Holdings) whereby he agreed to transfer the freehold title in return for the grant of a leasehold interest for a term of 999 years at the annual rent of \$1 and the company would also build a new chapel for the Bishop.

¹⁶⁴ This area of land was to be acquired by the Crown for the new Christchurch Convention Centre.

in property and, therefore, as long as the land remained in existence, it was not frustrated.¹⁶⁵ Furthermore, Davidson J did not consider that it was in the interests of justice that the lease be frustrated.¹⁶⁶

Although the lease in this case was not held to be frustrated, Davidson J began his discussion on the law on frustration as it relates to leases by saying it is settled law that leases can be frustrated,¹⁶⁷ following the House of Lords decision in *National Carriers Ltd v Panalpina (Northern) Ltd*.¹⁶⁸ He went on to say:¹⁶⁹

While leases endow their owner with an estate in land, contractual principles apply. In principle therefore, the doctrine of frustration applies to leases just as it does to other contracts. In practice however, the application of the doctrine to leases reflects the nature of the particular leasehold interest.

This case is interesting in that it is different from the usual commercial leases that are used for office space, retail, hospitality and other businesses in the CBD. This lease was for a lengthy term which suggested it was not just the building that was important, but the tenant's interest in the land. This was an influential factor in the Court's decision. Davidson J summed up by saying:¹⁷⁰

Perpetual leases will not readily be found to have been frustrated and provided that there remains property to which the lease can attach, particularly where such has value, the interest will subsist.

The Court reached the right decision. In any long lease the tenant's interest in the property must be the purpose of the lease. Over 999 years it is almost inevitable the buildings upon the land will age, be demolished and new ones rebuilt. The land always remains in existence and can always be used for some purpose. Compare this to a short lease of three to six years. Here, the tenant's purpose of having a lease is to use the building; if the building is destroyed the lease is useless.

¹⁶⁵ At [84].

¹⁶⁶ There were other arguments about the compulsory acquisition payment which would not have been shared with the Bishop had the lease been held to be frustrated.

¹⁶⁷ At [64].

¹⁶⁸ *National Carriers Ltd v Panalpina (Northern) Ltd* above n 22.

¹⁶⁹ At [64].

¹⁷⁰ At [88].

The New Zealand courts have clearly accepted that the doctrine of frustration applies to leases. The decision of the Supreme Court in *Planet Kids Ltd v Auckland Council*¹⁷¹ has provided guidelines about the application of the doctrine to general contracts. However, there is still a lack of case law on the specific application of the doctrine to leases, which are different from ordinary contracts because they vest an interest in land. The law will continue to develop on a case by case basis but is unlikely to happen quickly as there have been surprisingly few cases on frustrated leases arising out of the earthquakes.¹⁷²

As seen in Chapter Two, New Zealand has the Frustrated Contracts Act 1944 (NZ). In 1944, when the Frustrated Contracts Bill was initially debated, it appears that Parliament had no expectation the legislation would apply to leases. In Mr Oram's opening address to Parliament on the Frustrated Contracts Bill, he said "I presume that this Bill does not apply to leases and tenancies".¹⁷³ This is not surprising though because at that time the case law supported the view that the doctrine of frustration did not apply to leases.

The Frustrated Contracts Act 1944 was not drafted with the intention that it apply to leases. It therefore needs to be reviewed if it is to be applicable to leases in light of the changes in the law that have occurred over the past fifty years, such as the move to contractualise leases and, as a consequence, the fact that leases can now be frustrated.¹⁷⁴

¹⁷¹ *Planet Kids Ltd v Auckland Council* [2013] NZSC 147.

¹⁷² The reason for few cases arising out of the earthquakes might be because tenants and landlords do not want to litigate their disputes. Refer to Chapters Seven and Eight for information from the empirical research on how landlords and tenants resolved their issues.

¹⁷³ (23 November 1944) 267 NZPD 293 at 297.

¹⁷⁴ Also note there is the new Contract and Commercial Law Bill, referred to in Chapter Two, that is set to modernise the Frustrated Contracts Act 1944, but not make any substantive changes.

CHAPTER FOUR

REGISTERED LEASES

I Introduction

The effect of the application of the doctrine of frustration is to terminate the contract. A problem arises however, when the frustrated contract is a lease because a lease is both a contract and an interest in land.¹ This interest can be registered or unregistered. As seen in Chapter Three, New Zealand courts have accepted the doctrine of frustration applies to leases. When the doctrine is applied, it operates to terminate the lease-contract. The question is, how does it affect the registered interest? Neither the courts nor commentators have drawn a distinction between leases that are registered and those that are not.

The action of cancelling an unregistered lease brings the contract to an end. It also has the effect of terminating the estate in the land.² However, the position is not as clear for a registered lease. If the doctrine of frustration is applied to end a registered lease, the contract is terminated but the registered legal estate still remains.

The purpose of this chapter is to examine the application of the doctrine of frustration to leases that are registered. The chapter provides a brief overview of the Torrens system of land registration in New Zealand. It then looks at registration of leases and the reasons why leases are not generally registered. It concludes by exposing two problems that affect landlords and tenants; first, there is uncertainty about whether the doctrine of frustration can apply to a registered lease. Second, if it does not apply, tenants who rely on registration to protect their leasehold interest will not be able to use the doctrine and thus lose a remedy that would have been open to them but for registration.

¹ Refer to Chapter Three where leases are discussed.

² GW Hinde and DW McMorland *Land Law in New Zealand* (online edition, LexisNexis, Wellington).

II *The Torrens System of Land Registration*

New Zealand operates under the Torrens system of land registration, as do a number of other Commonwealth countries.³ It was originally introduced to New Zealand in the Land Transfer Act 1870. The current statute is the Land Transfer Act 1952.⁴ In *Fels v Knowles*, Edwards J expressed what is fundamental about it:⁵

The cardinal principle of the statute is that the register is everything, and that, except in cases of actual fraud on the part of the person dealing with the registered proprietor, such person, upon registration of the title under which he takes from the registered proprietor, has an indefeasible title against all the world.

In a review of the Land Transfer Act 1952 (“the LTA”) the Law Commission confirmed the aims of the Torrens system.⁶ One aim is that title should be, as far as possible, indefeasible. Another aim is to ensure the register should reflect as accurately as possible the true state of title to land with all encumbrances, so that “persons who propose to deal with land can discover all the facts relative to the title”.⁷ This is known as the mirror principle.

Central to the Torrens system is the principle that, upon registration of an instrument, a party obtains an indefeasible interest in the land. Section 62 LTA⁸ provides that the estate of the registered proprietor is paramount to all estates or interests, subject to any encumbrances, liens, estates or interests notified on the register, except in the case of fraud.⁹ Once registered, the proprietor obtains an immediate indefeasible interest¹⁰ that has the effect of protecting the registered proprietor¹¹ against adverse claims to the land and against interests that have not been registered.

³ Other countries that also operate under the Torrens system of land registration are Australia and parts of Canada and Malaysia.

⁴ There is also the new Land Transfer Bill 2016, which is discussed below.

⁵ *Fels v Knowles* (1906) 26 NZLR 604 at 620. Stout CJ was referring to the Land Transfer Act 1885 but the same principles of the Torrens system are found in the Land Transfer Act 1952.

⁶ Law Commission *Review of the Land Transfer Act 1952* (NZLC IP10, 2008) at 18.

⁷ At 18.

⁸ A similar provision is contained in the new Land Transfer Bill 2016, cl 51. The Bill is discussed below.

⁹ There are also other exceptions to the principle of an indefeasible title which are discussed at page 94.

¹⁰ *Frazer v Walker* [1967] NZLR 1069 (PC) at 1079.

¹¹ The Land Transfer Act 1952, s 2 defines a proprietor as “any person seised or possessed of any estate or interest in land, at law or in equity, in possession or expectancy”.

Under the LTA leases can be registered.¹² This provides the lessee with an indefeasible interest in the land, as owner of the leasehold estate.¹³ The lessor has an indefeasible interest as owner of the fee simple. A lease instrument that contains certain prescribed information¹⁴ and is executed by both the registered proprietor of the fee simple and the lessee, may be registered on the computer register. A lease for any length of term may be registered. If the land is subject to a mortgage, the mortgagee's consent to the lease must be obtained, however, it is important to note that should the mortgagee exercise its power of sale,¹⁵ the estate passes to a new purchaser free from any estate or interest.¹⁶ This is significant because it allows a mortgagee to disregard any leasehold interest in the land except in cases where the lease has priority over the mortgage or where consent given by the mortgagee is binding on the mortgagee. The Registrar may issue a title to the lessee as registered proprietor of his or her leasehold interest.¹⁷ When the lease is determined other than by effluxion of time, the title is cancelled by the Registrar.¹⁸

The Land Transfer Bill 2016 ("LTB") was introduced to Parliament on 11 February 2016 and is currently with the Select Committee.¹⁹ The provisions applicable to leases are similar in effect to those under the LTA. Like the LTA, a lease of any length may be registered under the LTB.²⁰

A lessee benefits from having a registered lease because it provides protection from adverse claims. Registration is also an advantage because it is notice to the world of the lessee's

¹² Section 115. The Land Transfer Act 1952 uses the terms lessor and lessee to describe the parties to a registered lease. This terminology is adopted in this thesis to differentiate them from the parties to an unregistered lease who are termed landlords and tenants.

¹³ The fact a lease is both a contract and an interest in land is a difference to be considered when the doctrine of frustration is being applied to a lease rather than a contract.

¹⁴ The lease instrument must contain the information required under s 115 Land Transfer Act 1952 including the land or estate or interest to be leased, the lessee, the term, the rent and the terms and conditions of the lease.

¹⁵ Section 115(4). Also refer to the Land Transfer Act 1952, s 119 which states the lease is not binding on the mortgagee without consent.

¹⁶ Section 105. See also Land Transfer Act 1952, s 119 which states that no lease of mortgaged or encumbered land shall be binding upon the mortgagee except so far as the mortgagee has consented thereto.

¹⁷ Section 66(1).

¹⁸ Section 66(3).

¹⁹ The Land Transfer Bill 2016 had its first reading on 15 March 2016.

²⁰ Clause 91.

interest in the property and any potential dealings with the property must be brought to his or her attention.²¹

Despite being considered a burden on the lessor's title, registration of a lease also benefits the lessor. Section 63(1) LTA provides that a registered proprietor of a registered interest in land (for example, a lessee) is protected from all actions for possession or recovery of that land. However, there are exceptions which include a lessee who is in default. In this situation the LTA gives the lessor a statutory remedy to recover the land from the lessee and therefore defeat the lessee's indefeasible interest. A registered lease also benefits a lessor in other ways; one, it is more difficult for a lessee to deny the existence of a lease if it is recorded on the register and two, a lessor's willingness to register the lessee's interest in the land, thereby affording the lessee more protection, could attract a lessee who is willing to enter a lease for a longer term.

Nevertheless, a registered lease inhibits a lessor's otherwise clear title. It restricts his or her ability to deal easily with the land. When a lease is registered any variations, renewals, cancellations or other dealings must be noted on the register and any mortgagee's consent obtained.²² This could create a lot of administrative work, especially if a lessor has multiple leases and the leases are for shorter terms.²³ This, in fact, may be a reason why the standard form leases contain clauses absolving landlords of any responsibility to register their leases.²⁴

III Pre-earthquake registration of leases in Christchurch and why they were rare

Although the LTA provides for registration of leases, in practice few are registered. There is no legal requirement to register a lease. An investigation into the number of leases that are registered in Christchurch has revealed only 51. This is surprising given that there would have been thousands of leases within the CBD, prior to the earthquakes. The following map shows the registered leases within the area known as the "Four Avenues" of the city.

²¹ For example, if the lessor should sell the property, a third party purchaser will have notice of a registered lease when he or she searches the Computer Register.

²² For example, s 116 Land Transfer Act 1952 sets out the procedure for any variation to the lease.

²³ The tenant participants in this research had leases with terms of between three and six years, refer to Chapter Seven.

²⁴ Refer to the discussion on the standard form leases in Chapter Five.

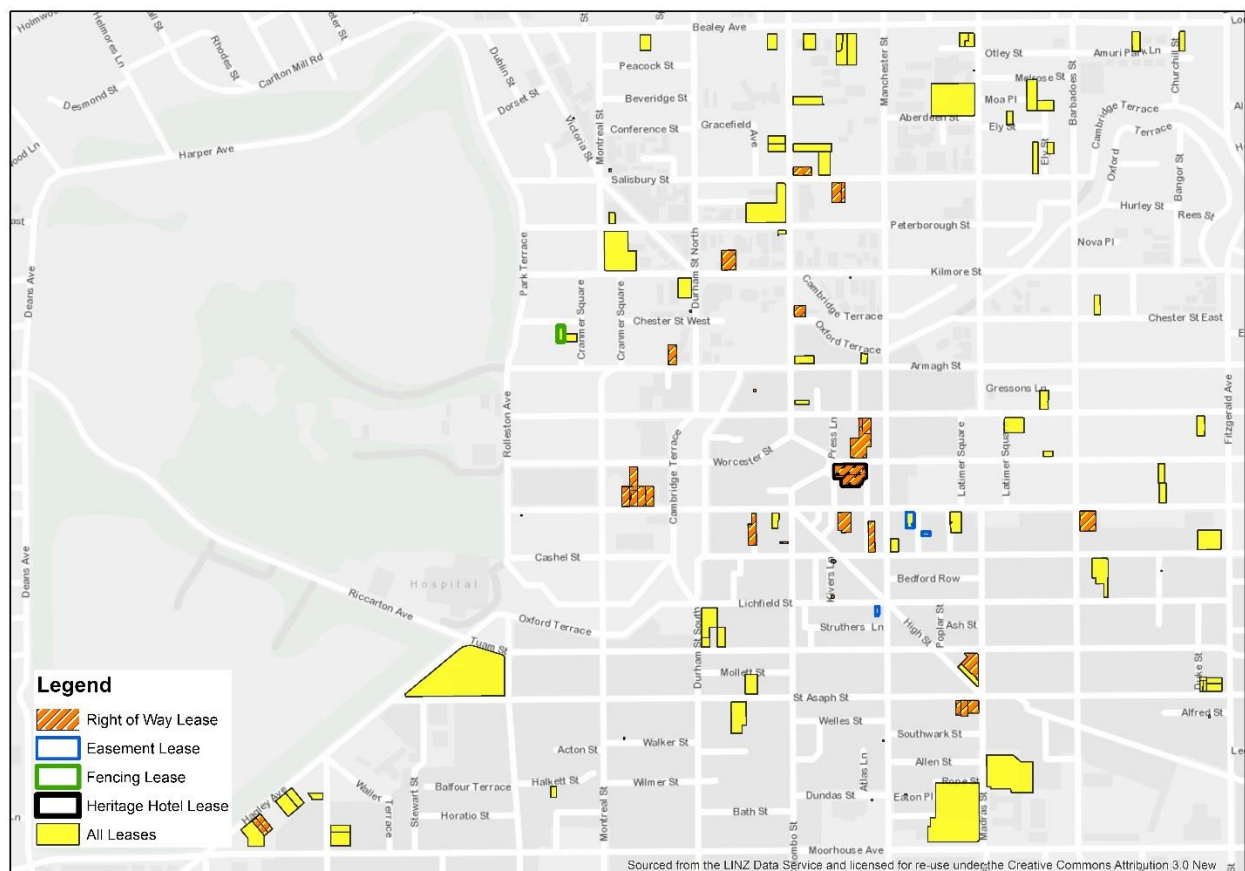


Figure 1: Registered leases in Christchurch²⁵

²⁵ This map was produced by Vicinity Solutions, a geospatial consulting firm. The methodology used to produce this map is set out in Appendix E. All registered leases are yellow boxes with black outline. The key also shows the registered leases that contain either a “right of way”, “fencing” or other easement contained in their memorial. There are also Heritage Hotel registered leases.

Of the leases shown on the map, there were vacant lots, motels and residential apartments.²⁶ The largest group were motels.

There are a number of possible reasons why commercial leases are not registered. First, the terms of a registered lease cannot be varied without carrying out the proper process to make amendments to a registered document; for example, registering a variation to the lease. Second, in multi-storey buildings with a large number of leases, a landlord may not want the administrative difficulties and expense of registering all leases and any changes to those leases. However, the most compelling reason why leases are not registered is that the standard form leases commonly used throughout New Zealand discourage registration.²⁷ The Auckland District Law Society lease (ADLS lease)²⁸ provides:²⁹

The Landlord shall not be required to do any act or thing to enable this lease to be registered or be required to obtain the consent of any mortgagee of the property and the tenant will not register a caveat in respect of the Tenant's interest under this lease.

The other two standard form leases less frequently used are the Property Council of New Zealand Office lease 2010 and the older BOMA³⁰ Office lease 1986.³¹ They have similar provisions to the ADLS lease in that the landlord is not required to register. The Property Council of New Zealand Office lease 2010, under the heading "Landlord not required to register" provides:³²

²⁶ Using specific search strings 51 registered leases were revealed from the database. It was difficult to tell from the map whether these were commercial leases and therefore the author drove past as many of the properties as possible in an attempt to determine the type of property on the map. A number of properties were vacant lots, the buildings having been demolished since the earthquakes, while others were difficult to view. However the largest group of buildings located were motels.

²⁷ Refer to Chapter Five for information on the standard form commercial leases.

²⁸ ADLS lease (2008, 5th edition) or earlier editions.

²⁹ Auckland District Law Society lease (2008, 5th edition) cl 41.1. This same clause is also contained in the most recent version of the lease (2012, 6th edition). The author made enquiries of the Auckland District Law Society to discover why the clause is in the lease. The response was that the clauses in the lease follow practice and that is what the practice has always been. There was no definitive reason other than that is how it has always been done.

³⁰ BOMA (an acronym for the Building Owners and Managers Association) which has now changed to the Property Council of New Zealand.

³¹ The BOMA lease has been overtaken by the Property Council of New Zealand Office lease (2010) although there may still be some BOMA leases in force.

³² Property Council of New Zealand Office lease (2010), cl 13.5.

The Landlord will not be obliged to do any act or thing or grant any consent or co-operate with the Tenant to register this Lease under the Land Transfer Act 1952.

The BOMA Office lease 1986 effectively prohibits the tenant from asking the landlord to provide a registrable lease. Under the heading “No Registrable Lease” it provides:³³

The Tenant shall not at any time call upon the Landlord to execute a registrable Memorandum of Lease of the Premises.

An added problem for tenants with an ADLS or BOMA Office lease is that they are also prohibited from registering a caveat against the property.³⁴

The Property Law Act 2007 deals with “no registration” clauses in leases.³⁵ It provides that leases containing these clauses are to be treated for all purposes as creating equitable interests in land.³⁶ However, the court cannot order registration of the lease.³⁷

In effect these “no registration” clauses mean a tenant is unable to protect his or her leasehold interest by registration or caveat unless the landlord consents to it.

The practice of not registering leases seems to be the antithesis to the principles of the Torrens system. The register has a number of purposes, one of which is to provide a party, in this case a lessee, with an indefeasible interest upon registration. Another purpose is to provide notice to the world of a lessee’s interest in land. Both protect the lessee from adverse claims. Failing to register leases deprives tenants of the protection the Torrens system has been set up to provide. The right to refuse consent also adds to the landlord’s position of power over the tenant. These issues could be addressed by a legislative

³³ BOMA (1986), cl 11.3.

³⁴ ADLS lease (2008, 5th edition) cl 41.1 and BOMA lease (1986) cl 11.4 “*Tenant not to Caveat* The Tenant shall not register or cause to be registered any caveat against the title to the Land.”

³⁵ Section 54. This section also applies to the other instruments listed including a mortgage over land, an easement, a *profit à prendre*, or a contract for the grant of an easement or a *profit à prendre*. A “no registration” clause is defined in s 54 (4).

³⁶ Where in the absence of a no registration clause it would create an equitable interest in land capable of being enforced under the doctrine in *Walsh v Lonsdale* (1882) 21 Ch D 9; Property Law Act 2007, s 54(1)(c).

³⁷ Section 54(2)(b).

requirement to register leases,³⁸ although there is the likelihood that the costs of registration would fall on the tenant which may be unwanted.

IV Cancellation and Termination of Leases

Under the LTA there are two situations in which the Registrar can remove a registered lease from the register. The first is when a registered lease is surrendered and a surrender instrument is registered and recorded in the register.³⁹ The second is when a landlord re-enters leasehold premises and recovers possession by process of law or by the exercise of any power of re-entry in the lease. Here the Registrar can notify the re-entry on the register upon proof of the landlord's actions.⁴⁰

However, there are other ways a lease can be cancelled. The Property Law Act 2007 provides a statutory code for cancellation of leases for landlords.⁴¹ The Contractual Remedies Act 1979 (and any provision in the lease) govern cancellation by tenants.⁴² In a situation where the lease has been cancelled in accordance with the legislation, the lease contract may have come to an end but the registered interest remains. In *Westpac Merchant Finance Ltd v Winstone Industries Ltd*,⁴³ a case about whether the Contractual Remedies Act 1979 was applicable to leases,⁴⁴ Anderson J then went on to say:⁴⁵

In the case of a registered lease the cancellation or termination of the contract giving rise to the legal estate cannot, of course, per se, terminate the legal estate but this is not to say that as between the parties the contractual obligations remain in existence. A lessee under a registered lease would hold as a resulting trustee for the lessor in the event of a valid cancellation.

³⁸ In Chapter Nine, the reforms chapter, it is proposed that a Commercial Tenancies Act be enacted. A requirement that any lease for a term of three years or more must be registered could be included in this new legislation.

³⁹ Section 120.

⁴⁰ Section 121(1). If the re-entry and recovery of possession is by formal process of law, the notice of application must be served on all persons interested under the lease or notified by publication before an entry is made on the register; Land Transfer Act 1952, s 121(1).

⁴¹ Property Law Act 2007, s 243. It provides that a lease may only be cancelled in accordance with the specific provisions of the Act, which are ss 244-264.

⁴² *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247.

⁴³ *Westpac Merchant Finance Ltd v Winstone Industries Ltd* above n 42.

⁴⁴ Anderson J held the Contractual Remedies Act 1979 is applicable to leases; at 255.

⁴⁵ At 255.

In other words, although the lease contract is terminated and the parties have no further rights or obligations under the lease, the registered interest remains on the register until it is removed by surrender or court order, but until that time, the tenant holds it as a resulting trustee for the landlord.

V Does the Doctrine of Frustration apply to Registered Leases?

Despite the fact that in practice few leases are registered, the ability to register them still exists,⁴⁶ and some leases will continue to be registered. Registration, though, has the potential to pose problems for those wishing to avail themselves of the common law remedy of frustration.⁴⁷ A registered interest prevents the doctrine from being applied because to do so would be to attack the indefeasible interest held by the other party.

There are exceptions to indefeasibility which will defeat a registered interest.⁴⁸ The main exception is fraud, which is usually committed against a previous registered proprietor. A registered interest obtained through fraud will be defeated. Another way to defeat a registered interest is to bring a claim *in personam*. Such a claim is brought where there has been unconscionable conduct on the part of the registered proprietor that affects another party's interest in the property.⁴⁹ For example, a registered proprietor transfers his or her home into a trust to defeat creditors who had relied on the property as security for their debt.⁵⁰ However, neither of these exceptions to indefeasibility apply in the case of a lease that is frustrated.

⁴⁶ The Land Transfer Act 1952, s 115 provides for the registration of leases.

⁴⁷ This may also pose a problem for other countries that operate under the Torrens system of registration such as Australia, some provinces in Canada and Malaysia, although they may have different rules.

⁴⁸ See Bennion and others *New Zealand Land Law* (online ed, Brookers Ltd, Wellington) at LTR6 and LTR9. It is outside the scope of this thesis to delve into the exceptions to the principle of indefeasibility except to alert the reader to their existence.

⁴⁹ There are three factors that must be met to bring a successful claim *in personam* and these are discussed in detail in Bennion above n 48, at LTR10. It is outside the scope of this thesis to detail the *in personam* claim except to say that the elements of the claim are not met because there must be a cause of action. The doctrine of frustration is a rule or principle of law, not a cause of action that could be relied upon for a claim *in personam*.

⁵⁰ *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433.

It appears that there is a gap in the law. Landlords and tenants with registered leases have no remedy in a situation where the doctrine of frustration might otherwise have applied.⁵¹ An example to illustrate the problem, is the situation of one tenant after the Canterbury earthquakes. The tenant leased a shop in a block of shops on a busy street. After the September 2010 earthquake all of the shops in the block were badly damaged except the one leased by this tenant. She wanted to stay and continue to operate her business out of the shop because hers was undamaged. The landlord wanted her to leave because he wanted to demolish the block of shops and build new premises. In this case the lease was unregistered. However, had it been registered, could the tenant have stood behind her indefeasible interest and refused to leave? If the landlord could not apply the doctrine of frustration to terminate the lease in such circumstances, this situation would have left him with only one undamaged shop from which he could receive rent and the rest of the block rendered useless if it could not be repaired. This situation could have had serious financial implications for the landlord.

There are two possible answers. The first is that a registered lease cannot be frustrated because the effect of frustration only applies to the lease contract and cannot defeat the indefeasible registered interest. The second is that the application of the doctrine terminates the lease, which, in turn, automatically ends the registered interest because the lease that had created the interest, is no longer in existence. In the second situation, Anderson J said in *Westpac Merchant Finance Ltd v Winstone Industries Ltd*,⁵² the lease contract would come to an end and the registered legal estate would be held on trust by the tenant for the landlord until there was a valid cancellation and the interest could be removed from the register, such as at the end of the term of the lease.

Although the question of whether the doctrine of frustration applies to a registered lease is not currently a major concern to landlords and tenants in New Zealand because most leases are unregistered, it may become an issue if there is any change in the law requiring leases to be registered. It may be a problem in any country that operates under the Torrens system of land registration. It is an issue that needs to be addressed but there does not appear to be a simple solution.

⁵¹ There could be a potential claim in tort, but further investigation into this possibility is outside the scope of this thesis.

⁵² *Westpac Merchant Finance Ltd v Winstone Industries Ltd* above n 42, at 255.

CHAPTER FIVE

RELEVANT LEASES AND LEGISLATION

I Introduction

The doctrine of frustration will only apply where the lease does not provide for the event that has made further performance impossible.¹ The general rule is that the terms of the lease are paramount. However, the courts are careful not to exclude the application of a doctrine that has been created to provide a fair resolution to exceptional situations. As such they have developed some qualifications to the general rule.² First, the terms of the lease must *specifically* cover the situation that has occurred. Second, the more disastrous the supervening event, the clearer the provision must be for it to apply. If the lease has no provision, or there is any doubt about whether the provision applies, it is then open to the court to consider whether the doctrine of frustration is applicable.

There are two standard form commercial leases commonly used throughout New Zealand. These were used by landlords and tenants in Christchurch at the time of the earthquakes.³ They contain provisions that apply when a building is destroyed or damaged. The clauses governing total and partial destruction use the term “untenantable” to determine whether the lease can be terminated. If the building is untenantable the lease will terminate; if it is not, the lease remains in force.⁴ In order to decide whether their lease has terminated after the earthquakes, landlords and tenants had to determine whether their building was untenantable. What, then, is the meaning of “untenantable”? And, is a building that is inaccessible, untenantable? The leases do not define the term. Case law has provided some guidance as to its meaning but there is no definitive test.

If an inaccessible building comes within the definition and test for “untenantable” then the lease governs the situation and will terminate. There is no need for the application of the doctrine of frustration.

¹ This point was made in Chapter Two.

² These qualifications were referred to in Chapter Two.

³ The two standard form commercial leases in use were the Auckland District Law Society lease and the Property Council of New Zealand Office lease which are discussed in detail in Part II of this Chapter.

⁴ ADLS lease (2008, 5th edition) cls 26 and 27; Property Council Office lease (1986) cl 7.1.

If an inaccessible building does not come within the definition of “untenantable” and the lease does not cover the situation, the next enquiry is whether there is legislation that does. The Property Law Act 2007, and its predecessor the Property Law Act 1952 (Repealed), applies to commercial leases by implying certain covenants where the lease has made no provision.

This chapter looks at the standard form commercial leases in use at the time of the earthquakes and the applicable property law legislation, to discover whether any provision was made for the situation of an inaccessible building. This analysis includes an investigation into the meaning of the term “untenantable” as determined by case law from New Zealand and overseas.

If the leases do not specifically cover an inaccessible building or there is any doubt about whether they apply, and if the legislation does not have provision either, there is nothing to preclude the doctrine of frustration from applying.

II The Standard Form Commercial Leases in use at the time of the Earthquakes

The two standard form commercial leases in use prior to the first earthquake on 4th September 2010⁵ were the Auckland District Law Society lease (2008, 5th edition) (“ADLS lease”) and the Property Council of New Zealand Standard Office lease (1986)⁶ (“Property Council Office lease”) or earlier editions.⁷ Both leases contain provisions that cover total or partial destruction of a building.

A Total Destruction of a Commercial Building

The ADLS lease provides for total destruction:⁸

⁵ Detailed information on the earthquakes is in Chapter Six.

⁶ This lease is commonly referred to as the “BOMA” lease, BOMA being an acronym for Building Owners & Managers Association which is now the Property Council of New Zealand.

⁷ New editions of these leases have since been released with changes to them prompted by the earthquakes. They are the ADLS lease (2012, 6th edition) and the Property Council Office lease (April 2013) which are discussed in more detail in Chapter Eight.

⁸ ADLS lease (2008, 5th edition).

Total Destruction

26.1 If the premises or any portion of the building of which the premises may form part shall be destroyed or so damaged

- (a) as to render the premises untenable then the term shall at once terminate; or
- (b) in the reasonable opinion of the Landlord as to require demolition or reconstruction, then the Landlord may within 3 months of the date of damage give the Tenant 20 working days notice to terminate and a fair proportion of the rent and outgoings shall cease to be payable as from the date of damage.

Any termination pursuant to this clause shall be without prejudice to the rights of either party against the other.

If the building is destroyed or so damaged as to be “untenable” then the lease will terminate at once. “At once” is likely to mean the date of the event that caused the building to be destroyed or damaged. It can also be terminated if the landlord believes the building should be demolished or reconstructed. In these circumstances the lease will terminate upon notice being given to the tenant.

The Property Council Office lease provides:⁹

Total Destruction

7.1 If the Premises are totally destroyed or so damaged as to be rendered totally untenable or unfit for use or if the Building is totally destroyed or any part or parts thereof become substantially unfit for use and if repair, rebuilding or reinstatement thereof is impracticable or undesirable or uneconomic in the opinion of the Lessor then this Lease and the term hereby created shall absolutely cease and determine as from the date of such destruction or damage but without releasing the Lessee from liability for rent and other moneys up to that date or for any previous breach of the provisions of this Lease.

Under this clause the lease can be terminated when a building is destroyed or damaged so that it is totally “untenable” or “unfit for use”.¹⁰ The use of two terms to describe the

⁹ Property Council Office lease (1986).

¹⁰ The lease can also be terminated by the landlord if repair, rebuilding or reinstatement is impracticable, undesirable or uneconomic, Property Council Office lease (1986), cl 7.1.

situation and the use of “or” suggests the terms have different meanings. These will be considered later in the chapter.¹¹

There are two issues that arise from these clauses: determining the date the lease terminated and the meaning of “untenantable”. In relation to the first issue both leases state they terminate at the date of the destruction or damage. In most cases this will be clear. However, there may be cases, as happened in Christchurch, where it is difficult to ascertain the damage a building has sustained owing to access issues or a general lack of resources to complete the required assessments. If it takes a while to determine the extent of the damage, it may be some time after the date of the event that it is known the building is untenantable and the lease has actually terminated. This delay could be detrimental to the parties, particularly tenants. There may be a period when the parties are left in doubt about whether their lease is going to terminate, which, in turn, could impact on the decisions that need to be made about alternative premises and how the business is to be continued in the aftermath of the disaster.

The second issue is that the standard form leases use the word “untenantable” as the test for determining whether the lease will terminate. The leases do not define “untenantable” and the case law has not provided a definitive test for determining its meaning. This issue is considered in more detail in Part B below.

B Partial Destruction of a Commercial Building

Where a building has been damaged, the standard form leases make provision for what will happen during the repair or reinstatement process.

In the ADLS lease, cl 27 covers partial destruction. The relevant parts of this clause are:¹²

Partial Destruction

- 27.1 If the premises or any portion of the building of which the premises may form part shall be damaged but not so as to render the premises untenantable and:

¹¹ The meanings of these terms are considered in Part B.

¹² ADLS lease (2008, 5th edition) cl 27 which is set out in full in Appendix B.

- (a) the Landlord's policy or policies of insurance shall not have been invalidated or payment of the policy moneys refused in consequence of some act or default of the Tenant, and
- (b) all the necessary permits and consents are obtainable, the Landlord shall with all reasonable speed expend all the insurance moneys received by the Landlord in respect of such damage towards repairing such damage or reinstating the premises or the building but the Landlord shall not be liable to expend any sum of money greater than the amount of the insurance money received.

27.3 Until the completion of the repairs or reinstatement a fair proportion of the rent and outgoings shall cease to be payable as from the date of damage.

There are two requirements that need to be met for this provision to apply: the building must be *damaged* and the building must *not* be untenable.¹³

The Property Council Office lease also covers partial destruction. The relevant parts of cl 7.2 provide:¹⁴

Partial Destruction

- 7.2 Subject as is hereinafter provided, if the Premises or any part thereof or the access thereto becomes substantially inaccessible or at any time during the term hereof is damaged or partially destroyed but so that the same may be repaired and reinstated without having to be wholly rebuilt then:
- 7.2.1 provided the Lessor is not prevented by any Act ordinance regulation or by-law then in force or by the requirements of any mortgagee from so doing the Lessor shall with all convenient speed repair and reinstate the Premises or restore such access BUT in no event shall the Lessor be bound to expend more on restoration than it receives from its insurance policies; and
 - 7.2.2 so long as no policy or policies of insurance effected on the Building shall have been vitiated or payment of the policy moneys refused in consequence of some act or default of the Lessee then a fair and just proportion (as the Lessor shall determine) of the rent and Operating Expenses hereby reserved according to the damage sustained shall as from the date of such damage or partial

¹³ If the building is untenable then the provisions relating to total destruction apply and the lease is terminated.

¹⁴ Property Council Office lease (1986). Clause 7.2 is set out in full in Appendix B.

destruction be abated until the Premises shall have been repaired and reinstated or made reasonably fit for occupation; and ...

These provisions apply in two situations. The first where the premises have become substantially inaccessible. The second where the premises are damaged but can be repaired or reinstated without having to be completely rebuilt.

The Property Council Office lease provisions covering partial destruction differ from those in the ADLS lease in two ways. First, the test is whether the premises can be repaired without having to be rebuilt in contrast to the test in the ADLS lease which is whether the building is damaged but not untenable. Second, the Property Council Office lease specifically covers premises when it, or part of it, becomes substantially inaccessible. In these circumstances the rent is abated until the premises can again be occupied. The ADLS lease does not cover inaccessibility.

There are a number of aspects that are common to the partial destruction provisions in both standard form leases. The landlord must act with speed to repair the premises and while this is being done the rent and operating expenses are abated. There is no timeframe specified for when the repair must be completed, nor is there any machinery in the leases for calculating the proportion of rent payable. Furthermore, the landlord must spend the insurance money on repairing or reinstating the building, however, he or she is not required to spend any more than the amount of insurance available. The landlord is also required to repair the premises unless there is a legal impediment to doing so.¹⁵

The other feature common to both leases is the use of the word “untenable” in the destruction and damage provisions.¹⁶ Where a building has been significantly damaged it may be obvious that it is untenable. Problems arise in the middle area of the spectrum between significant damage and minimal damage. What makes one building untenable and another tenable? How do parties to a lease determine whether *their* building is untenable in *their* particular circumstances? The courts have been left to answer these questions.

¹⁵ For example the landlord cannot obtain the necessary permits and consents (ADLS lease) or is prevented from repairing the premises by an Act, ordinance, regulation, bylaw or a mortgagee (Property Council Office lease).

¹⁶ The word “untenable” is used in the Property Council Office lease in the provisions covering total destruction in cl 7.1 but not in the provisions covering partial destruction in cl 7.2 whereas the ADLS lease uses it in both provisions, cls 26 and 27.

C The meaning of “untenantable”

1 The meaning of “untenantable” in New Zealand

The term “untenantable” has been used in the damage and destruction provisions of the ADLS lease since the first edition in 1984¹⁷ and in the Property Council Office lease for many years.¹⁸ However, there is no definition of “untenantable” in either lease.

It is, in fact, difficult to find a definition of “untenantable”.¹⁹ Two New Zealand legal dictionaries²⁰ do not contain the word. It is contained in *Words and Phrases Legally Defined*,²¹ but the definition is merely a reproduction of the judgment of Priestly J in *Russell v Robertson*,²² a case referred to in more detail later in this chapter.²³ The word “untenantability” has been considered in relation to the sale of land as it is used in the REI-ADLS form of Sale and Purchase Agreement. However, it is doubtful the term has the same meaning in this context as it does for commercial leases.²⁴

¹⁷ Email from Ben Thomson (Documents and Precedents Manager, Auckland District Law Society Incorporated) to Toni Collins (PhD Student) regarding the genesis of the ADLS lease (3 March 2014). There are now six editions of the ADLS lease (2012).

¹⁸ In the September 2010 edition of the Property Council Office lease the wording was changed so that the word “untenantable” was deleted and replaced by the term “unfit for use”. However “untenantable” was again used in the latest edition in April 2013. Whether anything is to be read into these changes in terminology is unclear.

¹⁹ Courts and lawyers have used both words “untenantable” and “untenantability” as grammatically necessary to refer to the issue, and in this thesis they will be referred to in the same way.

²⁰ Dmitri Hubbard (ed) *New Zealand Legal Words and Phrases* (Butterworths, Wellington, Consolidated Index 2001) or Peter Spiller *Butterworths New Zealand Law Dictionary* (6th ed, LexisNexis, Wellington, 2005).

²¹ David Hay (ed) *Words and Phrases Legally Defined* (LexisNexis Butterworths, London, Supplement 2012).

²² *Russell v Robinson* [2011] 2 NZLR 424 (HC).

²³ This case is discussed at page 104.

²⁴ In the *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at 438, DW McMorland says that the term “untenantability” is taken from landlord and tenant law and by adapting the definition to the sale of land, the test is “whether the property as a whole has been rendered unfit for the occupation and use of someone assumed to want the property for the same purpose as the purchaser”. However in *Bahramitash v Kumar* [2006] 1 NZLR 577 Blanchard J in the Supreme Court considered this test to be apt where the property is being sold rather than leased.

The Residential Tenancies Act 1986 covers the destruction of residential premises.²⁵ Where premises are uninhabitable there are remedies available to the landlord and tenant, including rent abatement and termination of the tenancy agreement. However, the Act does not define “uninhabitable” and there is a lack of case law on its meaning. After the earthquakes, the meaning of “uninhabitable” was considered in the District Court in *Watkin v Brazier Property Investments Ltd*.²⁶ Judge Kellar held that “uninhabitable” should be assessed in light of prevailing conditions and expectations of the particular community at the particular time. This was a matter of fact and degree. In light of the conditions that existed after the earthquakes, the degree of damage in this case was not so severe as to render the whole house uninhabitable.²⁷ There may be an argument that similar considerations apply to the meaning of “untenantable” although to date none have been expressed.

“Untenantable” has been the subject of judicial consideration in a number of New Zealand cases. In *DFC NZ Ltd (in statutory management) v Samson Corporation Ltd*²⁸ the parties had a lease²⁹ for a term of six years during the course of which a fire damaged the premises. The repairs took 10 weeks to be completed and the tenant treated the lease as having been terminated. In the High Court Robertson J held the premises were untenantable. He then went on to explain the meaning of “untenantable”:³⁰

For the purposes of this case I am satisfied that the word [tenantable] means nothing more nor less than able to be used and enjoyed by a tenant. Within that general catalogue of clause 26, sub-clause (a) [involves] some degree of permanence. In other words, something which is merely transitory or temporary will not make a building untenantable. However where there is a substantial inference with the tenants’ ability to enjoy, use and operate, particularly when one is talking about commercial premises, then you have “untenantability”.

²⁵ Section 59.

²⁶ *Watkin v Brazier Property Investments Ltd* [2012] DCR 186 (DC).

²⁷ The premises were without electricity for five days, water or sewage for 10 days and a toilet for three weeks. The main concern by the plaintiff was that the chimney could collapse in subsequent aftershocks.

²⁸ *DFC New Zealand Ltd (in statutory management) v Samson Corporation Ltd* (1993) ANZ ConvR 481 (HC).

²⁹ It is stated in the judgment that it was an ADLS lease but not specifically which edition or year.

³⁰ At 483.

The Court of Appeal³¹ approved Robertson J's dictum on the meaning of "untenantable" but reached a different conclusion because, in its view, the disruption to the lease was only temporary. There had been some delay in effecting the reinstatement of the premises because the repairs should only have taken a maximum of three weeks. The Court considered that in the context of a lease with a six year term, this amounted to damage of a merely transitory or temporary nature and was insufficient to satisfy the description of "untenantable".³²

There is an interesting difference in the approaches taken by Robertson J and the Court of Appeal in determining whether the building was untenantable. Robertson J's emphasis was on the damage and how it affected the tenant's ability to use, enjoy and operate out of the premises.³³ He clearly considered that his test had been met. In contrast, the Court of Appeal focused on the time it would take to repair the building and compared that to the overall term of the lease. It also said the relevant time for determining untenantability was the time it should have taken to complete the repairs and not the actual time taken.

The Court of Appeal's approach seems logical at first glance. However, assessing whether a building is "untenantable" on the basis of how long the repairs should have taken is bound to produce an unfair result. If, as happened in Christchurch, there is a lack of resources or the building is inaccessible, then the length of time taken for assessing buildings and completing repairs will not be the fault of the parties. The better way to deal this issue is to consider the delay in light of the actions of the parties in the particular circumstances of the case.

In the next case, *Russell v Robinson*,³⁴ the respondents entered a lease³⁵ with the appellants for a term of four years with one right of renewal. Prior to the start of the lease the appellants were given advance access to carry out alterations and improvements to the premises. During this time there was a serious fire which caused extensive damage and it the repairs were estimated to take 10 months. Two months after the fire, the landlord respondents terminated the lease on the basis that the premises were untenantable.³⁶

³¹ *DFC New Zealand Ltd v Samson Corporation Ltd* (1994) ANZ ConvR 216 (CA).

³² At 219.

³³ Robertson J also stated it must not be a temporary or transitory disruption.

³⁴ *Russell v Robinson* [2011] DCR 367 (DC).

³⁵ ADLS lease (2002, 4th edition).

³⁶ The other basis upon which they argued that the lease had been terminated was under cl 26.1(b).

In the District Court Judge Sinclair held that the reconstruction period of 10 months out of the four year term (albeit with one right of renewal) meant that the level of disruption was considerably more than merely transitory or temporary as had been the case in *DFC NZ Ltd (in statutory management) v Samson Corporation Ltd*.³⁷ She said there was substantial interference with the plaintiffs' ability to use the premises for their intended commercial purpose which rendered them untenable and the lease was validly terminated. On appeal to the High Court the decision was upheld.³⁸ Priestley J referred to the dictum of Robertson J in the *DFC New Zealand Ltd* case³⁹ and concluded that "untenable" was an objective state to be determined on the specific relevant facts. He said:⁴⁰

... the focus of the inquiry must be whether the premises are capable of being tenanted by the lessee, who in terms of a lease went into the premises for a specific purpose and for a specific term. The tenant's purpose is inextricably tied up with the permitted use of the premises. But that understandable focus on the use of the leased premises by a tenant does not permit an objective assessment of the adjective "untenable" being watered down or coloured by the subjective preferences of either landlord or tenant.

The approach taken by the District and High Courts in *Russell v Robinson* differs from that taken by the High Court and Court of Appeal in the *DFC New Zealand Ltd* case. In *Russell v Robinson*, the emphasis was on the purpose of the lease and the intended use of the premises. The end result is that the test for "untenable" continues to remain uncertain. Clearly all of these factors are relevant to the test but what is less certain is the weight to be given to each.

³⁷ *DFC New Zealand Ltd v Samson Corporation Ltd*, above n 31. Judge Sinclair undertook a thorough examination of the law on the meaning of "untenable". She looked at *Black's Law Dictionary* (8th edition) at 1575 which defined "untenable" as being "not capable of being occupied or lived in; not fit for occupancy". She referred to the Ontario Court of Appeal decision in *United Cigar Stores Limited v Buller Hughes* [1931] 2 DLR 144 where the Court had approved and followed the English cases *Proudfoot v Hart* (1890) 25 QBD 42 (CA) and *Belcher v McIntosh* (1839) 5 C. & F. 186, 174 ER 257. She referred to the New Zealand Court of Appeal decision in *DFC New Zealand Limited v Samson Corporation Limited*, above n 31. She also looked at how the word had been used in the context of the sale of land referring to DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011).

³⁸ *Russell v Robinson*, above n 22.

³⁹ *DFC New Zealand Ltd (in statutory management) v Samson Corporation Ltd*, above n 28. Priestly J also referred to the well-known dictum of Alderson B in *Belcher v McIntosh* above n 37, which is referred to in more detail at page 112.

⁴⁰ At [26]-[27].

Further uncertainty about the meaning of “untenable” arose as a result of a case about a building affected by the earthquakes, *GP 96 Ltd v FM Custodians Ltd*.⁴¹ This was an application for an interim injunction to stop the defendant terminating the lease of a building that had suffered damage and was inaccessible owing to its location within the cordon. The lease⁴² was for a term of six years and contained two rights of renewal, each for a further period of six years. At the time of the earthquakes the lease had been in force for four years. The defendant terminated the lease for various reasons, one being that the building was untenable.⁴³

In the High Court the injunction was granted. Chisholm J held there was an arguable case that the building was still tenable for two main reasons. First he said the damage was mainly cosmetic and not structural. Second, in light of the fact that the lease still had 16 years to run (including renewals) at the date that the damage occurred, 16 weeks required for repairs was only a temporary or transitory disruption.

Chisholm J helpfully set out the factors that he considered are important when determining whether a building is untenable. He said:⁴⁴

- (a) the focus must be on the damage to the building and its implications in terms of tenability. This is an objective test and one that is for the benefit of both parties;
- (b) there needs to be a degree of permanence in terms of the problems with the building. If they are merely transitory or temporary that will not be enough;
- (c) all relevant facts need to be taken into account including the purpose of the lease, the duration of the lease, the extent of the damage and the estimated time for repairs before the premises can be reoccupied.

Two other important issues were raised in this case. The first was whether the rights of renewal should be treated as part of the overall term. The second, whether a building that was inaccessible was “untenable”. In this case there were two rights of renewal for six years each. Whether they were included in the calculation of the overall term or excluded, made a significant difference to the decision. The defendant’s counsel submitted the rights of renewal should not be taken into account because they were for the tenant’s benefit only

⁴¹ *GP 96 Ltd v FM Custodians Ltd* [2011] 12 NZCPR 489 (HC).

⁴² The judgment states this was an ADLS lease but does not specify the edition or year of the lease.

⁴³ The defendant also alleged the lease had terminated on the basis that it was frustrated. This is discussed in Chapter Three.

⁴⁴ At [31]. Chisholm J’s observations related to the ADLS lease, cl 26.1(a).

and there was always the possibility that a right of renewal might not be exercised at the end of each term. Chisholm J disagreed, saying that it was “commercially unrealistic to ignore a feature of the lease that is of such importance to the parties”.⁴⁵ He was of the view that, from the outset, both parties knew that if they complied with their obligations they would have the benefit of a lease for up to 18 years. Therefore, in his opinion, the correct approach was to include rights of renewal in calculating the term of the lease.

If Chisholm J’s approach is correct it has significant implications for the test for “untenantable”. It means that few leases will be terminated on that basis because, in most leases, the rights of renewal will extend the term of a lease to a point where it will become very difficult for parties to argue that the repair time (unless it is exceptionally long) is anything more than temporary or transitory. In this situation, the only time a building will be untenable is when the lease is nearing its end. What becomes critical in this assessment is whether a renewal of the lease creates a new and separate lease contract. If it does then rights of renewal should not be part of the calculation for the overall term. The answer to this question depends on the provision in the lease. Rights of renewal can be drafted as a covenant on the part of the landlord to grant a further term to the tenant or drafted as providing the tenant with an option to renew the lease. There is little difference between these rights because in both the choice to renew sits with the tenant. However, it is a very different situation if the lease is drafted to provide the tenant with a right of first refusal to renew. Here the landlord does not have to offer the tenant a new lease if he or she is not going to re-let the premises. The tenant has a limited right to renew the lease because his or her choice to do so is dependent upon the landlord’s decision to re-let and the landlord could decide not to.

There has been some confusion about whether a right of renewal grants a new lease on similar terms to the old lease or whether the right is to extend the present lease.⁴⁶ It has been suggested that the exercise of a right of renewal should grant a new lease and the presumption should only be displaced by the construction of the lease and clear words to the contrary.⁴⁷ The ADLS lease, the BOMA Office lease and the Property Council of New Zealand Office lease, have renewal clauses.⁴⁸ Providing the tenant has given the required

⁴⁵ At [32].

⁴⁶ See Bennion & Others *New Zealand Land Law* (online ed, Brookers Ltd, Wellington).

⁴⁷ G W Hinde *Hinde on Commercial Leases* (2nd ed, LexisNexis NZ Ltd, Wellington, 2013) at 249; Tom Bennion above n 46.

⁴⁸ ADLS lease (2008, 5th edition), cl 33.1; Property Council of New Zealand Office lease (2010), cl 2.2; BOMA Office lease (1986) has optional clauses to insert, one of which is the tenant’s option to renew.

notice for renewal and is not in breach of the lease, the landlord will grant a new lease for a further term. It is submitted this clause gives the tenant a right to renew the lease and every renewal of the lease creates a new one. In these circumstances, rights of renewal should not be included in calculating the overall term of the lease.

The second important issue in the case was the tenant's inability to access the building because of its location within the cordon. Chisholm J was unmoved by the argument that lack of access might render the building untenable. At the time of the hearing the cordon around the CBD was still in place and there was no timeframe for its removal. Chisholm J felt unable to properly weigh this issue,⁴⁹ although he did opine that restricted access for a further seven months on top of the interruption already experienced he would still consider a temporary delay in light of the term of the lease. Again, Chisholm J's approach could cause extreme hardship for many tenants with smaller businesses if they cannot terminate their leases, yet have to pay rent for a prolonged period for premises they cannot access and use.

*GP96 Ltd v FM Custodians Ltd*⁵⁰ is interesting because it is the first case in which a court has considered the meaning of "untenable" in relation to a building affected by an earthquake. Nevertheless, there are several aspects of this judgment that leave it open to question and therefore it should be treated with caution. First, this was an application for an interim injunction and, as such, would have been made as a matter of urgency. These applications do not enjoy the weight of evidence or comprehensive arguments on the law that would be presented at a full trial. Second, in an application for an interim injunction the plaintiff has a lower threshold to meet than that required in a full trial. Third, there was insufficient evidence produced about how long the building would be inaccessible. It is now known the cordon was in place for two and half years. If this information had been available at the time of trial it may have made a difference to the decision.⁵¹

It is clear that Chisholm J was strongly influenced by policy considerations when making his decision. He acknowledged the widespread use of the ADLS lease in New Zealand and that this would have significant implications in Christchurch after the earthquakes, owing

⁴⁹ There was a letter produced from the Canterbury Earthquake Recovery Authority which did not give a timeline for removal of the cordon.

⁵⁰ *GP 96 Ltd v FM Custodians Ltd* above n 41.

⁵¹ Although this is unclear in light of Chisholm J's approach to the assessment of the term of the lease as including rights of renewal when looking at the issue under the test for "untenable" or for "frustration".

to the large number of leased buildings within the cordon. If these buildings were held to be untenable owing to their issues over access, the leases would have automatically terminated. One of Chisholm J's justifications for deciding the case the way he did was because he thought there would be commercial chaos if parties could just walk away from their leases. It was a precedent he was not prepared to set in the context of an interim injunction.⁵²

Another justification for Chisholm J's decision was that he believed the ADLS lease had provision for the consequences of the earthquakes in the destruction and damage provisions in cls 26 and 27. In this case there was only minor damage to the building that could be repaired within weeks. The on-going problem was that of access and this was not covered by the lease. Nevertheless, Chisholm J chose to treat the damage and access issues together as part of the overall enquiry. The case settled before the full hearing was held and therefore these issues remain unresolved.

The meaning of "untenable" was also considered in another case that arose in 2011, although it did not concern the earthquakes. In *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd*,⁵³ the appellants were tenants of commercial premises under an ADLS lease.⁵⁴ Approximately four years into the lease⁵⁵ the premises were badly damaged by fire. It was estimated the repairs would take up to six months so the landlord terminated the lease and brought proceedings to recover unpaid outgoings. The High Court held the landlord was entitled to terminate the lease under cl 26.1(b) where, in the landlord's reasonable opinion, the premises required demolition or reconstruction.⁵⁶

In deciding this case, Ellis J made some comments about "untenable" and cl 26 in general. First, she rejected the appellant's contention that in order for premises to be untenable they must be totally destroyed because, she said, a building can remain standing but still be unsafe or unsanitary.⁵⁷ Second she drew a distinction between the two limbs of cl 26.1 in the ADLS lease.⁵⁸ She suggested that sub-clause (a) was for the benefit

⁵² At [36].

⁵³ *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd* (2011) 12 NZCPR 730 (HC).

⁵⁴ ADLS lease (2002, 4th edition).

⁵⁵ The term of the lease is not clear from the judgment.

⁵⁶ ADLS lease, cl 26 is set out in full in Appendix B.

⁵⁷ At [34].

⁵⁸ The only difference between the ADLS lease (2008, 5th edition) and the ADLS lease (2002, 4th edition) is that in cl 26.1(b) there is a difference in the time for the notice period.

of the tenant⁵⁹ and sub-clause (b) for the benefit of the landlord,⁶⁰ making the question of whether premises are untenable under sub-clause (a) a subjective enquiry from the tenant's point of view. She suggested that it was for the tenant to determine whether the premises were untenable and whether to stay.

Ellis J's interpretation of cl 26 is unusual. Her subjective test for "untenable" is difficult to reconcile with Priestly J's objective test in *Russell v Robinson*.⁶¹ In *Russell v Robinson*⁶² the tenant had wanted to continue with the lease, yet the building was held to be untenable and the landlord able to terminate the lease on the basis of the very clause that Ellis J said was for the benefit of the tenant. France-Hudson believes the interpretation taken by Ellis J stretches the plain meaning of cl 26.1(a).⁶³ He argues that although cl 26.1(b) is clearly drafted for the benefit of the landlord, it does not necessarily follow that cl 26.1(a) is for the benefit of the tenant and the clause is not clearly expressed in this way.⁶⁴ If it was, then the tenant would have the choice of whether to stay in premises that were destroyed or damaged regardless of whether they were untenable or not. This is a crucial point because if Ellis J is correct then "untenable" as a test becomes superfluous. It is difficult to see how this interpretation could be right.

There are also other reasons why the decision in *Birdwood* should be treated with caution. It does not follow the line of earlier authorities. There was no reference to *Russell v Robinson*⁶⁵ or to any of the other New Zealand cases that have considered the meaning of "untenable".⁶⁶ It would also appear that Ellis J's decision arose out of her desire to find a fair solution. She expressed concern about the consequences that arose from a finding that the premises were objectively untenable. In this case if the premises had become untenable on the day of the fire and the lease terminated, the tenant had only seven days within which to remove its chattels from the premises. She felt this was unfair for two reasons; first, the tenants had been led to believe the lease might continue. Second, they

⁵⁹ Ellis J said that tenantability is the fundamental prerequisite to a continued tenancy from the tenant's perspective, not the landlord's. If a tenant ceases to occupy the premises this will often be evidence that it is untenable; at [36].

⁶⁰ At [36]. Sub-clause (b) will apply when the tenant remains in occupation and the landlord wishes to terminate the lease following damage to all or part of the building.

⁶¹ *Russell v Robinson*, above n 22.

⁶² *Russell v Robinson*, above n 22.

⁶³ Ben France-Hudson "What does 'untenable' mean?" (2012) *The Property Lawyer* 11 at 12.

⁶⁴ *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd* is noted (2012) 15 BCB 50 (McDonald).

⁶⁵ *Russell v Robinson*, above n 22.

⁶⁶ Also see McDonald, above n 64.

were not told the lease had terminated until nearly three weeks after the fire which meant they had missed the opportunity to remove their chattels. This reasoning shows some confusion between an estoppel argument and the issue of the validity of termination under the terms of the lease. If the lease had been validly terminated because the premises were untenable, it would have happened automatically whether or not the parties had knowledge of it.⁶⁷ The reasoning in this decision appears to be flawed and therefore this case should be treated with caution.

The test for “untenable” is far from settled because a number of factors are still uncertain. These include whether the test is subjective or objective, which factors the courts will consider, the weight they will give to each and how rights of renewal are to be treated in calculating the term of the lease. In *DFC New Zealand Ltd v Samson Corporation Ltd*,⁶⁸ the Court of Appeal focused on a comparison between the length of the disruption and the overall term of the lease. In *Russell v Robinson*,⁶⁹ the High Court’s main concern was the inability of the tenant to be able to use the premises for the purpose of the lease. In *GP 96 Ltd v FM Custodians Ltd*,⁷⁰ the High Court compared the length of the disruption with the remaining term of the lease. In *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd*,⁷¹ the High Court determined it was the tenant who should decide whether the premises are “untenable”. The state of the law is uncertain and confusing.

In New Zealand there is no definitive test to determine when a building is “untenable”. It is, therefore, useful to look overseas to discover whether the term is used in other jurisdictions.

2 The meaning of “untenable” in overseas jurisdictions

(a) England, Australia and Canada

England, Australia and Canada do not appear to use the term “untenable” in their commercial leases. There is no case law on this term.

⁶⁷ *Birdwood Custodians Ltd v New Lynn Compliance Centre Ltd* DC Auckland CIV-2009-090-152, 22 February 2011 at [42] where Judge Sinclair said “Pursuant to clause 26.1(a) of the Lease where the Premises are rendered untenable the term shall terminate at once. That termination is brought about by the condition of the Premises and no notice is required to be given by the landlord.”

⁶⁸ *DFC New Zealand Ltd v Samson Corporation Ltd*, above n 31.

⁶⁹ *Russell v Robinson*, above n 22.

⁷⁰ *GP 96 Ltd v FM Custodians Ltd*, above n 41.

⁷¹ *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd*, above n 53.

In England most of the cases have examined similar terms such as “tenantable repair” and “habitable repair” which are commonly used to describe the standard to which a tenant must repair residential premises during the term of the lease.

Although there do not appear to be any cases on point, the cases of *Belcher v McIntosh*⁷² and *Proudfoot v Hart*⁷³ have both been cited by New Zealand courts when considering the meaning of “untenantable”. These cases involved residential tenancies. In *Belcher v McIntosh*,⁷⁴ it was held that the term “put into habitable repair” meant to put the premises into a state reasonably fit to be occupied by an inhabitant. Alderson B said:⁷⁵

It is difficult to suggest any material difference between the term ‘habitable repair’ and the more common expression ‘tenantable repair’; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied.

In *Proudfoot v Hart*⁷⁶ Lopes LJ was concerned with the meaning of “in good tenantable repair”. Having cited *Belcher v McIntosh*,⁷⁷ he put forward another definition:⁷⁸

‘Good tenantable repair’ is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.

Case law in England provides some assistance in determining the meaning of “untenantable”. However, it is submitted that a higher standard would be required for residential premises compared to premises used for business purposes, except where the standard affected the health and safety of employees. Therefore these cases are not very helpful.

⁷² *Belcher v McIntosh*, above n 37.

⁷³ *Proudfoot v Hart* above n 37.

⁷⁴ *Belcher v McIntosh*, above n 37.

⁷⁵ *Belcher v McIntosh*, above n 37. This is also the definition of ‘tenantable repair’ used in *Words and Phrases* (4th ed, LexisNexis Butterworths, London, 2007) at 810.

⁷⁶ *Proudfoot v Hart*, above n 37.

⁷⁷ *Belcher v McIntosh*, above n 37.

⁷⁸ At 55.

In Australian commercial leases, the phrase “unfit for occupation or use” or “unfit for occupation and use” is used. There are two cases that have considered the meaning of the phrase “unfit for occupation” as it relates to commercial leases. In *Georgeson v Palmos*,⁷⁹ the High Court of Australia had to decide whether fire damaged premises had become “wholly unfit for occupation or use” for the purposes for which they had been leased. It was held that where an event has produced only a transient or temporary consequence premises are not “wholly unfit for occupation or use” and the example given was the disruption to, and restoration of, electricity which usually only involves a short period of interruption.⁸⁰ *Dunworth v Mirvac Queensland Pty Ltd*,⁸¹ was an interim application and in it the court considered the meaning of “unfit for occupation” in the context of the sale and purchase of a house. Wilson J said that the matters relevant to the assessment of unfitness for occupation are the degree of damage, whether the damage can be rectified and how long the rectification will take. At the full hearing this point was conceded and therefore it was taken no further.

The matters referred to by both courts in assessing whether a property is unfit for occupation are similar to those factors considered by the courts in New Zealand in determining whether a building is untenable. However, there is little commentary on the meaning of the phrase “unfit for occupation and use”. Duncan⁸² suggests that whether premises are unfit for occupation and use will depend on the nature of the damage to them. For example, a property that might have sustained insignificant physical damage may still be unfit for occupation owing to health and safety concerns.⁸³

The test to determine whether a commercial building is “unfit for occupation” is still unclear in Australia, nevertheless, the lack of case law on the meaning of this phrase suggests it has not been a significant issue for commercial landlords and tenants.

In *The Dictionary of Canadian Law*,⁸⁴ “untenable” is defined as the actual physical state of property being suitable for occupation by tenants. However, its meaning has not been considered in cases involving commercial leases. The most often cited case in this context

⁷⁹ *Georgeson v Palmos* (1962) 106 CLR 578.

⁸⁰ At 587 per Menzies J.

⁸¹ *Dunworth v Mirvac Queensland Pty Ltd* (No 3) [2011] QSC 27.

⁸² WD Duncan *Commercial Leases in Australia* (6th ed, Thomson & Reuters, Sydney, 2011).

⁸³ At [5.90].

⁸⁴ In Daphne A Dukelow *The Dictionary of Canadian Law* (3rd ed, Thomson Carswell, Ontario, 2004).

is the 1931 case of *United Cigar Stores Ltd v Buller Hughes*.⁸⁵ Here the Ontario Supreme Court, in deciding that premises were unfit for use as a ladies lingerie shop, considered various factors including the extent of the damage to the building, its effect on the shop and the purpose for which it was used.⁸⁶

(b) United States

By contrast, the meaning of “untenantable” has received judicial consideration in the United States.⁸⁷ In 1873 the Superior Court of the City of New York in *Kip v Merwin*⁸⁸ held that, where three of the four storeys in a building were damaged by fire, water and debris, the premises were rendered “wholly untenantable.” It defined “untenantable” to mean “that the building was not fit for the use of an occupant; that it was not in suitable repair or condition for a tenant”.⁸⁹ In *Reischmann v L N Hartog Candy Co*,⁹⁰ the Supreme Court of New York held “untenantable” to mean “not fit to be rented or occupied by a tenant”.⁹¹ Citing *Kip v Merwin*,⁹² the Court also said that the continued occupation by a tenant is some evidence of a building’s fitness for rent or occupation, but is not conclusive.

The courts have looked at various factors to determine whether a building is untenantable. One was the purpose of the lease. In *Gerson v Blanck*,⁹³ Guy J said that “tenantable condition” is a condition whereby tenants can use the premises for the purposes contemplated by the lease.⁹⁴ Similarly in *Luis v Ada Lodge #3, Independent Order of Odd Fellows*,⁹⁵ the Supreme Court of Idaho considered the purpose of the lease, and the ability to repair the premises. In a majority decision it was held that premises are untenantable if the destruction is so complete that they cannot be used for the purpose for which they were leased and cannot be “restored to a fit condition by ordinary repairs made without

⁸⁵ *United Cigar Stores Ltd v Buller Hughes* [1931] 2 DLR 144.

⁸⁶ In Cheryl Finch (ed) *Words & Phrases Judicially Defined in Canadian Courts and Tribunals* (Thomson Canada Ltd, Toronto, 1993) vol 8 T-Z at 512 the editors cite the *United Cigar Stores Ltd* case in which it was said that the authorities on the subject of “tenantability” and “untenantability” are quite uniform because the test laid down in *Proudfoot v Hart* above n 37, has never been questioned.

⁸⁷ *American Jurisprudence Landlord and Tenant* (2nd ed, 2013, online edition) at §624.

⁸⁸ *Kip v Merwin* 2 Jones & Sp 531(SC NY 1873) affirmed on appeal in 52 NY 542.

⁸⁹ At 536.

⁹⁰ *Reischmann v L N Hartog Candy Co* 132 NYS 435 (SC NY 1911).

⁹¹ At 437.

⁹² *Kip v Merwin*, above n 88.

⁹³ *Gerson v Blanck* 79 Misc 24, 139 NYS 47 (SC NY 1913).

⁹⁴ At 50.

⁹⁵ *Luis v Ada Lodge #3, Independent Order of Odd Fellows* 77 Idaho 392, 294 P 2d 1095 (1956).

unreasonable interruption to the tenant's use".⁹⁶ The Court also looked at other factors that need to be considered in the overall determination, such as the required repairs, the value of the whole building, the duration of the lease and the improvements made to the premises by the appellants. In this case, the lease had more than seven years to run, it was a valuable asset and the repairs were of short duration compared with the length of the remainder of the term. The majority of the Court held the premises were not untenable.

Other factors have also been considered. In one case the meaning of the phrase "untenable and unfit for occupancy" was determined by reference to whether the damage to the building substantially affected the tenant's enjoyment of it.⁹⁷ In other cases the courts have looked at whether damaged buildings can be restored by ordinary repairs.⁹⁸ In *Presbyterian Distribution Service v Chicago National Bank*,⁹⁹ the Appellate Court of Illinois had to determine whether premises had become untenable when 550 square feet of ceiling with six electric light fixtures fell from a total ceiling of 6,300 square feet. The Court held the premises were not untenable. The plaintiff had not been deprived of the use of the premises other than in a limited area, the necessary repairs would only take a short time to complete, the cost of repairs was modest compared to the value of the premises and the amount of the rental and the lease had over one year to run before expiration. Schwartz PJ said:¹⁰⁰

Untenability has been defined as a condition which exists when destruction (sic) of demised premises is of such a nature that it cannot be used for the purposes for which it was rented and cannot be restored to a fit condition by ordinary repairs made without unreasonable interruption of the lessee's use.

In *Old Line Company v Getty Square Department Store Inc*,¹⁰¹ evidence of substantial damage to the building was compelling. The premises were without power, heat or air conditioning; a large portion of the roof was destroyed, a huge proportion of the nonstructural elements were damaged, including the interior stairway, the roofing and the

⁹⁶ At 396. Also see *Puskoris v Gulik* 4 Ill App 2d 83 (1954) where Schwartz PJ in the Appellate Court of Illinois held that the breakdown of heating apparatus did not render the premises untenable and did not enable the landlord to terminate the lease because it was something that could be easily remedied.

⁹⁷ *Tallman v Murphy* 120 NY 345, 24 NE 716 at 717, a majority decision.

⁹⁸ *Scharbauer v Cobean* NM 427, 80 P 2d 785, 786 ALR 102(1938); *Barry v Herring* 153 Md 457, 138 A 266; *Mottman Mercantile Co v Western Union Telegraph Co* 3 Wash 2d 62, 100 P 2d 16 (1940).

⁹⁹ *Presbyterian Distribution Service v Chicago National Bank* 28 Ill App 2d 147 (1960).

¹⁰⁰ At 154.

¹⁰¹ *Old Line Company v Getty Square Department Store Inc* 66 Misc 2d 825 (1971).

interior partitions. The court concluded that the premises were "wholly untenable" under the terms of the lease. The premises could not have "lawfully, safely and practically been occupied or used by the tenant for any purpose whatsoever".¹⁰²

In *New Henry & John Corporation v Rainbow Restaurant Inc*,¹⁰³ Howard G Lane J had to determine the meaning of "wholly untenable" under the fire clause of a commercial lease. He approved the meaning contained in Friedman on Leases:¹⁰⁴

Premises are not untenable because damage has made them unsatisfactory for the normal conduct of a tenant's business. Untenability is like destruction in that it means substantial damage to a structure ... Untenability ... has been defined as damage of such a nature that the premises cannot be used for the purpose for which they were rented and cannot be restored to a fit condition by ordinary repairs made without unreasonable interruption of the tenant's use ...

In holding that the premises were not "wholly untenable", Howard G Lane J said the damage would have to have been so extensive that it consumed and totally destroyed a substantial part of the building and the premises no longer existed for the purpose for which it was intended by the parties. This had not happened in this case. The fire damage may have made use of the premises unpleasant and inconvenient for the conduct of the respondent's restaurant business temporarily, until repaired, but the damage did not render the premises untenable.

When determining the meaning of "untenable", the factors considered by the courts in the United States are substantially the same as those considered by the courts in New Zealand. However the problems they have with the test are also the same. There are no clear guidelines as to the weight to be given to each of the factors and so the law is developing on a case by case basis.

A writer in the United States, David Weisman, argues that "untenable" means the premises are not suitable for occupancy by anyone.¹⁰⁵ He also suggests that "untenable" is a stronger standard than "unusable" or "unsuitable for the operation of a tenant's business", the latter being more subjective because it means the premises cannot be used

¹⁰² At 828.

¹⁰³ *New Henry & John Corporation v Rainbow Restaurant Inc* 12 Misc 3d 1176 (A) (2006).

¹⁰⁴ At [*3], referring to Milton R Friedman *Friedman on Leases* (3rd ed, Practising Law Institute, New York, 1990) vol 1 at §9.5.

¹⁰⁵ David Weisman "Destruction and Major Forces" (2007) 21 Prob. & Prob. 28.

for the purpose for which the tenant leased them.¹⁰⁶ Ross Green¹⁰⁷ takes it a step further and suggests that the suspension of utility, elevator or other building services as a result of a natural disaster should make a building untenable, even if it is otherwise undamaged. He argues that such services are so important to the tenant's ability to use and enjoy the building that without them the building is untenable.¹⁰⁸ It will be interesting to observe whether these issues will be addressed by the courts in the future.

3 *The test for "untenable" and the test for frustration*

The test for "untenable" and the test for frustration are separate but related. Both tests are necessary to determine whether the lease will be terminated. The test for "untenable" is considered under the terms of a lease. If the issue of access is held to come within meaning of "untenable", the lease will cover the situation. However, the courts have given no indication that it does. *GP 96 Ltd v FM Custodians Ltd*¹⁰⁹ is the only case in which the issue has arisen and the High Court did not directly address it.

If it is decided that the issue of an inaccessible building does not come within the meaning of "untenable" because, for example, it would be stretching the meaning too far, and the lease has no other provision that would cover the situation, then the doctrine of frustration may apply. The test for frustration takes into account similar factors to those considered under the test for "untenable".¹¹⁰ However, there are also differences. The test for frustration includes consideration of the unexpected and unforeseen nature of the supervening event that caused the damage and the change that has occurred in the nature of the contractual obligations.¹¹¹

4 *The likely legal meaning of "untenable"*

It will take the authority of a higher court to clarify the meaning of, and test for, "untenable". Although no definitive test has emerged, the following factors have been established from New Zealand case law and these are supported by the overseas cases:

¹⁰⁶ At 30.

¹⁰⁷ Ross Green "Catastrophic Service Interruption in Commercial Leases" (1994) 8 Real Prop.Prob&Tr.J. 6.

¹⁰⁸ Green, above n 107. Green argues the services fall within the scope of the usual damage and destruction provisions in a lease even though they relate to building systems not the structure of the building itself.

¹⁰⁹ *GP 96 Ltd v FM Custodians Ltd*, above n 41. This case is discussed at page 106.

¹¹⁰ Such as the length of the disruption compared to the overall term of the lease.

¹¹¹ See Chapter Two for a discussion on the test for frustration.

- the condition or state of the premises;¹¹²
- there must be some degree of permanence to the tenant's inability to use the premises, it cannot be merely temporary or transitory;¹¹³
- there must be substantial interference with a tenant's ability to enjoy, use and operate out of, the premises;¹¹⁴
- there must be substantial interference with a tenant's ability to use the premises for their intended commercial purpose;¹¹⁵
- all relevant facts must be taken into account including the purpose of the lease, the duration of the lease, the extent of the damage and the estimated time for repairs before the premises can be reoccupied;¹¹⁶
- a building may be untenable even though it remains standing and may appear on the surface to be largely intact;¹¹⁷
- where there is danger to the health or safety of occupants the premises are not habitable.¹¹⁸

These factors may provide some guidance about the factors the court will take into account when determining whether a building is untenable. However, the weight to be attached to each factor has not been established. Furthermore there are questions that relate to the

¹¹² *GP96 Ltd v FM Custodians Ltd*, above n 41; *Pentagon Investments Ltd v The Canadian Surety Company* (1991) CILR 1734 (NSNC); *Lam v Gerling Global General Insurance Co* (1992) 34 ACWS (3d) 1005 (BCSC); *Kip v Merwin*, above n 88; *Reischmann v L N Hartog Candy Co*, above n 90; *New Henry & John Corporation v Rainbow Restaurant Inc*, above n 103.

¹¹³ *DFC NZ Ltd (in statutory management) v Samson Corporation Ltd*, above n 28; *GP 96 Ltd v FM Custodians Ltd*, above n 41; *Georgeson v Palmos*, above n 79; *Presbyterian Distribution Service v Chicago National Bank*, above n 99; *New Henry & John Corporation v Rainbow Restaurant Inc*, above n 103.

¹¹⁴ *DFC NZ Ltd (in statutory management) v Samson Corporation Ltd*, above n 28; *Tallman v Murphy*, above n 97.

¹¹⁵ *Russell v Robinson*, above n 34; *Belcher v McIntosh*, above n 37; *United Cigar Stores Ltd v Buller Hughes*, above n 85; *Gerson v Blanck*, above n 93; *Luis v Ada Lodge #3, Independent Order of Odd Fellows*, above n 95; *Presbyterian Distribution Service v Chicago National Bank*, above n 99; *Georgeson v Palmos*, above n 79; *Old Line Company v Getty Square Department Store Inc*, above n 101; *New Henry & John Corporation v Rainbow Restaurant Inc*, above n 103.

¹¹⁶ *GP 96 Ltd v FM Custodians Ltd*, above n 41; *Dunworth v Mirvac Queensland Pty Ltd* (No 3) above n 81; *United Cigar Stores Ltd v Buller Hughes*, above n 85.

¹¹⁷ *New Lyn Compliance Centre Ltd v Birdwood Custodians Ltd*, above n 53.

¹¹⁸ *Belcher v McIntosh*, above n 37; *Summers v Salford Corporation* [1942] AC 283 (HL); *Old Line Company v Getty Square Department Store Inc*, above n 101; *New Henry & John Corporation v Rainbow Restaurant Inc*, above n 103; *New Lynn Compliance Centre Ltd v Birdwood Custodians Ltd*, above n 53.

application of each of the factors. For example, what is “substantial interference” and “a degree of permanence”? The determination of each of the factors will also be dependent on the facts of the particular case, which makes the outcome difficult to predict.

There are other questions that remain unanswered too. One is whether the assessment of “untenantable” is objective or subjective.¹¹⁹ Another is the degree of relevance and importance of the stated purpose of the premises. Another is whether the original term of the lease or the unexpired portion of the term at the date of the supervening event, or both, are the relevant enquiry into whether a building is untenantable. And, finally, whether rights of renewal should be included or excluded from the term of the lease. These uncertainties form the baggage that is now attached to commercial leases and has to be dealt with every time there is a question about the meaning of, or the test for, “untenantable”.

In the absence of clear provisions in the lease the common law will step in and fill the gap. However, before the common law can apply, the property law legislation must be considered.

III The Property Law Legislation

The Property Law Act 2007 and the Property Law Act 1952 (Repealed) govern commercial leases unless they are specifically excluded. The Property Law Act 2007 (“PLA 2007”) came into force on 1 January 2008 with the purpose of restating, reforming and codifying (in part) certain aspects of the law relating to real and personal property.¹²⁰ As part of this process it repealed the earlier Property Law Act 1952¹²¹ (“PLA 1952”),¹²² however, the older Act remains relevant because its provisions continue to apply to leases entered into before the commencement of the current legislation.¹²³

¹¹⁹ There are conflicting views on whether the assessment of “untenantable” is objective or subjective see *Russell v Robinson*, above n 34 and *New Lyn Compliance Centre Ltd v Birdwood Custodians Ltd*, above n 53.

¹²⁰ Section 3.

¹²¹ The Property Law Act 1952 has been repealed but for the sake of fluency, the Act will not be referred to as repealed in every reference.

¹²² Section 366.

¹²³ Section 367(4).

Prior to the enactment of the PLA 2007, a number of covenants were implied into leases: those contained in the PLA 1952,¹²⁴ common law covenants and usual covenants,¹²⁵ in addition to and in modification of the common law covenants. The law was complicated and confusing.¹²⁶ Now all of the covenants that are implied into commercial leases are set out in Schedule 3 of the PLA 2007¹²⁷ and apply unless a contrary intention is expressed.¹²⁸ No covenants are now implied as a matter of law.¹²⁹

The two covenants that specifically refer to earthquakes are materially the same in both Acts: the tenant's covenant to pay rent which will be abated in the event that the building is destroyed or damaged¹³⁰ and the tenant's covenant to keep and yield up the premises in their existing condition except where damage is caused by certain events, including an earthquake.¹³¹ In addition, the PLA 2007 contains two other provisions that could be relevant in the event of an earthquake. One gives the tenant an implied power to terminate the lease if it is an express or implied term that the leased premises may be used for one or more specified purposes and at any time during the currency of the lease those premises cannot, or can no longer be, lawfully used for those specified purposes.¹³² The other is a landlord's covenant that the tenant shall have quiet enjoyment of the leased premises.¹³³ Each of these is considered.

A *Rent*

The PLA 1952 applies to commercial leases entered into before 1 January 2008 and sets out the circumstances in which rent will be abated. Section 106(a) provides:

¹²⁴ Sections 106 and 107.

¹²⁵ Section 221 refers to 'usual covenants' and states that any reference to them in a lease must now be taken to be a reference to the covenants implied by ss 218, 219 and 220 PLA 2007.

¹²⁶ Law Commission *The Property Law Act 1952* (NZLC PP16, 1991).

¹²⁷ Sections 218-220.

¹²⁸ Section 217.

¹²⁹ Section 281(2).

¹³⁰ Section 218(1), Schedule 3, Part 2 cl 4; PLA 1952, s 106(a).

¹³¹ Section 219, Schedule 3, Part 3, cl 13 and PLA 1952, s 106(b). The general provisions covering leases in the Property Law Act 1908 (Repealed), the predecessor to the PLA 1952, were brief. There were only two implied covenants – the tenant would pay rent and would yield up the property in a good and tenantable condition. Only the second of these referred to an earthquake by exempting the tenant from liability for depreciation from a number of causes, one of which was in the event of an earthquake. The first covenant did not exempt the tenant from paying rent in any circumstances.

¹³² Section 218(1), Schedule 3, Part 2, cl 10.

¹³³ Section 218(1), Schedule 3, Part 2, cl 9. This covenant is not codified in the PLA 1952.

Section 106 Covenants implied in leases

In every lease of land there shall be implied the following covenants by the lessee

...

- (a) That he will pay the rent thereby reserved at the time therein mentioned:

Provided that in the case the demised premises or any part thereof shall at any time during the continuance of the lease, without neglect or default of the lessee, be destroyed or damaged by fire, flood, lightning, storm, tempest, or earthquake so as to render the same unfit for occupation and use the lessee, then and so often as the same shall happen, the rent thereby reserved, or a proportionate part thereof, according to the nature and extent of the damage, shall abate, and all or any remedies for the recovery of the rent or the proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for occupation and use of the lessee, and in case of any dispute arising under this proviso the same shall be referred to arbitration under the provisions of the Arbitration Act 1908:

There are two requirements that must be met before rent can be reserved or abated. The first is that the premises are destroyed or damaged by any of the listed events, including an earthquake, which render them unfit for occupation and use. The second is that the tenant must not be at fault.

The PLA 2007 applies to commercial leases entered into on or after 1 January 2008. Section 218(1) provides that every lease contains the implied covenants contained in Schedule 3. Clause 4 of Schedule 3 covers the payment of rent:¹³⁴

Clause 4 Payment of Rent

- (1) The lessee will pay the rent payable under the lease when it falls due.
- (2) However, if the leased premises or any part of them are destroyed or damaged by any of the causes specified in subclause (3) to the extent that they become unfit for occupation and use by the lessee, the rent and any contribution payable by the lessee to the outgoings on those premises will abate, in fair and just proportion to the destruction or damage, until those premises –
 - (a) have been repaired and reinstated; and
 - (b) are again fit for occupation and use by the lessee.
- (3) The causes referred to in subclause (2) are –
 - (a) fire, flood or explosion (whether or not the fire, flood or explosion is caused, or contributed to, by the lessee's negligence); or

¹³⁴ The full section is set out in Appendix B.

- (b) lightning, storm, earthquake, or volcanic activity; or
- (c) any other cause the risk for which the lessor has insured the premises.

Under this provision, the rent will be abated if the premises are destroyed or damaged by any of the listed events.¹³⁵ The trigger for an abatement of rent is that the premises be “unfit for occupation and use”. This term is different than that used in the standard form commercial leases which provide that rent will be abated where the premises are not “untenantable”. A practical example of the application of the terms is the case of a cool store. If the building is significantly damaged and cannot be used for any purpose, it is clearly unfit for occupation and use. In the situation where only the cooling device is damaged, the building may not be of use as a cool store, but it could still be used for another purpose, such as the storage of items that do not need to be chilled. In this scenario, the building is fit for occupation and use even though it is not fit for the purpose for which the premises were leased. This interpretation could cause problems for tenants who have leased a building for a specific purpose, although the legislation may provide relief in these circumstances.¹³⁶

Why there is a difference in terminology between the leases and the legislation is unclear.¹³⁷ It might indicate an intention by those who drafted the leases that the terms “unfit for occupation and use” and “untenantable” have different meanings. The term “unfit for occupation and use” is used in commercial leases in Australia and case law on the meaning of this term, albeit limited, is suggestive of the fact that the test involves a consideration of factors similar to those used to determine whether a building is “untenantable” in New Zealand.

If cl 4 is to apply the destruction or damage must be caused by one of the causes listed in sub-clause 3. These include natural disasters such as an earthquake but they also include any other cause the landlord has insured against. An interesting point to note is there is no obligation on the landlord to insure against any other risks.¹³⁸ If there is no insurance cover for a particular risk,¹³⁹ then there will be no abatement of rent if the premises are damaged. However, if there is any insurance, even if it is inadequate to cover the loss or damage that

¹³⁵ Under the PLA 2007 the listed events are the same as those in the PLA 1952 with the addition of explosion, volcanic activity and any other risk insured by the landlord.

¹³⁶ Section 218, Schedule 3, Part 2, cl 10. This is discussed in more detail at page 125.

¹³⁷ The Property Law Act 1908 (Repealed) which preceded the PLA 1952 did not contain either term so it does not clarify the position, nor was there any discussion on the wording of the provision in Hansard.

¹³⁸ Law Commission *A New Property Law Act* (NZLC R29, 1994) at 355.

¹³⁹ Such as an air or motor vehicle accident.

occurs, there will be an abatement. It is therefore important that both landlords and tenants are aware of the insurance cover for the building and the insurance they need to protect themselves.

There is an important difference between the provisions of the standard form commercial leases and the PLA 2007. The Act does not allow for termination of the lease where the premises have been damaged or destroyed. In this way the legislation contemplates a continuing tenancy which means that parties are bound to the lease for the duration of the rebuild or repair process. The Law Commission has justified this position by saying that a provision that allows for termination of the lease upon destruction or damage to the premises is inappropriate as a general implied term. The reason is the difficulty in determining, in a variety of different cases, whether there has been destruction or substantial damage.¹⁴⁰

There are two other issues that arise from this clause. The first is that as for the standard form commercial leases, the statutory provisions apply where the building has sustained damage. If the building has not been damaged but is affected in some other way, for example is inaccessible, the legislation does not address this problem. The second issue is that there is no machinery in the legislation that covers how to calculate the abatement of rent. The PLA 2007 states it should be “in fair and just proportion to the destruction or damage”,¹⁴¹ while the PLA 1952 says “... a proportionate part [of the rent] according to the nature and extent of the damage shall abate ...”.¹⁴² This does not seem clear and there could be the potential for disputes, however the parties can refer the matter to arbitration if necessary.¹⁴³

The covenant as to payment of rent under the property law legislation will not apply to parties who have an ADLS lease or a Property Council lease as these contain their own provision.

¹⁴⁰ Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) at 136. The example the Law Commission gave was a farming lease.

¹⁴¹ Property Law Act 2007, Schedule 3, Part 2, cl 4(2).

¹⁴² PLA1952, s 106(a).

¹⁴³ Section 219, Schedule 3, Part 2, cl 4(5); PLA 1952, s 106(a).

B Yield up premises in their existing condition

Both Property Law Acts contain covenants requiring the tenant, during the course of the lease, to keep the premises in the same condition they were in when the term of the lease began.¹⁴⁴ The exception is if damage has been caused to the property by one of a number of listed events including an earthquake.¹⁴⁵ The provisions in both Acts are materially the same.¹⁴⁶ In the PLA 2007, Schedule 3, the relevant parts of cl 13 are:¹⁴⁷

- Clause 13 Lessee to keep and yield up premises in existing condition
- (1) The lessee will, -
- (a) At all times during the currency of the lease, keep the leased premises in the same condition that they were in when the term of the lease began; and
- (b) At the termination of the lease, yield the leased premises in that condition.
- (2) However, the lessee is not bound to repair any damage to the leased premises caused by –
- (a) Reasonable wear and tear; or
- (b) Any of the following:
- (i) Fire, flood, or explosion (whether or not the fire, flood, or explosion is caused or contributed to by the lessee's negligence);
- (ii) Lightning, storm, earthquake, or volcanic activity;
- (iii) Any other cause the risk for which the lessor has insured the premises.

These provisions protect the tenant in the case of damage to the premises brought about by certain events over which he or she may have no control. However, they do no more than simply state how the premises should be preserved and place the responsibility for damage from natural disasters and other insurable risks on the landlord. Foster suggests that the approach to the construction and application of cl 13 will not differ from that taken prior to the enactment of the statute.¹⁴⁸

¹⁴⁴ Section 219, Schedule 3, Part 3, cl 13(1); PLA 1952, s 106(b).

¹⁴⁵ Section 219, Schedule 3, Part 3, cl 13(2); PLA 1952, s 106(b).

¹⁴⁶ PLA 1952, s106 is set out in full in Appendix C.

¹⁴⁷ Section 219, Schedule 3, Part 3, cl 13, set out in full in Appendix B.

¹⁴⁸ Jody L Foster *Property Law Act 2007 A Practitioner's Guide* (LexisNexis, Wellington, 2009). See the judgment of the Court of Appeal in *Weatherhead v Deka New Zealand Ltd* [2000] 1 NZLR 23.

The following clauses are found only in the PLA 2007: the implied condition that the leased premises are used for one or more specified purposes and the implied covenants covering non-derogation from the grant of the lease and quiet enjoyment.

C Leased premises used for one or more specified purposes

The PLA 2007 implies the following condition into all leases:¹⁴⁹

- Clause 10 Premises unable to be used for particular purpose
- (1) The lessee may terminate the lease, on reasonable notice to the lessor, if –
- (a) It is an express or implied term of the lease that the leased premises may be used for 1 or more specified purposes; and
 - (b) At any time during the currency of the lease, those premises cannot, or can no longer be, lawfully used for 1 or more of those specified purposes.

There is one exception to this provision. If the leased premises cannot be used for the specified purpose because of the tenant's own act or omission or an act or omission by someone under the tenant's control then he or she cannot terminate the lease.¹⁵⁰

In the Law Commission's Report on the Act it gave an example of how this clause should apply. A lease is granted over a building to be used for two purposes A and B. If it is later revealed that the premises cannot be used for purpose B, or during the lease the tenant no longer has the right to use it for purpose B, the tenant can terminate the lease.¹⁵¹

In the aftermath of an earthquake this clause might apply if there are local government changes to zoning and therefore changes to the permitted use of premises within the new zone. However, this is a different issue to the problem of legal access which is not covered by this clause.

D Non-derogation from grant and quiet enjoyment of leased premises

The PLA 2007 codifies the covenants formerly implied by the common law that the tenant shall have quiet enjoyment of the leased premises and the grantor, in this case the landlord,

¹⁴⁹ Section 218(1), Schedule 3, Part 2, cl 10(1).

¹⁵⁰ Section 218(1), Schedule 3, Part 2, cl 10(2).

¹⁵¹ Law Commission *A New Property Law Act* (NZLC R29, 1994) at 356.

must not derogate from the grant or lease.¹⁵² There is a clear overlap between the two covenants although it has been suggested that the covenant not to derogate from the lease is wider in scope.¹⁵³

The covenant that the lessor will not derogate from the lease, has been held to mean:¹⁵⁴

... a landlord must not voluntarily prejudice the rights which he has created and he will not be permitted to do anything which is inconsistent with the purpose for which the demised premises are let.

Acts in derogation from the grant have also been described as “acts of the lessor which prejudice the successful fulfilment of the purpose of the lease”,¹⁵⁵ which is the essential difference between them and a breach of the covenant of quiet enjoyment. The question about whether there has been a breach of the derogation of the lease is one of fact and degree,¹⁵⁶ however, the interference with the use for which the premises were let must be substantial.¹⁵⁷ An example of a breach of this covenant is the case where a landlord relocated an exhaust fan from the basement of premises the tenant used for the purpose of a restaurant, to the roof.¹⁵⁸ This action caused the premises to be substantially less fit for use as a restaurant because the fan was too far removed to be effective. However, it is important to note that there is no implied term that premises are suitable for the purpose of the lease¹⁵⁹ or that premises can lawfully be used for the purposes for which the tenant wishes to use them.¹⁶⁰

¹⁵² Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) at 133. Bennion, above n 46, at LS8.01.

¹⁵³ Bennion, above n 46, at LS8.01(5).

¹⁵⁴ *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481 at 496 (CA) per Woodhouse J.

¹⁵⁵ Bennion, above n 46, at LS8.02(1)(a).

¹⁵⁶ *Nordern v Blueport Enterprises Ltd* [1996] 3 NZLR 450 at 456 affirming *Mt Cook National Park Board v Mt Cook Motels Ltd* [1972] NZLR 481 at 496 (CA) per Woodhouse J.

¹⁵⁷ At 455.

¹⁵⁸ *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185. There is often an overlap between the principles of non-derogation of grant and quiet enjoyment. Also see *Westpac Merchant Finance Ltd v Winstone Industries Ltd* [1993] 2 NZLR 247 where the problem was water seepage from faulty pipes that resulted in disconnection of the water supply. Also *Aldin v Latimer Clark Muirhead & Co* [1894] 2 Ch 437.

¹⁵⁹ *Felton v Brightwell* [1967] NZLR 276; *Southwark LBC v Mills* [2001] 1 AC 1.

¹⁶⁰ *Balcairn Guest House Ltd v Ware* [1963] NZLR 301.

It is clear that a breach of the covenant not to derogate from the lease requires action by the landlord. In the case of an earthquake, it is not the landlord who has caused problems for the tenant. Therefore this covenant is unlikely to be relevant in the immediate aftermath, but could be relevant during the rebuild or repair process.¹⁶¹

The covenant that the tenant shall have quiet enjoyment of the property is found in the PLA 2007¹⁶² and is also a specific term of the ADLS lease.¹⁶³ The covenant for quiet enjoyment protects the tenant from interference with possession of the premises by the landlord. Examples of actions by the landlord that have breached this covenant include causing subsidence to the premises,¹⁶⁴ placing scaffolding adjacent to the premises¹⁶⁵ and excessive noise.¹⁶⁶ As this covenant is central to the relationship of landlord and tenant, it has been held that a breach may occur even if the landlord's actions are lawful and reasonably necessary.¹⁶⁷ In these circumstances the courts have held that the landlord must take all reasonable steps to minimise disruption to the tenant.¹⁶⁸

As for the covenant not to derogate from the lease, there is no breach of the covenant of quiet enjoyment if the disruption to the tenant is not caused by the landlord. However, the landlord may be accused of a breach in the future if he or she fails to attend to repairs and/or reinstating access to the premises as soon as possible or, if during the course of repairs, the landlord fails to take all reasonable steps to minimise disruption to the tenant.

E Other provisions

The landlord may cancel the lease in accordance with the provisions of the PLA 2007 if any rent is unpaid for 15 days after the due date for payment or if the tenant has failed to observe or perform any other covenant expressed or implied in the lease for a period of 15 days.¹⁶⁹

¹⁶¹ See the discussion on the covenant for quiet enjoyment, below.

¹⁶² Section 218(1), Schedule 3, Part 2, cl 9.

¹⁶³ ADLS lease (2008, 5th edition) cl 32.1.

¹⁶⁴ *Markham v Paget* [1908] 1 Ch 697.

¹⁶⁵ *Owen v Gadd* [1956] 2 QB 99.

¹⁶⁶ *Southwark LBC v Mills*, above n 159.

¹⁶⁷ *Owen v Gadd* [1956] 2 QB 99; *Smith v Coker* HC Hamilton, CP70/90, 27 April 1995, noted (1995) 3 NZ ConvC 192,157. Bennion, above n 46, at LS8.01(2).

¹⁶⁸ *Goldmile Properties Ltd v Lechouritis* [2003] 2 P & CR 1.

¹⁶⁹ Section 218(1), Schedule 3, Part 2, cl 12 and ss 244-246.

The PLA 2007 also refers to earthquakes in relation to insurance for leased premises and its provisions apply if leased premises are destroyed or damaged by certain events, including an earthquake, or the occurrence of some other event against which the landlord has insured.¹⁷⁰ In these circumstances, the landlord cannot require the tenant to pay for the damage or indemnify the landlord against the damage, even if it is as a result of the tenant's or the tenant's agent's negligence.¹⁷¹

IV Summary

In order to determine their legal rights after an earthquake, landlords and tenants must go through a three stage process. First, the lease must be considered to identify whether any provisions apply, second, any applicable legislation must be examined and third, the common law that might apply.

The standard forms of commercial lease commonly used in New Zealand contain provisions that will apply in the event of an earthquake. However, they are not comprehensive in their coverage because they only apply to a building that has been damaged. The leases provide that termination will occur if a building is destroyed. If a building is damaged the parties are required to determine whether it is then "untenantable". The answer to this question is important because if the building is untenable the lease automatically terminates; if it is not, the lease remains in force and rent will abate while the repairs are undertaken. Unfortunately, it is difficult to determine the meaning of "untenantable". The leases do not contain a definition and the case law has not provided a definitive test.

The Property Law Acts have clearly been drafted in contemplation of an earthquake because some clauses specifically refer to them. However, as for the leases, the legislation is not comprehensive in its coverage. There are rent abatement provisions but there is no provision for termination of the lease even if the building is destroyed. This means there is the potential for tenants to be tied to a lease for a prolonged period of time while their building is repaired or rebuilt. Whether or not landlords can be in breach of the covenants and conditions during rebuilds and repairs will depend on the individual circumstances of the case and is untested in an earthquake situation. There is, however, nothing in the Act that covers an inaccessible building.

¹⁷⁰ Sections 268 - 273.

¹⁷¹ Section 268(2).

It is clear that landlords and tenants have not made provision in their leases to cover the situation of an inaccessible building. Nor does the legislation cover this problem. This means there is no provision that precludes the application of the doctrine of frustration.

CHAPTER SIX

The Canterbury Earthquakes as a Supervening Event

*“I didn’t even think Christchurch, in general, was prone to earthquakes”.*¹

I Introduction

The House of Lords held that the doctrine of frustration is applicable to leases, but in doing so suggested the situations in which it would apply to terminate leases would be rare.² Some of the judges referred to Viscount Simon LC’s statement in *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd*,³ where he considered the application of the doctrine to leases would be limited to cases where “some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea”.⁴ In other words, to meet the test for frustration a supervening event must be something out of the ordinary; something exceptional.

In *Planet Kids Ltd v Auckland Council*,⁵ the Supreme Court confirmed that the supervening event is one of the factors to be considered in the multi-factorial approach to determining whether a contract has been frustrated. The supervening event must significantly change the nature of the contractual rights.⁶ The court will have regard to the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, at the time the contract was made.⁷ The court will also consider the extent to which the supervening event, and its consequences, were foreseeable.⁸

The aim of this chapter is, therefore, to show that the Canterbury earthquakes were extraordinary supervening events that met the requirements of the test for the doctrine of

¹ FQ203.

² *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. Four of the five judges said the doctrine would hardly ever apply to a lease; see Chapter Three at page 64.

³ *Cricklewood Property and Investment Trust Ltd v Leighton’s Investment Trust Ltd* [1945] AC 221.

⁴ At 229.

⁵ *Planet Kids Limited v Auckland Council* [2103] NZSC 147 at [62]. The Supreme Court’s multi-factorial approach is set out on pages 27-28.

⁶ *National Carriers Limited v Panalpina (Northern) Limited*, above n 2 at 700 per Lord Simon.

⁷ *Planet Kids Limited v Auckland Council*, above n 5, at [60].

⁸ At [158]. It is necessary to remember that foreseeability is only one of a number of factors that must be taken into account when the court is determining whether a contract has been frustrated.

frustration. To do this the history of earthquakes in the Canterbury region is examined to show how few events there have been in the past and, therefore, how unexpected the earthquakes in 2010/2011 were. The chapter also looks in detail, at the largest earthquakes in the Canterbury earthquake sequence, to show how extraordinary they were. Finally, the chapter covers the consequences of the earthquakes and their effect on landlords and tenants.

New Zealand has a long history of earthquakes and is appropriately known as the “Shaky Isles”. The country is made up of three main islands, the North Island, the South Island and Stewart Island, situated above the meeting place of the Australian and Pacific tectonic plates. These plates constantly move against each other and subject the country to regular seismic activity. In the centre of the South Island, the plates collide and three quarters of the pressure built up is released during earthquakes along the Alpine Fault in the mountainous range called the Southern Alps. The Alps run nearly the length of the island on the west side. The remaining pressure is released through occasional earthquakes on active faults on the east of the island.

Earthquakes are a regular occurrence in New Zealand.⁹ They range in size from very small and hardly detectable, to large powerful events capable of considerable destruction.¹⁰ In September 2010, the rupture of a fault beneath the Canterbury Plains caused a significant earthquake that set off a sequence of aftershocks over a period of 18 months.¹¹ A number of these aftershocks were strong, with the most destructive occurring in February 2011, when the epicentre was located close to the CBD of the city of Christchurch and 185 people lost their lives as a result. This sequence of earthquakes is known as the Canterbury earthquakes.

The Canterbury earthquakes were extraordinary. They occurred on unknown faults; their force was exceptional; they caused ground movement that was unique; they were unanticipated and unforeseen. As a result, the vast majority of buildings in the CBD of Christchurch were substantially damaged, along with city infrastructure. To ensure the safety of citizens, a cordon was erected around the CBD and access restricted. This action

⁹ GeoNet instruments locate approximately 20,000 earthquakes in and around New Zealand each year: <<http://www.info.geonet.org.nz>>. GeoNet is a collaboration between the Earthquake Commission and GNS Science and operates a geological hazard monitoring system in New Zealand.

¹⁰ For example the Hawkes Bay earthquake in Napier in 1931.

¹¹ Earthquakes that are associated with, and follow closely behind, a major earthquake are technically aftershocks. In this thesis the terms “aftershocks” and “earthquakes” are used interchangeably.

was unprecedented. In research undertaken for the Earthquake Engineering Research Institute, Chang said:¹²

With some 50,000 central city workers displaced, over 1,100 commercial buildings demolished or slated for demolition, and some 23 city blocks remaining within the cordon as of this study (15 months after the February 2011 earthquake), the CBD cordon is unprecedented as a post-earthquake response and recovery decision in scale and duration (at least in developed countries).

The catastrophic collapse of two multi-storey buildings in the CBD led to the establishment of the Canterbury Earthquakes Royal Commission of Inquiry.¹³ Its findings are referred to throughout this chapter.

II The Canterbury Earthquakes

A The South Island's Extensive Earthquake History

The Canterbury region is located in the South Island of New Zealand. It is a large area stretching from north of Kaikoura to south of Timaru and as far inland as the Southern Alps. The Canterbury Plains lie within the Canterbury region and are a large flat area of land covering approximately 8,000 square kilometres. They run from the foothills of the Southern Alps in the west, to the Pacific Ocean in the east. Christchurch is the largest city in the Canterbury region, the largest city in the South Island and the second largest city in New Zealand.

¹² Stephanie E Chang and others “Urban Disaster Recovery in Christchurch: The Central Business District Cordon and Other Critical Decisions” (2014) 30(1) *Earthquake Spectra* 513 at 528.

¹³ The Royal Commission’s terms of reference were to report on the causes of building failure as a result of the earthquakes and the legal and best practice requirements for buildings in New Zealand Central Business Districts.¹³ The inquiry took over 18 months to complete beginning in April 2011 and finishing in November 2012. The Royal Commission’s report is contained in seven volumes and was released by the Government in stages: Volumes 1, 2 and 3 released on 23 August 2012; Volume 4 released on 7 December 2012 and Volumes 5, 6 and 7 released on 10 December 2012.



Figure 2: The Canterbury Region.¹⁴

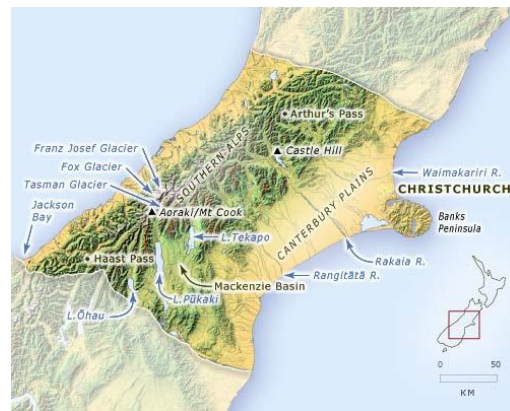


Figure 3: The Canterbury Plains.¹⁵

Since Europeans began settling in Canterbury, over 150 years ago, a number of large earthquakes have occurred in the South Island. These include Marlborough (1848), North Canterbury (1888), Cheviot (1901), Buller and Arthurs Pass (1929), Inangahua (1968), Avoca (1994) and Fiordland (2003 and 2009).¹⁶

B Large earthquakes from faults on the Canterbury Plains were considered rare

Of the earthquakes originating in the Canterbury region, most occurred in the northern and western parts¹⁷ outside the Canterbury Plains and some distance from Christchurch and its immediate surrounds. Some of these earthquakes caused minor damage to buildings in Christchurch. The only two recorded earthquakes that had epicentres close to the city occurred in 1869 and 1870: in 1869 a magnitude 4.7 - 4.9¹⁸ earthquake had its epicentre just east of Christchurch and in 1870 the epicentre of a magnitude 5.6 – 5.8 earthquake was

¹⁴ Statistics New Zealand website <<http://www.stats.govt.nz>>.

¹⁵ The Encyclopaedia of New Zealand website <<http://www.teara.govt.nz/en/map/13036/central-south-island/googleimages>>.

¹⁶ There is discussion of these historical earthquakes in texts such as M Wright *Living on Shaky Ground* (Random House New Zealand, Auckland, 2014), Anna Rogers *The Shaky Isles – New Zealand Earthquakes* (Grantham House Publishing, Wellington, 2013) and in GNS Science reports Mark Stirling and others “Seismic Hazard of the Canterbury Region, New Zealand: New Earthquake Source Model and Methodology” (2008) 41(2) Bulletin of the New Zealand Society for Earthquake Engineering 51 and TH Webb (Compiler) “The Canterbury Earthquake sequence and implications for Seismic Design Levels” (GNS Science Consultancy Report 2011/183, July 2011).

¹⁷ Stirling, above n 16, at 53.

¹⁸ The magnitude of earthquakes is measured by the Richter scale.

to the south east of the city. Both earthquakes were at a shallow depth but caused only minor damage to buildings.

New Zealand has a large number of faults across the country. The Alpine Fault is one major fault line that runs the length of the South Island underneath the Southern Alps and up into the North Island. For many years New Zealanders have been forewarned that a significant earthquake generated by the Alpine Fault is overdue and should be expected at any time.¹⁹

GNS Science terms an active fault as being “one that is likely to move within a period of concern to society”.²⁰ The Alpine Fault is a well-known, well studied, active fault in the South Island. There are also more than 100 active faults that have been documented in the Canterbury region.²¹ However, little was known about active faults beneath the Canterbury Plains because prior to the Canterbury earthquakes there was little evidence of earthquake activity in this area. GNS Science concluded, therefore, that movements with the potential to cause large earthquakes along faults in this area were rare and separated by a quiet period of thousands of years.²²

Christchurch residents have understood that the city’s earthquake risk comes from a rupture of the Alpine Fault. Although this will be a massive event, the fault is a long way from Christchurch and will therefore have less impact on the city than a closer fault. Furthermore a lack of knowledge of historical seismic activity on the Canterbury Plains or in close proximity to Christchurch had previously led to general feelings of complacency about the earthquake risk to Christchurch. This attitude has changed significantly.

¹⁹ More detailed information on the Alpine Fault can be found in Webb above n 16.

²⁰ Webb, above n 16.

²¹ GNS Science Active Fault Database contains details of all known faults considered to be possible sources of earthquakes. The faults that caused the Canterbury earthquakes were not on the database because they were unknown.

²² Webb above n 16 at 7.

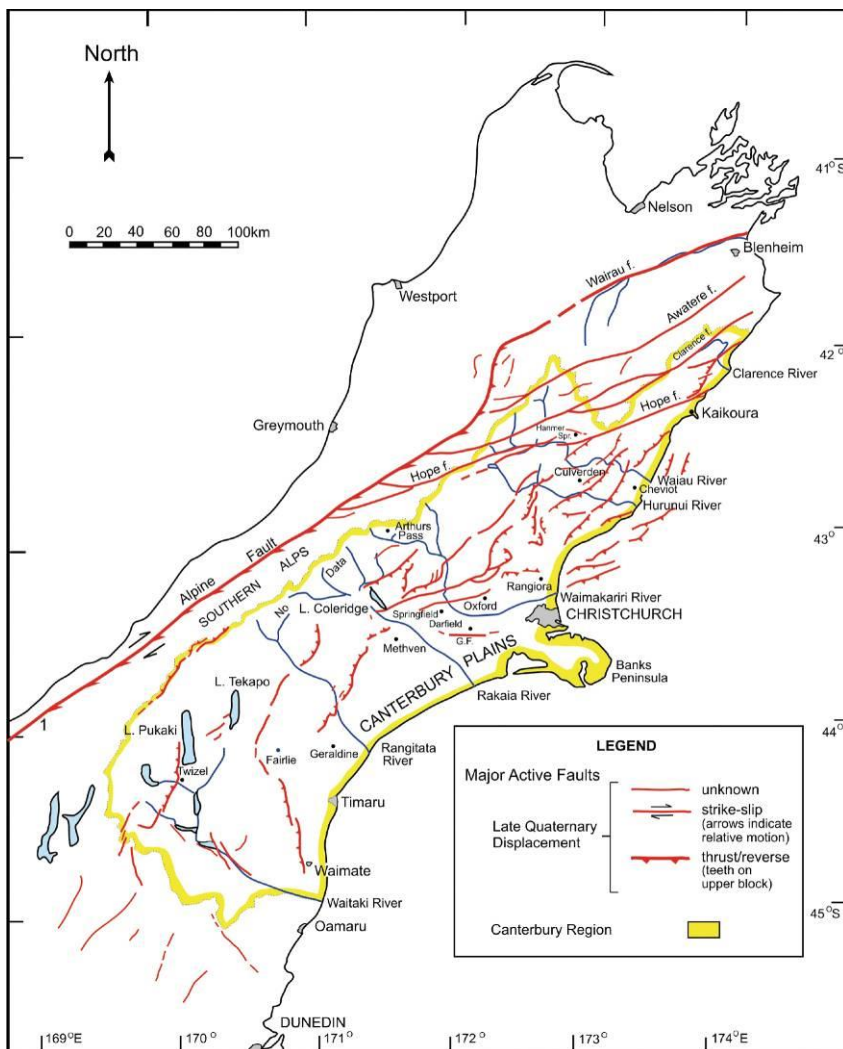


Figure 4: Known active faults in the Canterbury region now including the Greendale fault.²³

²³ Webb above n 16, at 7.

C The September 2010 Earthquake

At 4.35am NZST on 4 September 2010 a magnitude 7.1 earthquake shook the Canterbury region. Its epicentre was close to the small town of Darfield, and it occurred at a shallow depth of 10 kilometres. The shaking was intense,²⁴ lasted for over 30 seconds and was felt in many places around the South Island. Fortunately, the earthquake occurred in a rural location, at a time in the morning when few people were up; there were no fatalities. It did, however, cause extensive damage. The earthquake's fault line, now known as the Greendale fault, caused a rupturing of the surface of the land which displaced shelter belts, railway lines and caused cracking to roads and bridges. Some rural homesteads were severely damaged too. By world standards it was a significant earthquake. It occurred on a fault that had not ruptured for a very long time. In fact, GNS Science predicts the rupture recurrence interval for the Greendale fault to be at least 8,000 years.²⁵

Christchurch, just 40 kilometres west of the epicentre of the earthquake, sustained widespread damage. A local State of Emergency was declared. There were power outages, flooding and damage to infrastructure. In the CBD, many older buildings were damaged, mainly brick and masonry buildings and those made of stone. Residential properties in the eastern suburbs of the city in particular, were damaged by liquefaction of the soil after the earthquake.²⁶

²⁴ On the Mercalli Intensity Scale the earthquake was recorded as X or Intense.

²⁵ Webb, above n 16, at 14.

²⁶ The online Oxford Dictionary says the verb "liquefy" means "make or become liquid"; <<http://www.oxforddictionaries.com>>.

The September 2010 earthquake initiated a major aftershock sequence that is represented pictorially in Figure 5. It shows the recorded aftershocks from 4 September 2010 until 22 February 2011.

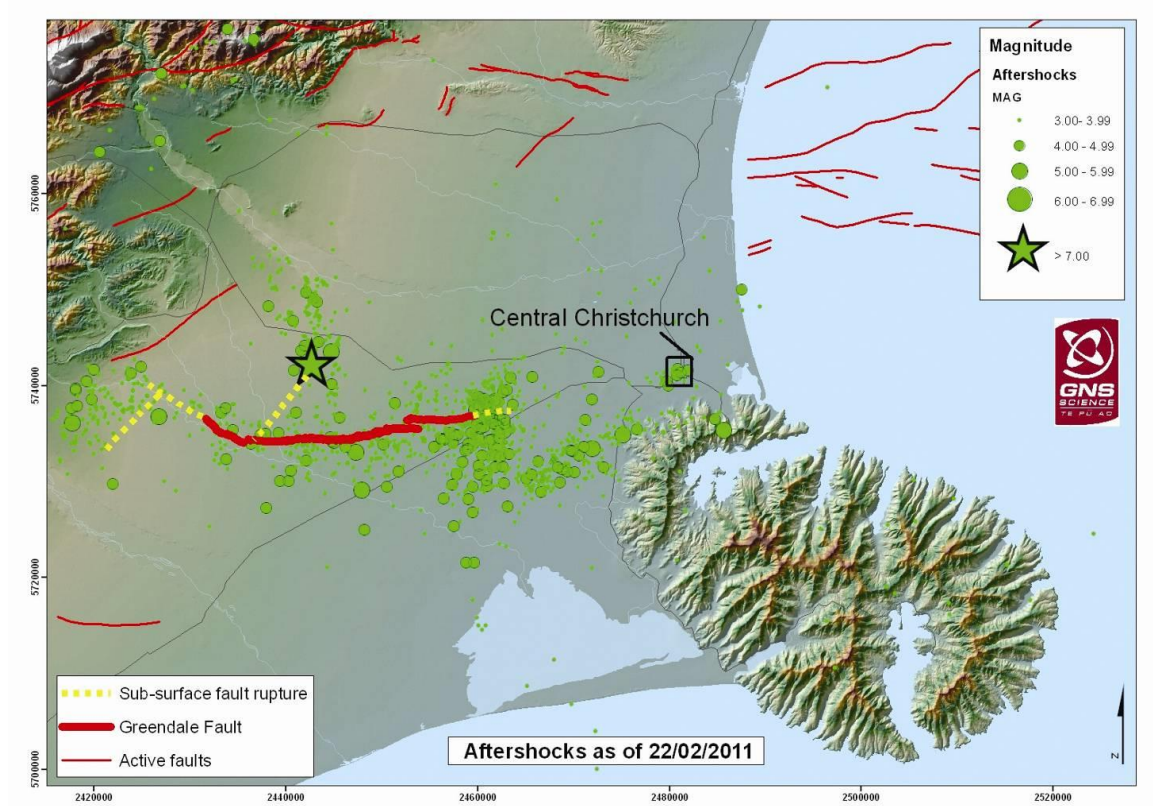


Figure 5: The September 2010 earthquake and aftershocks until 22 February 2011.²⁷

²⁷ Webb, above n 16, at 15.

A number of aftershocks were large earthquakes in their own right and are detailed below: the Boxing Day 2010 earthquake, the February 2011 earthquake and the June and December 2011 earthquakes. There were also over 10,000 smaller aftershocks that shook the region on a regular basis over the course of several years.

D The Boxing Day 2010 Earthquake

On 26th December 2010, a magnitude 4.7 aftershock shook Christchurch. The epicentre of this earthquake was near the city centre and it set off a series of over 30 aftershocks, the largest being 4.6 and 4.4 in the hours following. The Boxing Day 2010 earthquake, although not large in magnitude, was notable because it was shallow, at a depth of only 4km, and centred near the CBD.²⁸ Those who experienced this earthquake reported “damaging or heavily damaging ground motions”.²⁹ The CBD took the full brunt of the force and many commercial buildings were damaged and weakened by this event.

E The February 2011 Earthquake

Five and a half months after the September 2010 earthquake and only two months after the Boxing Day earthquake, another significant aftershock unexpectedly struck Christchurch.³⁰ On 22 February 2011 at 12.51pm NZST, a magnitude 6.2 earthquake brought death and destruction to the city. The earthquake was located on a previously unknown fault,³¹ at a shallow depth,³² with an epicentre 5km south-east of the CBD. It caused severe ground shaking over much of the city owing to a complex faulting movement that resulted in extremely high ground motions.³³ The Royal Commission report stated:³⁴

²⁸ Webb, above n 16, at 19.

²⁹ Webb, above n 16, at 21.

³⁰ Even though the February 2011 earthquake occurred on a different fault to that of the September 2010, the February 2011 earthquake is still considered to be an aftershock of the September event.

³¹ This fault is now known as the Port Hills Fault.

³² Some parts of the fault reached to one kilometre of the surface. Canterbury Earthquakes Royal Commission *Summary and Recommendations in Volumes 1-3 Seismicity, Soils and the Seismic Design of Buildings* (CERC Vol 1, 2012) at 2.7.1.3.

³³ The vertical accelerations reached 2.2g and horizontal accelerations reached 1.7g near the epicentre: At 2.7.1.3.

³⁴ At 2.7.1.3.

The high accelerations experienced in central Christchurch because of the February earthquake may be attributed to the shallowness of the rupture and its proximity to the city. Basin and topographical effects and the high water table are likely to have added to the force of the earthquake. These have contributed to the high vertical accelerations observed, which were greater than the horizontal accelerations nearer the epicentre.

The February 2011 event was the worst earthquake to hit a city in New Zealand since the Hawke's Bay earthquake in 1931.³⁵ It occurred at lunchtime on a business day and resulted in the loss of life,³⁶ thousands of injuries, landslides, rock fall, damage to city infrastructure; the catastrophic collapse of two large multi-storey commercial buildings and significant damage to many other commercial and residential buildings. There was widespread liquefaction across the city, more than had occurred in the September 2010 earthquake, with the worst again in the eastern suburbs. It also occurred in other suburbs not previously affected.

Further damage was caused to buildings already affected by the September 2010 event. Heritage buildings over 100 years old were particularly hard hit again, including the Christ Church Cathedral,³⁷ the Cathedral of the Blessed Sacrament³⁸ and the Canterbury Provincial Council Buildings.³⁹ More modern buildings were not immune either. The relatively recently built Canterbury Television Building (known as CTV)⁴⁰ and Pyne Gould Corporation Building (known as PGC)⁴¹ buildings collapsed while many others were significantly damaged. A national State of Emergency was declared.

³⁵ In the Hawke's Bay earthquake (also known as the Napier earthquake) 256 people were killed, thousands injured and the city of Napier and the Hawke's Bay region were devastated. The earthquake was a magnitude 7.8 which caused shaking for two and a half minutes. It is still New Zealand's deadliest natural disaster.

³⁶ Those 185 people who lost their lives came from New Zealand and a number of countries around the world: Japan, Australia, Great Britain, Thailand, China, the Philippines, Korea, Ireland, Malaysia, Turkey, Taiwan, Israel, Canada and the United States of America.

³⁷ Built between 1864 -1904; <my.christchurchcitylibraries.com>.

³⁸ Built between 1901-1905; <my.christchurchcitylibraries.com>.

³⁹ Built between 1858-1865; <www.ccc.govt.nz>.

⁴⁰ Built between 1986-1988; Canterbury Earthquakes Royal Commission *Canterbury Television Building (CTV)* (CERC Vol 6, 2012) at 89.

⁴¹ Built between 1964-1966; Canterbury Earthquakes Royal Commission *The Performance of Christchurch CBD Buildings* (CERC Vol 2, 2012) at 20.

The February 2011 earthquake then triggered its own sequence of aftershocks. Several were strong, of magnitude 5 or greater, damaging buildings already weakened from the numerous earthquakes since September 2010.

F Other Significant Aftershocks

After the February 2011 earthquake aftershocks regularly shook the Canterbury region. They were an almost everyday occurrence. However, several large aftershocks⁴² that occurred in June and December 2011 are significant and worthy of mention owing to their size and the location of their epicentres close to the CBD. On 13th June 2011, two large earthquakes struck in the middle of the day, within a little over an hour of each other. The first was a magnitude 5.7, termed a foreshock, and the second a magnitude 6. They were centred in the seaside suburb of Sumner. As with the February earthquake, these aftershocks created high accelerations which caused liquefaction in the central city. The June earthquakes were particularly damaging to buildings in the CBD because their epicentres were near the city, they were strong shakes and close together. For many buildings already weakened by earlier events, the damage wrought by these earthquakes took them from the status of awaiting repairs to being irreparable.

On 23 December 2011 there were another two large aftershocks. The first was a magnitude 5.8 which was centred off the coast of New Brighton, an eastern suburb of Christchurch, only kilometres from the CBD. Many large aftershocks followed, the most significant a magnitude 5.9. These were not insubstantial earthquakes: they were damaging events being large in magnitude and again centred close to the city.

⁴² As previously mentioned, earthquakes following the September 2010 event are termed aftershocks even if their epicentres are in a different location to the main earthquake.

The following map shows the large number of earthquakes that occurred in Canterbury for a period of 18 months from the initial one on 4 September 2010.

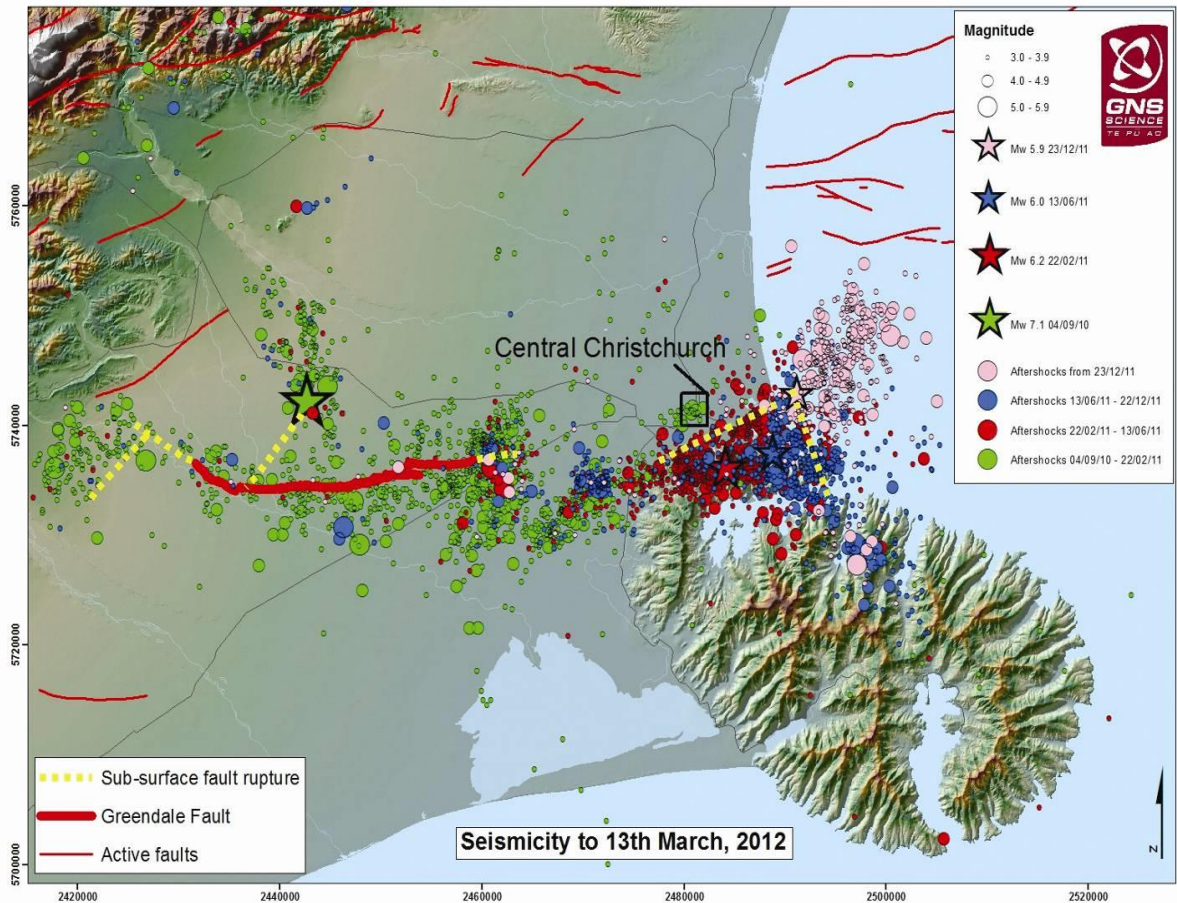


Figure 6: Earthquakes and their associated aftershock sequences from the September earthquake in 2010 until March 2012⁴³

⁴³ CERC (Vol 1, 2012) above n 32, at 2.7.1.8, taken from a letter by Terry Webb, Anna Kaiser and Stephen Bannister, GNS Science, to Justine Gilliland, Executive Director, the Royal Commission, 2 April 2012. Letter Report No. CR 2012/94 LR.

III The Extraordinary Nature of the Canterbury Earthquakes

A Unusual Earthquakes

The Canterbury earthquakes were extraordinary. Several different unusual features cumulatively turned this sequence of earthquakes into an extraordinary event. They consisted of one significant earthquake followed by a number of large aftershocks, as well as thousands of smaller aftershocks which occurred over the course of 18 months. They occurred in a low-to-moderate zone of seismic activity on unknown faults. A number of the faults were located close to a high density urban area, which is unusual in that historically all of the larger earthquakes in the South Island have affected rural areas.

In a report for GNS Science, the authors highlighted other features of the Canterbury earthquakes that made them unusual: the high amount of energy released for earthquakes of their size; the extreme vertical accelerations and the shallowness of the faults. Each is examined in turn.

1 High release of energy

The energy released by the three largest earthquakes was high for their size.⁴⁴ The Royal Commission⁴⁵ noted that in the February 2011 earthquake the intensity of the shaking was unusually high.⁴⁶ GNS Science⁴⁷ reported:⁴⁸

The ground accelerations in Christchurch, the largest ever recorded for a New Zealand earthquake, were as much as four times higher than the highest accelerations measured in the magnitude 9.0 earthquake off the east coast of Japan on 11 March 2011.

⁴⁴ Webb, above n 16, at 56.

⁴⁵ The “Royal Commission” refers to the Canterbury Earthquakes Royal Commission of Inquiry which was established to report on the causes of building failure as a result of the earthquakes as well as the legal and best-practice requirements for buildings in New Zealand Central Business Districts: Refer <http://canterbury.royalcommission.govt.nz>.

⁴⁶ CERC (Vol 1, 2012), above n 32.

⁴⁷ GNS Science, Te Pu Ao, is New Zealand’s leading provider of Earth, geoscience and isotope research and consultancy services. It is a government owned company with an independent Board of Directors.

⁴⁸ GNS Science “Scientists find rare mix of factors exacerbated the Christchurch quake” (17 March 2011) <www.gns.cri.nz/Home/News-and-Events/Media-Releases/Multiple-factors>.

Scientists⁴⁹ believe these particular faults only slip occasionally and are therefore very strong, so the amount of energy released is greater than for other earthquakes of the same size. A high release of energy is common for faults where the strain builds up gradually producing long periods of time between earthquakes.⁵⁰ GNS Science reported that “the shaking from the three largest earthquakes exceeded both the 500-year and more stringent 2,500-year design levels in the New Zealand Loadings Standard for certain frequencies of shaking”.⁵¹ A contributing factor to the high energy released was the high “stress drop”⁵² that occurred during the Canterbury earthquakes, some of the earthquakes having the highest worldwide.⁵³ The high stress drop indicates the fault was strong so that the rupture released more energy than an average earthquake of the same size.⁵⁴ In the September and February earthquakes, the direction of the rupture along the fault (known as directivity) is also believed to have increased the severity of the ground motions in the CBD.⁵⁵

Furthermore, the force of the February 2011 earthquake was exceptionally strong. The peak horizontal accelerations of this earthquake were approximately twice as strong as those in other earthquakes.⁵⁶ GNS Science says the maximum horizontal acceleration was 0.4 - 0.8g. In comparison, the maximum horizontal acceleration for a rupture of the Alpine Fault will be less than 0.04 g and yet the Alpine Fault is considered to be capable of generating an earthquake of magnitude 8 or higher. Higher accelerations are also one of the factors that led to severe building damage.⁵⁷

2 *Extreme vertical accelerations*

The February 2011 earthquake produced extreme vertical accelerations. At some locations the vertical accelerations were so strong they were greater than the horizontal accelerations.⁵⁸ These vertical movements caused the “trampoline effect” which is a

⁴⁹ Webb, above n 16, at 56.

⁵⁰ At 19.

⁵¹ At 56.

⁵² The stress drop is the “sudden reduction of stress across a fault during a rupture” and is used to measure the energy released: Webb above n 16, at 19.

⁵³ At 45.

⁵⁴ At 19.

⁵⁵ At vi.

⁵⁶ At vi.

⁵⁷ At 14.

⁵⁸ At 56.

recently discovered physical phenomenon.⁵⁹ When the energy of a ruptured fault travels through the horizontal layers of earth it causes some of the layers to separate. These layers fall back down to meet other layers coming up and hit against each other producing a high impact.

3 Shallowness of the faults

The faults that triggered the Canterbury earthquakes were very shallow. The shallowness of the faults heightens the effects of earthquakes – the vertical and horizontal accelerations are higher and the shaking more extreme than an earthquake caused by the rupture of a fault much deeper underground.

4 Other unusual features

Other factors are also believed to have led to strong ground shaking in the CBD during the February 2011 event.⁶⁰ The earthquake was caused by the rupture of a blind fault (a fault that does not rupture the ground surface) and these types of fault produce strong ground motions. The location of the epicentre of the fault at the edge of the Port Hills near the city meant that the energy was directed towards the CBD and there was little time for the energy to reduce before it hit. Further, the land Christchurch is built on can magnify ground shaking as it is weak marsh land. These unusual features contributed to the extraordinary movements generated by the earthquakes which caused severe damage to buildings in the CBD.

Finally, the Canterbury earthquakes are also unusual owing to the number of large aftershocks⁶¹ that followed the main event in September 2010. The Royal Commission said “... the analyses suggest that the comparatively high magnitude of three of the aftershocks in the Canterbury sequence is not the usual pattern ...”.⁶² Further, the cumulative effect of the aftershocks cannot be overstated.⁶³ Every earthquake that occurred weakened the ground further. Many buildings that survived the first earthquake in September 2010, were

⁵⁹ GNS Science “Scientists find rare mix of factors exacerbated the Christchurch quake” (17 March 2011) <www.gns.cri.nz/Home/News-and-Events/Media-Releases/Multiple-factors>.

⁶⁰ Although work in this area is ongoing: Webb, above n 16, at 43.

⁶¹ The largest aftershocks were magnitude 5 or greater and two were magnitude 6 or greater.

⁶² CERC (Vol 1, 2012) above n 32, at 2.7.1.8.

⁶³ Misko Cubrinovski and others “Geotechnical Aspects of the 22nd February 2011 Christchurch Earthquake (2011) 44(4) Bulletin of the New Zealand Society for Earthquake Engineering 205 at 225.

damaged in February 2011 and were then irreparable after the June or December earthquakes. Then, as well as the larger aftershocks, there were also over 10,000 smaller earthquakes. It was an unprecedented experience.

B Foresight and foreseeability of the Canterbury Earthquakes

Earthquakes are different from other natural disasters in that scientists do not have the ability to predict when and where they will occur. There is technology that can forewarn of cyclones, tornadoes, hurricanes, tsunamis and volcanic eruptions. However there is no way to know precisely when a fault will rupture under the ground. Earthquakes happen without warning. Scientists can only provide advice based on the probability of earthquakes occurring.

Some countries in the world are more prone to earthquakes owing to their placement on or near the edges of tectonic plates.⁶⁴ New Zealand, as one such country, experiences regular seismic activity. Nevertheless, the Canterbury earthquakes were not expected or foreseen: not by local residents who had always been led to believe that Christchurch's earthquake risk was from a rupture of the Alpine Fault; not by the City Council which had assessed the risk of material damage occurring in Christchurch as a result of an earthquake as low⁶⁵ and not by the scientists who had no knowledge of these particular faults. Environment Canterbury, the Regional Council which manages the natural resources of Canterbury⁶⁶ said on its website, "The 2010 and 2011 earthquakes are very rare events".⁶⁷

It is clear that, prior to the Canterbury earthquakes, little was known about the earthquake risk to Christchurch from faults beneath the Canterbury Plains. A 2001 report by Pettinga and others on the identification of earthquake sources in the Canterbury region said the Canterbury Plains was an area of hidden and unstudied faulting,⁶⁸ owing to its geography,

⁶⁴ For example the countries around the edge of what is known as the "Pacific Ring of Fire" including New Zealand, Japan, the west coast of North America and Chile.

⁶⁵ Canterbury Earthquakes Royal Commission *Volume 7: Roles and Responsibilities* (CERC, Vol 7, 2012) at 5.5.2.

⁶⁶ Environment Canterbury is the Regional Council which manages the Canterbury region's air, water and land resources: <www.ecan.govt.nz>.

⁶⁷ <www.ecan.govt.nz/advice/emergencies-and-hazard/earthquakes/pages/earthquake-hazard.aspx>.

⁶⁸ Jarg Pettinga and others "Earthquake Source Identification and Characterisation for the Canterbury Region, South Island, New Zealand" (2001) 34(4) *Bulletin of the New Zealand Society for Earthquake Engineering* 282 at 288.

in that it has a thick layer of gravel across it that conceals any fault activity.⁶⁹ Furthermore, the faults associated with earthquakes of magnitude 6 or less are relatively small and often do not cause damage to the surface of the land. Where there is no surface rupture, active faults can be difficult to locate.⁷⁰ Nevertheless, those who did study the earthquake potential of the Canterbury Plains believed the risk to be low. Pettinga's report said, apart from an area in the northwest there were no active faults or fold structures shown on the surface of the land.⁷¹ This report reveals that scientists working in the field were themselves unaware of these active faults that had the potential to affect Christchurch. Therefore the Canterbury earthquakes occurred on faults that were previously unknown.⁷²

GNS Science said the Canterbury earthquakes were unexpected and rare.⁷³ The Royal Commission found particular features of the February earthquake made it an event that was unexpected. When reporting on GNS Science's investigation into the distance between the epicentre of the September 2010 earthquake and the largest aftershock in February 2011 it said:⁷⁴

What these analyses do not consider is the effects of the proximity of the February earthquake to the Christchurch CBD, its very shallow depth and the orientation of the energy produced by the rupture towards the city. It is clear that these aspects of the February event were not anticipated and could not have been, given that the rupture occurred on a previously unknown fault.

Finally, the Royal Commission also determined that the situation of an aftershock causing more damage and destruction than the main earthquake was another aspect of these earthquakes that was unforeseen.⁷⁵

⁶⁹ CERC (Vol 1, 2012) above n 32, at 2.5.

⁷⁰ Webb, above n 16, at 57.

⁷¹ Pettinga, above n 68, at 298. The report recommended a more detailed study be undertaken of the earthquake source potential of the Canterbury Plains.

⁷² CERC (Vol 1, 2012) above n 32, at 2.5.

⁷³ Webb, above n 16, at 12.

⁷⁴ CERC (Vol 1, 2012) above n 32, at 2.7.1.8.

⁷⁵ CERC (Vol 7, 2012) above n 65, at 2.4.3.4.

IV The Consequences of the Canterbury Earthquakes

Prior to the earthquakes the majority of buildings in the CBD of Christchurch were low-rise commercial buildings. The few high-rise buildings were used for offices, hotels and apartments. There were also a number of heritage buildings and buildings used for residential purposes. At the time of the earthquakes there were around 6,000 businesses in the CBD, which employed approximately 50,000 people.⁷⁶

The consequences of the Canterbury earthquakes were damage to buildings, the erection of the red zone cordon, interruption to essential services and pressure on resources. All of these are considered in turn.

A Damage to Buildings

The September 2010 earthquake caused damage to buildings in the CBD. Liquefaction caused foundations to sink and buildings to move. Unreinforced masonry fell from older buildings, bricks were dislodged and windows were broken. The interiors of buildings were also damaged from burst water pipes and, in some cases, fire. Furniture and equipment was strewn about.

Civil Defence set up a preliminary assessment system for buildings in the form of coloured stickers, known as Civil Defence placards.⁷⁷ In light of the sheer number of buildings affected, engineers were given the task of doing preliminary assessments⁷⁸ and placing a coloured sticker on them to indicate whether they were safe to be accessed: red meant access was prohibited because the building was unsafe; yellow meant access was only permitted for emergency purposes, damage assessment, for making the building safe or for demolition purposes;⁷⁹ and green meant there were no restrictions on entry to or the use of

⁷⁶ Chang, above n 12, at 519.

⁷⁷ The Civil Defence placards were colloquially known as stickers – for example people would often talk about a building being “red-stickered” or “yellow-stickered”; see Civil Defence Emergency Management Act 2002. The guidelines for the sticker system were developed by the New Zealand Society for Earthquake Engineering: New Zealand Society for Earthquake Engineering “Building Safety Evaluation During a State of Emergency, Guidelines for Territorial Authorities” August 2009.

⁷⁸ Refer also to the Canterbury Earthquakes Royal Commission Report where there is a detailed discussion about the system for assessing buildings (rapid assessments) that took place after the earthquakes: CERC (Vol 7, 2012) above n 65, at 2.3.2.2.

⁷⁹ <www.cera.govt.nz/notices>. The Civil Defence placards expired on 12 July 2011.

the building. After the September 2010 earthquake approximately 26 per cent of buildings in the CBD were red or yellow-stickered.⁸⁰

The February 2011 earthquake caused more destruction in the CBD than the one in September 2010. Two multi-storey office buildings collapsed. All buildings sustained damage: for some it was only minor and cosmetic while for others it was total destruction and there was varying degrees of damage in-between these extremes. After the preliminary building assessment 24 per cent of buildings in the CBD were red-stickered and 23 per cent were yellow-stickered.⁸¹ One report suggested that more than 50 per cent of the approximately 2,000 commercial buildings in the CBD may have to be demolished and this will also be true of the nearly 220 buildings over five stories high.⁸² The Canterbury Earthquake Recovery Authority's (CERA) records in April 2015 showed that 1,086 commercial buildings had been demolished, with many more having been partially demolished or work carried out on them to make them safe.⁸³

The Royal Commission estimated the cost of earthquake damage to buildings in Christchurch to be approximately \$20 billion (commercial \$4 billion; residential \$13 billion and infrastructure \$3 billion) which equates to approximately 10 per cent of New Zealand's annual GDP.⁸⁴ This is high in comparison to the major earthquake and tsunami that occurred in Japan in 2011, which caused damage equating to only 3-4 per cent of Japan's GDP.

B The Red Zone Cordon

After the September 2010 earthquake, a fenced and patrolled cordon was erected around the CBD. Over a period of seven days the cordon was reduced as areas were made safe.⁸⁵ At the end of that time any buildings that continued to pose a threat to public safety had

⁸⁰ Chang, above n 12, at 519.

⁸¹ At 519.

⁸² At 519.

⁸³ CERA website <www.cera.govt.nz>, demolitions list as at April 2015.

⁸⁴ The Canterbury Earthquakes Royal Commission used the RBNZ definition of damage to buildings which is the cost of repairing and rebuilding in 2011, therefore as years go by the costs increase: Canterbury Earthquakes Royal Commission *Summary and Recommendations in Volumes 5-7, Christchurch, the city and approach to this inquiry* (CERC Vol 5, 2012) at 2.7.1.1.

⁸⁵ The cordon was set up on 4 September and fully removed on 10 September 2010: Chang, above n 12, at 520.

fences placed around them. However, for most it was back to business as usual within a week.⁸⁶

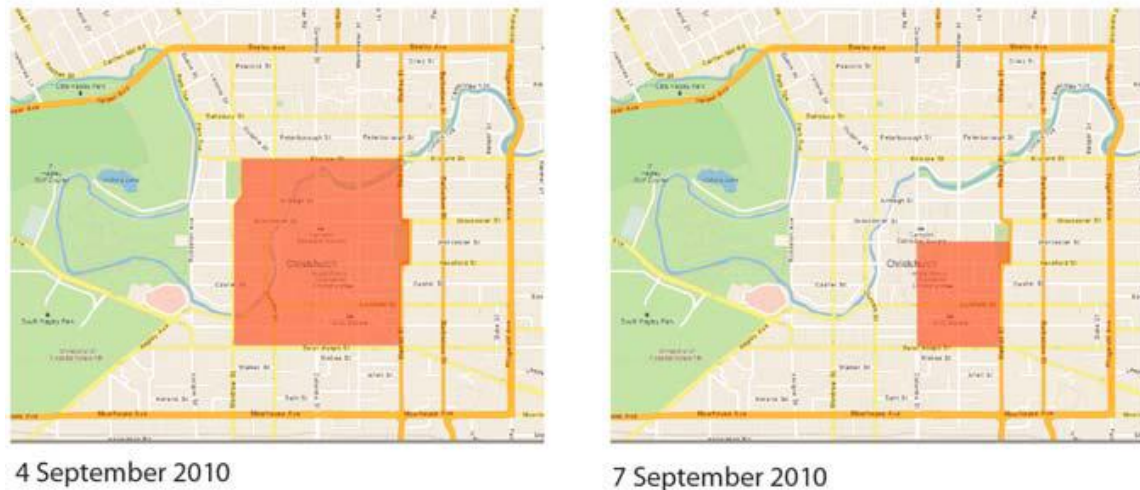


Figure 7: Map of Christchurch's CBD red zone cordon showing its reduction from 4 September 2010 to 7 September 2010.⁸⁷

The February 2011 earthquake was centred closer to the CBD and caused significantly more damage to buildings in the city than the September 2010 event. A new cordon was set up around the CBD using the locally known Four Avenues as a boundary.⁸⁸ It made a 3.9 square kilometre⁸⁹ no access zone that became known as the “Red Zone”. The National Controller had authority over the cordon, which was manned by the New Zealand Defence Force and the New Zealand Police. An access pass system was established to enable residents and authorised people to travel in and out of the restricted area at specific checkpoints.

⁸⁶ H Kachali and others “Organisational Resilience and Recovery for Canterbury Organisations after the 4 September 2010 Earthquake” (2012) *The Australasian Journal of Disaster and Trauma Studies* 11: in this study the organisations surveyed reported that cordons around nearby buildings were one of five main factors that caused business interruption.

⁸⁷ Canterbury Earthquake Recovery Authority website <www.cera.govt.nz/maps/cordon-reduction>.

⁸⁸ The “Four Avenues” refer to Bealey Avenue, Fitzgerald Avenue, Moorhouse Avenue and Deans Avenue, which are the four main roads that surround Christchurch’s CBD.

⁸⁹ Or 387 hectares.



Figure 8: Cordon fences preventing access to the CBD.⁹⁰

On 30 April 2011 the national State of Emergency was lifted. The newly established Canterbury Earthquake Recovery Authority (“CERA”) took over responsibility for the cordon and worked towards opening up access to the CBD as soon as possible. As dangerous buildings were demolished or made safe, roads were reopened. By May 2011 the red zone cordon had been significantly reduced. However, progress slowed thereafter. It was not until June 2013, nearly two and a half years after the February earthquake, that the cordon was removed completely.

⁹⁰ Photographs taken by Toni Collins in November 2012.

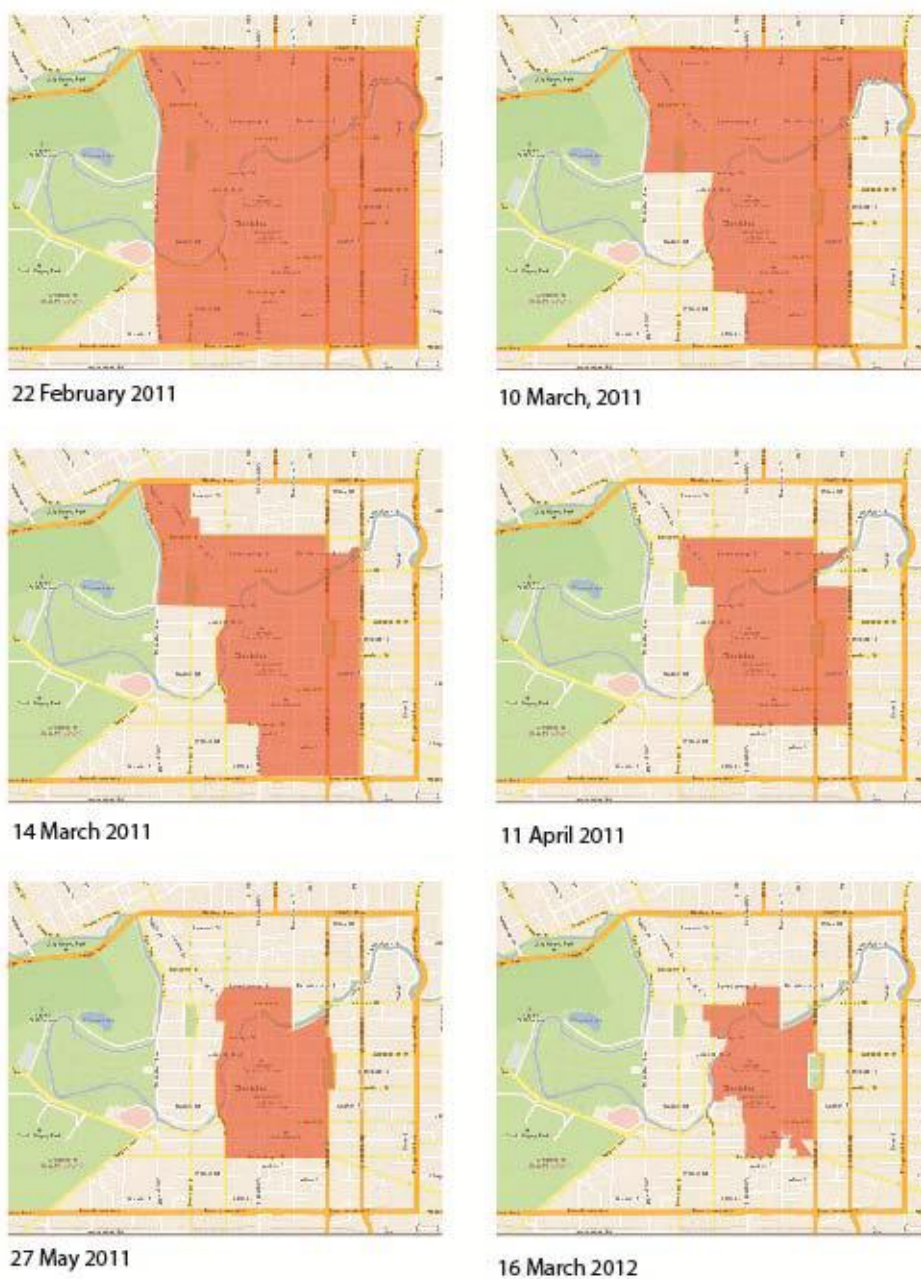


Figure 9: Map of the CBD of Christchurch showing the red zone cordon and its reduction from 22 February 2011 to 16 March 2012.⁹¹

⁹¹ Canterbury Earthquake Recovery Authority website, <www.cera.govt.nz/maps/cordon-reduction>. CERA's website contains a link to <www.data.govt.nz> which contains a timeline of the Christchurch CBD cordon removal.

The placement of a cordon around the CBD of a city is an unprecedented response to the damage caused by an earthquake and has far-reaching effects. There were, however, a number of good reasons why it was necessary that a cordon be established. First and foremost it was about public safety: large aftershocks continued to shake the city and the CBD became a dangerous place. The sheer scale of damaged buildings was overwhelming and there were fears that more buildings might collapse as each aftershock agitated already weakened foundations. Therefore, “drop zones” were created by engineers which showed areas in the CBD that could be susceptible to the collapse of a multi-storey building. There were other reasons too: search and rescue teams needed to work without hindrance from spectators; security was needed for buildings made insecure by the earthquakes; building assessments needed to be undertaken and demolition companies required space to safely demolish buildings without concern for public safety. Although there was pressure to reduce the cordon as quickly as possible, the decision to retain it became defensible when the large June 2011 aftershock exposed the danger that damaged buildings in the CBD still posed to the public.

Having said there were a lot of damaged buildings in the CBD, there were also a large number of buildings that were undamaged and withstood the earthquakes well. However, the restrictions on admittance to the CBD meant that tenants could not enter the area even if their buildings were green-stickered and functional. They could not use their buildings and there was nothing their landlords could do to provide access. It also became clear very early on that the cordon was not a short term solution. The huge amount of work that had to be undertaken to demolish buildings and make the area safe would take years. The establishment of the cordon was a necessary but exceptional and unexpected response to the Canterbury earthquakes.

C Other Issues

There were also a number of other issues that affected tenants of buildings located within the cordon. They had no essential services and there was pressure on resources for repairs and other required work.

1 No essential services

After the September 2010 earthquake there were initial difficulties with essential services but they did not seem to cause too many problems. Power was quickly resumed. Those

most affected lived in the eastern suburbs and in the small town of Kaiapoi, which was north of the city, on the eastern side.

It was a different story after the February 2011 earthquake. The ground movement significantly affected essential services to the city and in particular the CBD. The infrastructure of the city was severely damaged. Roads⁹² and bridges were broken as were waste⁹³ and storm water systems; electricity⁹⁴ and telecommunications were affected; there was also a lack of fresh water. Liquefaction caused flooding on streets and in the basements of buildings and random fires were also a problem.

Tenants cannot use their buildings if they do not have essential services. They may need power for business purposes, but they also need water and waste facilities for the health and safety of their staff. Although power was restored to the greater Christchurch area within weeks, it was disconnected from the CBD for many months. The flooding receded within weeks but the repair and replacement of earthquake-damaged waste water pipes was a long term problem.⁹⁵ It is likely to take years to rebuild the city's infrastructure to what it was before the earthquakes and is likely to cost in excess of \$2 billion dollars.⁹⁶

2 *Pressure on resources*

The September 2010 earthquake was large and powerful. Despite its distance from the city, the ground movement in the CBD was significant and warranted a structural assessment of all buildings to ascertain whether they had sustained damage. With over 2,000 buildings requiring assessment, this was an enormous job. It put huge pressure on limited resources. The work was complex and there was a shortage of suitably skilled personnel to carry it out, despite many coming in from other parts of New Zealand and overseas. There were

⁹² It is estimated that over 1,000km of road was damaged in the earthquakes and will need to be rebuilt which is over 50 per cent of the urban sealed road in Christchurch: CERC (Vol 5, 2012) above n 84, at 2.7.

⁹³ It is estimated that over 30 per cent of the sewerage systems in Christchurch were damaged in the earthquakes. The waste water treatment plant was also badly damaged: CERC (Vol 5, 2012) above n 84 at 2.7.

⁹⁴ The earthquakes severely affected Christchurch's electricity distribution networks, stretching some underground power cables and damaging substations: CERC (Vol 5, 2012) above n 84 at 2.7.

⁹⁵ It is expected that the repair of wastewater and storm-water systems will be completed in 2016; Canterbury Earthquake Recovery Authority (CERA): *Briefing for the incoming Minister for Canterbury Earthquake Recovery* (CER648.1014A, October 2014) at 7.

⁹⁶ CERC (Vol 5, 2012) above n 84, at 2.7.

also delays for assessments, reports and repair work. These problems also arose after the February 2011 earthquake.

V Conclusion

Earthquakes are a known risk in New Zealand and are therefore a foreseeable risk. However, that does not mean every particular earthquake is necessarily foreseeable or that its consequences are foreseeable. In this thesis it is argued that the particular features of the Canterbury earthquakes made them unforeseeable events. The cordon erected around the CBD of a city as a consequence of these earthquakes, was unprecedented and unforeseeable. Therefore the Canterbury earthquakes as a sequence, were an extraordinary supervening event for the purposes of the test for the doctrine of frustration.

CHAPTER SEVEN

THE CANTERBURY EARTHQUAKES AND THEIR EFFECT ON COMMERCIAL LEASES

*“I think it was clear that our rights were not protected under the lease”.*¹

I Introduction

The aim of this thesis is to discover whether the doctrine of frustration could apply to terminate leases of inaccessible buildings in Christchurch after the earthquakes. To do this, empirical research was undertaken to obtain qualitative data from landlords and tenants who had been directly affected by the earthquakes and from lawyers who had advised landlords and tenants on earthquake-related lease issues. The purpose of gathering this data was to discover whether the circumstances of these landlords and tenants met the test for the doctrine of frustration.

This chapter sets out the methodology and findings from the research. In the next chapter, the findings are applied to the test for the doctrine of frustration.²

II Methodology and Collection of Qualitative Data

In this research information was collected through the use of questionnaires and interviews. The aim was to find 30 participants; 10 commercial landlords, 10 commercial tenants and 10 lawyers, to obtain direct evidence of their experiences after the earthquakes.³ Knowing that most commercial leases used in Christchurch were the standard form Auckland District Law Society (ADLS) lease, it was useful to prepare a questionnaire that specifically related to it. Participants were given an initial short questionnaire that required them to disclose the type of lease they had. If it was an ADLS lease, the participant was given a questionnaire with questions relating specifically to that type of lease. If it was a different type of lease, he or she was given an alternative questionnaire containing questions that were more general in nature and covered all other forms of lease.⁴ The lawyers' initial

¹ FQ208.

² The findings are analysed in Chapter Eight.

³ More information relating to the methodology is set out in Appendix C.

⁴ For example a Property Council of New Zealand Office lease, a bespoke lease or other form of lease.

questionnaire contained a list of different types of leases and they were asked to disclose the proportion of their clients who had each type. If the largest proportion of clients had an ADLS lease, the lawyer was given the questionnaire relating to that lease. If the largest proportion of clients used another form of lease, he or she would have been given the other general questionnaire, however, all lawyers qualified for the questionnaire pertaining to the ADLS lease.

The landlord and tenant questionnaires focused on the earthquake-related lease issues the participants had experienced. They aimed to prompt answers to various questions such as whether their lease had provided for the issues that arose, the actions the parties had taken and their views on the need, or otherwise, for changes to the law. The questionnaire for lawyers focused on revealing the earthquake-related lease issues their clients had experienced. The aim was to discover whether the leases provided for these issues, the advice that was given and whether the lawyers considered the law was adequate in these circumstances.

The first drafts of the questionnaires were trialled on colleagues and friends to ensure the questions were in a logical order, easy to understand and would elicit all the information necessary for the research but without being too repetitive. The questionnaires were reviewed after each trial and any required amendments made. It was estimated that the initial questionnaire would take five minutes to complete while the full questionnaire, on average, would take one hour.⁵

A *Ethical Approval of Low Risk Research*

Research involving human participants requires approval from the Human Ethics Committee at the University of Canterbury.⁶ The proposed research met the criteria for a low risk application and was approved.⁷

⁵ The time it would take to complete a questionnaire would depend on whether the participant, when asked, would expand on his or her answers.

⁶ University of Canterbury, Human Ethics Policy - Research Involving Human Participants, UCPL-4-136.

⁷ The Human Ethics Committee approval for the research was obtained on 28 September 2012. An amendment to the research proposal was sought and approved by the Human Ethics Committee on 17 July 2013 after the form of the questionnaires was changed slightly upon finalising.

The participants were required to sign a consent form which contained a list of matters they could choose to consent to.⁸ These included an audio recording of the interview being made, being identified in the thesis and having their data added to the CEISMIC⁹ archive of data on earthquake-related matters. The majority of participants gave their consent to all of these requests. The participants were also offered a copy of the thesis upon completion and a number have taken up this offer.

Once ethics approval was obtained the collection of data began. There were three distinct stages to the empirical research: finding participants, completing the questionnaires and completing the interviews.

B The Search for Potential Participants

The first stage of the research involved identifying potential participants.¹⁰ Commercial tenants with earthquake-related lease issues were relatively easy to find and keen to participate in the research. Data was gathered from 14 tenants who came from a broad cross section of business including sole traders, partnerships, companies, trusts and a Non-Governmental Organisation. Although the original plan was to collect data from 10 tenants, the data gathered from all 14 participants was used to extend the range of reported experiences, as some were more topical than others.

Commercial landlords were more difficult to recruit for the research. At the time of the interviews many were continuing to deal with insurance, legal and other earthquake-related issues.¹¹ A number said they were too busy to participate. They may also have been unwilling to discuss issues relating to their buildings and their tenants owing to the sensitive nature of the information, particularly if they had unresolved insurance claims. Furthermore, some landlords did not live in Christchurch and were therefore more difficult to contact. Overall, nine landlords participated along with a Property Manager who had acted for a number of landlords after the earthquakes. This group provided a range of small

⁸ The consent form is set out in Appendix C.

⁹ CEISMIC is a comprehensive digital archive on a broad range of earthquake-related research material gathered by leading New Zealand cultural and educational organisations. For further information refer to the website <www.ceismic.org.nz>. By consenting to their data being added to this archive they allow the data to become available to other researchers in the field.

¹⁰ The search for potential participants began in July 2013. The search for landlords continued until 2015 because of difficulties in getting a sufficient number of subjects for the research.

¹¹ The search for participants began at the end of 2013, less than two years after the February earthquake.

to large companies and, for the purposes of the research, provided a good cross section of Christchurch landlords.

There were few problems obtaining lawyers because the profession was extremely approachable and helpful. The search for lawyer participants began by sending a letter to as many working in the property and commercial areas of the law as could be found, inviting them to be involved.¹² In total 11 lawyers from a variety of different sized law firms, including a lawyer in sole practice, have participated and this has provided an excellent range of legal practitioners for the research.

C The Questionnaires

The second stage of the research involved the completion of questionnaires.¹³ The relevant information sheet, consent form and initial questionnaire were emailed to participants who then completed them in either a digital format or printed them out and completed them in hard copy form. Thereafter, they were returned either by email or post. Upon receipt of the initial set of completed documents, the appropriate full questionnaire was sent out for completion and return in the same way. Copies of all questionnaires are contained in Appendix C.

The original aim was to have the questionnaires completed prior to the interview. Unfortunately this was not able to be achieved in every case. As participants were contacted it soon became apparent that some did not have the time to spend an hour completing a questionnaire. Therefore, in some circumstances, it was more important to get the landlord, tenant or lawyer to participate in the research than insist on adhering to a strict order in which information was obtained. In these cases, the questionnaires were completed at the interview, which worked well because the participants expanded on their answers to the questions themselves as they talked it through.

¹² The search for lawyers began by viewing their personal profiles on their firm websites. In some cases the profiles listed the areas of work they were involved with and those who worked in commercial or property law were contacted.

¹³ The questionnaires were completed from November 2013 to September 2015.

D The Interviews

In the third stage of the empirical research all participants were interviewed.¹⁴ The one-on-one interviews enabled aspects of the answers given in the questionnaires to be clarified and more detail obtained if necessary. The interviews were semi-structured and participants were encouraged to tell their stories, and their experiences of the earthquakes, in a narrative. The general talk started with the question “Could you tell me about your experiences after the earthquakes?” This style of prompting elicited a story-like response which led participants to remember more about what happened to them in the aftermath of the earthquakes than they had professed in their questionnaires.

The majority of the interviews took place in 2014, with a few at the end of 2013 and one in 2015. All interviews were conducted in person, in Christchurch and they typically lasted for one hour. For landlords and tenants the interviews were conducted mostly at their places of work, although for those who asked to meet elsewhere it was usually at a café. For lawyers, the interviews were conducted either in the law firm’s meeting room or in a café.

III The Participants

A wide range of tenants, landlords and lawyers were secured for this research. In the following part information is provided about the participants and their businesses. This group is merely a snap-shot of a much larger picture of landlords and tenants who were working in the central business district at the time of the Canterbury earthquakes. However, the group does represent a good cross section of Christchurch’s business community. There is a broad range and size of businesses amongst the participants yet all their stories and experiences are typical of many who lived through the aftermath of the earthquakes.

¹⁴ The interviews usually followed the questionnaires (except for the participants who did not complete questionnaires prior to) and took place within two or three weeks of the questionnaire being completed and returned. The first interview took place on 12 November 2013 and the last interview on 30 September 2015.

A Commercial Tenants

Like the rest of New Zealand, Christchurch is made up of predominately small-to-medium sized businesses.¹⁵ Therefore, it is not surprising that the majority of tenant participants were small to medium sized companies.¹⁶ There was also a sole trader, a trading trust and a Non-Governmental Organisation (NGO). While most of the tenants work in Canterbury, two conducted business at a national level and one internationally. At the time of the earthquakes¹⁷ the majority of tenants leased only one building.¹⁸ However one tenant had leases of between two and five buildings and another more than ten buildings. Most tenants shared their buildings with between two and 12 other tenants¹⁹ while three were the sole tenant.

The majority of tenants had landlords with Canterbury based businesses. Only a few of their landlords were national or international businesses. These were a good mix of partnerships, companies, family trusts and, as well, a Canterbury-based trust. The relationships between tenants and their landlords prior to the earthquakes were reported as being “very good” or “good” with only one reporting “poor”.²⁰

B Commercial Landlords

The landlords were mainly companies with Canterbury based businesses.²¹ Only one landlord operated internationally as well as in New Zealand²² and only one said it operated

¹⁵ “Small Businesses in New Zealand: How do they compare with larger firms?” *Ministry of Business, Innovation and Employment* (Factsheet, New Zealand, May 2016); <www.mbie.govt.nz>.

¹⁶ The size of the tenant’s business was estimated from answers to questions three and four in the Preliminary Questionnaire (a copy of which is attached in Appendix C). Question three asked tenants to disclose if their business was International, National or Canterbury-based and if they were companies, partnerships, sole traders or other. Question four asked tenants to disclose the number of commercial buildings they leased in New Zealand. The majority were Canterbury-based businesses with one lease from which it was assumed their business was not large.

¹⁷ “The time of the earthquakes” in this context refers to the time period between 4 September 2010 and 22 February 2011 (the dates of the main earthquake and the first significant aftershock).

¹⁸ Twelve of the 14 tenants leased only one building.

¹⁹ Eleven of the 14 tenants had other tenants in their buildings.

²⁰ The tenants were required to choose how good their relationship was with their landlord on a scale of 1 to 5 with 1 being “extremely good” and 5 being “poor”.

²¹ Eight of the nine landlord participants have businesses based in Canterbury.

²² The New Zealand Government is also a shareholder in this company.

nationally. Four participants were landlords of between five and 20 leased buildings and four, between one and four buildings. Only one had over 100 buildings.

The majority of landlords reported their tenants to have Canterbury-based businesses, although three had tenants with national businesses and two with international businesses. Most landlords had been in a relationship with their tenant for between five and 10 years although for one, it was only one year and for another, over 10. All landlords reported having very good relationships with their tenants prior to the earthquakes.²³

C Lawyers

Lawyers were keen to assist with the research and talk about their experiences advising clients on commercial leases after the earthquakes. All lawyer participants were experienced in the law, having been in practice for eight years or more with eight having been so for more than 20.²⁴ The majority held senior positions in their firms as Partners or Associates and one was a sole practitioner. Their main areas of practice were commercial law or property and conveyancing law. The majority of lawyers acted for both landlords and tenants; two had only commercial tenants.

Most lawyers had been tenants themselves at the time of the earthquakes²⁵ and two were also landlords. Their ability to give advice about earthquake-related lease issues was affected by their own experiences as a tenant or landlord. They were able to understand their clients' problems and "had a real appreciation for the practical implications of situations".²⁶

IV Findings

The earthquake on 4 September 2010 was the strongest of the Canterbury earthquake sequence and yet it was the smaller aftershock on 22 February 2011 that caused the most problems for landlords and tenants. As a consequence of this earthquake, the "red zone"

²³ Three landlords reported their relationship with their tenant was "extremely good" and three reported the relationship was "very good" on a scale of one to five with one being "extremely good" and five being "poor".

²⁴ One lawyer reported being in practice for 42 years.

²⁵ Nine of the 12 lawyers.

²⁶ FQ008.

cordon was erected around the CBD. The February 2011 aftershock therefore is the earthquake referred to throughout this chapter unless another is specifically mentioned.

The following findings have emerged from the completed questionnaires and the interviews with tenant, landlord and lawyer participants. They have been set out under headings and in an order that follows the requirements for the test for the doctrine of frustration in line with the approach of the Supreme Court in *Planet Kids Ltd v Auckland Council*.²⁷

A *The ADLS lease*

1 A lease that was prevalent in Canterbury

At the time of the first earthquake in September 2010 and the aftershock on 22 February 2011, the Auckland District Law Society lease (ADLS lease)²⁸ was the most commonly used standard form lease in Christchurch. However, as seen in Chapter Five, the ADLS lease did not contain provisions that covered an inaccessible building.²⁹

Most participants had an ADLS form of lease. Thirteen of the 14 tenant participants and six of the landlords used this lease.³⁰ The Property Manager said the majority of his clients also used the ADLS form. Other types of leases did not expressly cover an inaccessible building either. One landlord who used a bespoke lease said:³¹

No, we make no mention of it so I guess it is silent as to access. So our position is that that doesn't relieve the tenant of any obligation that they have got under the lease.

Of the lawyers surveyed, seven said all clients who sought advice on earthquake-related lease issues had an ADLS lease while three said 90 per cent of their leases were in the

²⁷ *Planet Kids Limited v Auckland Council* [2013] NZSC 147.

²⁸ The ADLS lease (2008, 5th edition) or earlier editions. For more information on the ADLS lease refer to Chapter Five.

²⁹ Refer to Chapter Five.

³⁰ Two landlords had a bespoke lease (although one of these landlords said his other tenants had an ADLS lease. One landlord was unsure about the type of lease he had.

³¹ FQ301.

ADLS form.³² Any bespoke leases were reported to be similar to, or based on, the standard form leases. One was a heavily modified form of the ADLS lease (2008, 5th edition) and another was a custom lease based on the Property Council of New Zealand lease.³³ Lawyers also reported advising on BOMA³⁴ leases, Property Council of New Zealand Office leases, ground leases, custom leases and a Government Ministry's own form of lease. However, these types of leases were very much in the minority.

It was clear from the research that the ADLS leases were largely used without any changes to the standard wording of the destruction and damage clauses.³⁵ Not one participant reported any amendments or additions. This is not surprising. The ADLS lease is prepared by a committee of land law specialists and is well regarded among commercial and property lawyers. It is considered to be sufficiently comprehensive for the commercial leasing environment in New Zealand and cost effective. It takes into account the needs of tenants and landlords, in light of the fact that the majority are small to medium sized businesses and is considered, as well, to be a fair lease. It is unlikely that any tenant, landlord or lawyer, would have thought to add to, or amend, the standard clauses because it was considered to be sufficient as it was. One lawyer explained it thus:³⁶

I think people would have taken comfort from the fact that this was a widely used form of lease and that there would have therefore been a lot of thought go into preparing it. The use of a form does save costs because you don't have to produce something new every time. Your client is not going to want to pay you to devise a clause and then negotiate it with the other side for something that is such a remote possibility.

³² The other two lawyers said their clients were a 60/40 split of ADLS leases to other forms of lease or a 50/50 split (although this lawyer only advised two clients).

³³ The Property Council of New Zealand Office lease is another standard form lease used in New Zealand and was in use in Christchurch at the time of the earthquakes, although not as common. For more information on this lease refer to Chapter Five.

³⁴ BOMA is an acronym for Builders and Managers Association and is an older standard form lease used when the Builders and Managers Association was in existence. The Property Council of New Zealand Office lease is now used instead of the BOMA lease. For more information on the BOMA lease refer to Chapter Five.

³⁵ The destruction and damage clauses in the ADLS lease are clauses 26 and 27. They are discussed in more detail in Chapter Five and are set out in full in Appendix B.

³⁶ FQ003.

Furthermore, there were no reports of additional clauses being inserted in the leases to cover a natural disaster, such as a force majeure clause.³⁷ One lawyer said:³⁸

I think most people were kind of surprised that there wasn't anything in [the lease] to deal with the non-accessibility. But most clients don't read leases anyway. If anyone had had the foresight to say I wonder what would happen in an earthquake if you couldn't get to [the buildings] ... I mean I don't think anyone would have thought that ... Most clients would have said "oh really, how likely is that! Well not likely; I am not paying you to try and make problems."

2 No provision in lease

*Well I suppose it's like most of these things, we did not prepare for the worst scenario that was possible so you were left in no man's land in some ways.*³⁹

As discussed in Chapter Five, the ADLS lease did not specifically cover an inaccessible building even though it did contain provisions that covered total and partial destruction. It did however, provide for termination of the lease if the building was untenable. However, the problem was it was unclear whether an inaccessible building came within the meaning of that term. The following comments by one lawyer illustrate the problem:⁴⁰

It was all a bit vague and there was no definition in the ADLS form as to what is tenable and what is untenable and particularly in terms of the timeframes. How long is too long to be out of a building to make it untenable?

Another said:⁴¹

[The disputes we had were] more the ones where the building itself was actually okay but nothing around it was okay or they were stuck in a cordon and the landlord was saying well its tenable and simply because you can't get access to it because of the cordon is not my problem and you will continue to pay rent.

³⁷ Force majeure clauses are those which set out the rights and obligations of the parties in the event of an occurrence over which they have no control, such as a natural disaster, strike, war or terrorist act. For further information on force majeure clauses refer to Chapter Three.

³⁸ FQ003.

³⁹ FQ011.

⁴⁰ FQ006.

⁴¹ FQ006.

The lease seemed to cater for short term disruptions such as a fire or flooding. In this way it was clear that a building becoming inaccessible for a prolonged period was just not anticipated by the lease. A lawyer said:⁴²

[The parties] contemplated the building being damaged because the lease provides what happens but the lease was silent on anything to do with inaccessibility because no-one contemplated it.

Another major problem was that the ADLS lease only provided for an abatement of rent where the building was damaged. If the building was undamaged and merely inaccessible, there was no basis on which to challenge the fact that the lease remained in force and the tenant continued to be liable to pay rent for a building he or she could not access. One lawyer said:⁴³

The whole abatement of rent [was] tied up in the clauses 26 and 27 which were entitled damage and destruction. If there wasn't any damage or destruction then you were sort of left out in the cold really.

All lawyer participants were in agreement that the ADLS lease did not cover the earthquake-related lease issues that arose. Their responses were: "No, [it was] particularly unhelpful in guiding tenants as to the future of their leases when excluded physically from their premises";⁴⁴ "Not adequately or in sufficient detail";⁴⁵ "The 5th edition did not contain a meaningful definition of "untenantable" and did not address the circumstances where a building was undamaged but inaccessible all the same".⁴⁶ One lawyer explained:⁴⁷

[The lease] was more unhelpful than helpful as an immediate source of guidance for tenants who were facing a practical lock-out situation not knowing what to do when the circumstances were not described in the lease at all. Their building might have been fine but they weren't allowed to get anywhere near it. The lease just didn't have answers for that.

⁴² FQ003.

⁴³ FQ004.

⁴⁴ FQ002.

⁴⁵ FQ006.

⁴⁶ FQ004.

⁴⁷ FQ002.

Lawyers found they were faced with multiple earthquake-related lease issues and the ADLS lease did not cover these either.⁴⁸

For the vast majority of people and I suspect for 95 per cent of practitioners, they would never have to deal with [these issues] in the entire lifetime of [their] career and all of a sudden in the space of two years every single practitioner had to try and figure out what these [clauses] actually mean and try to work through them. I think that was a bit of a problem.⁴⁹

I think the earthquake created a lot of other issues that were simply not anticipated and I think dealing with the earthquake issues the [leases] simply did not cover the number of issues that needed to be dealt with and I think that all of the uncertainty came out.⁵⁰

Lawyers were surprised the ADLS lease did not provide for the issues that arose. One lawyer went straight to the lease after the earthquakes expecting to find answers for her clients. She was disappointed:⁵¹

I think everyone thought the ADLS lease was a good document and so it was widely used. I had read it and I kind of understood it but my immediate thing after September or after February was I need to read it again because obviously I have missed something in it. I was shocked [the ADLS lease did not provide for the issues] and I am sure I wouldn't have been alone in that.

It seems clear that if lawyers had thought about the possibility of an inaccessible building they would have provided for it in the lease.⁵² It was just not something lawyers or anyone else had turned their mind to. One lawyer explained:⁵³

[The earthquakes were] absolutely unforeseen. I mean it would be interesting if you had this conversation in Wellington. I suspect the answer might be different. But I just don't think it registered with anyone here what was going to happen to us was capable of happening.

⁴⁸ Refer to Appendix C for the Lawyers' Full Questionnaire. Question seven lists a number of issues clients sought advice on. Most lawyers interviewed said their clients experienced one or more of these issues, with seven lawyers listing four or more.

⁴⁹ FQ010.

⁵⁰ FQ010.

⁵¹ FQ008.

⁵² FQ009.

⁵³ FQ001.

When asked whether he thought the lease was drafted to cover the type of event that occurred in Christchurch, another lawyer said:⁵⁴

No I don't think so. I mean there are obviously damage provisions in there so people have contemplated damage but I don't think people contemplated just the sheer extent of the damage plus the red-zone for many properties across Christchurch so the lease documentation wasn't really ready for it. It still may not be.

3 *The lease was not effective*

*I think [the lease] fell a long way short of protection for both landlord and tenant. Clearly the red-zone around the outside of the city meant that tenants could not operate, whether the building was okay or not. That was not covered in those leases.*⁵⁵

Lawyers did not consider the ADLS lease to be effective in clearly setting out the legal rights of landlords and tenants in relation to the earthquake-related lease issues that arose.⁵⁶ Furthermore, all lawyer participants reported that it was also not effective in providing solutions,⁵⁷ responding that it was “not very effective” or it was “not effective at all”.

The lease assumed that there would be an effective and timely response from insurers and the Council to progress and put right any damage. The fact then you have got insurance disputes, Council issues around consent and Building Codes and Standards and things, the Royal Commission Report on building collapses in Christchurch ... so that is why it was just beyond contemplation.⁵⁸

⁵⁴ FQ009. The participants' views on the lack of provision in the ADLS lease confirm the analysis of the lease in Chapter Five.

⁵⁵ FQ305.

⁵⁶ Only two of the 11 lawyers thought the ADLS lease was effective in clearly setting out the legal rights of landlords and tenants in relation to earthquake-related lease issues. For the full question refer to the Lawyers' Full Questionnaire in Appendix C.

⁵⁷ The scale was from one to five with one being “extremely effective” and five being “not effective at all”. For the full question refer to the Lawyers' Full Questionnaire in Appendix C.

⁵⁸ FQ001.

After the 4 September 2010 earthquake, when a few buildings were rendered inaccessible owing to the closure of small areas within the city,⁵⁹ lawyers drafted their own “no-access” clauses to deal with the problem of an inaccessible building. In 2012, a new edition of the ADLS lease was released containing an additional clause under the destruction and damage provisions called a “No-access in emergency” clause.⁶⁰ This clause provided, among other things, that either party could terminate the lease if the tenant was unable to access the premises for the period of time specified in the First Schedule. The default period was nine months although the parties were permitted to insert their own period of time. This new clause was included in the lease as a direct response to the problems that arose after the Canterbury earthquakes. It clearly shows that the earlier editions of the lease did not cover this problem and which needed to be addressed.

B Length of term; length of disruption; length of remainder of term

When considering whether the doctrine of frustration should apply to a lease, the courts assess how the supervening event has affected it by considering three factors; the length of the term of the lease, the length of the disruption and the length of the remainder of the term. A comparison between the length of the disruption and the length of the term of the lease shows how much of a disruption the supervening event has caused. If it is a long lease, for example 99 years, the lease is unlikely to be frustrated because any disruption (even if it is lengthy) will not have a significant effect on the lease. If the lease is for a shorter term, for example three years, then a disruption of years will have a substantial effect. The remainder of the term still to run is also relevant. The shorter the time left to run, the more likely a disruption will frustrate the lease. Each of these is dealt with in turn.

1 Length of the term of the lease

The research revealed that most leases were for terms of six years or less. Tenants reported terms of between three and six years. Six tenants had terms of three years, two had four years, one had five years and two had six-year terms. The longest term reported by a tenant was a lease for nine years. Landlords reported terms of six or 10 years. The terms of leases in Christchurch were clearly variable and dependent on many factors such as the type of building and the size of the business.

⁵⁹ The areas cordoned off in the September earthquake were mainly to contain dangerous buildings and therefore were very localised.

⁶⁰ ADLS lease (2012, 6th edition) cls 27.5 and 27.6.

Most leases also contained rights of renewal. Tenants, landlords and lawyers reported that rights of renewal were common. In relation to earthquake-related lease issues, rights of renewal were considered and used by lawyers in different ways; when assessing the test for “untenantable”; in negotiations with landlords; to “crystallise our client’s thoughts as to whether the lease was valuable enough to be worth fighting over”,⁶¹ and as a factor in threatening damages for potential wrongful repudiation of the lease by the landlord.⁶²

2 Length of disruption to the lease

Tenants reported their leases were disrupted for varying lengths of times after the earthquake. The shortest time was six weeks and the longest, nearly four years.⁶³ Other examples of the length of disruption included eight months,⁶⁴ 18 months⁶⁵ and two and a half years.⁶⁶ For landlords, the shortest disruption was one to two months and the longest over two years. It is clear from the research that there were significant periods of disruption to the leases.

3 Length of the remainder of the term

The length of the remainder of the term after the earthquake varied greatly. Tenants reported between one month and six and a half years.⁶⁷ Landlords reported that most leases still had a lengthy time to run, between six and 10 years. Some participants included rights of renewal in these calculations which would have made the terms even longer.

Lawyers considered the length of the remainder of the term when looking at the tests for “untenantable” and frustration. Without clear guidelines to apply though, lawyers had to

⁶¹ FQ004.

⁶² FQ002.

⁶³ FQ215.

⁶⁴ FQ208.

⁶⁵ FQ211.

⁶⁶ FQ212.

⁶⁷ For example FQ212 the remainder of the term at the date of the earthquake was six months and the building was inaccessible for all that time; FQ213 the remainder of the term was only six weeks; FQ214 the remainder of the term was two and a half years; FQ215 the remainder of the term was six and a half years.

give the best advice they could. Some made up their own rules to provide consistency in the advice given by their firm.⁶⁸

As a rough rule of thumb we were prepared to argue that a lease had become untenable if it was not going to be available for the tenant's full use for over 20 per cent of its remaining term.

C How did the earthquakes affect the lease?

1 Buildings were inaccessible

Despite the devastation caused by the earthquakes, there were many buildings that survived relatively unscathed. A large number suffered only minor damage, that could be easily repaired, or no damage at all.



Figure 10: Buildings in the CBD after the earthquake.⁶⁹

⁶⁸ FQ005.

⁶⁹ Photographs obtained from the internet.

The only real problem was that these buildings were inaccessible because of their location behind the cordon.



Figure 11: The Cordon.⁷⁰

(a) Tenants

Most tenants reported that their buildings came through the earthquakes well and were remarkably undamaged. Eleven of the 14 tenants said their buildings sustained some damage in the February earthquake but most said it was minimal. This is important because inaccessible buildings with little or no damage are not covered by the lease. One tenant explained his situation:⁷¹

Our building was fine. There was no physical damage to it, no windows broken. There was stock everywhere on the floor of course as the stands with stock on just got thrown to the ground – it was total chaos inside the shop – but most of the building didn't have too much damage.

Tenants reported that the damage to their buildings would not have prevented them from being used. It was the cordon preventing access that was the problem. One tenant said her building in New Regent Street, a popular shopping street in the CBD of Christchurch, was repairable and she could have used it after the earthquakes but for the cordon.⁷²

⁷⁰ Photographs of the cordon fences taken by Toni Collins in 2012.

⁷¹ FQ215.

⁷² FQ210.

Most buildings in the city remained standing after the earthquake and from a visual check seemed undamaged. Nevertheless all were required to be assessed for structural soundness. The restrictions on access to the CBD made it difficult to get information. Initially, at least, tenants did not know whether their buildings were damaged and if they were, the extent of the damage because it was not always immediately apparent. One lawyer explained:⁷³

If a building was still standing and looked ok from the outside you were inclined to think that it probably was. It was often a surprise to find that sometime later, after engineering reports were completed, the buildings were not okay.

Therefore, immediately after the earthquakes the inability to access buildings was the important issue for all tenants. At that stage they did not have enough information about their buildings to decide whether they were destroyed, damaged, repairable or undamaged. It therefore had to be assumed that the building was undamaged until proven otherwise. Even for those buildings that were eventually demolished some months or years later,⁷⁴ there was still an initial period of time when the state of the building was unknown and the main issue was access.⁷⁵

All tenants said they were unable to use their buildings for a period of time after the earthquake. Three tenants were excluded for two months, two for seven to eight months, two for one to two years and six for over two years. Therefore, 10 of the tenant participants suffered a significant disruption to their leases in that they were unable to access their buildings for seven months or more. One tenant said:⁷⁶

We didn't have access to [the building] because we were in the red-zone so we had zero access to anything in the building or the building itself as of that day and [that] is still the case today.

No-one knew how long the cordon would remain in place. No-one knew how long the buildings would be inaccessible. There was little information available because the scale of the job to clear the city and demolish buildings was still being quantified. It was a confusing and uncertain time. As one tenant said:⁷⁷

⁷³ FQ007.

⁷⁴ Six tenants said their buildings were eventually demolished.

⁷⁵ One tenant's building was demolished 10 months after February earthquake (FQ200); another two and a half years after February earthquake.

⁷⁶ FQ208. In this case the building was inaccessible for eight months.

⁷⁷ FQ200.

The most difficult thing at the start was information. We couldn't find out what was happening. We didn't know where we stood in terms of our lease with the landlord and no-one knew what was going to happen in Christchurch and how long things were going to take to happen.

Nevertheless many who had worked in the CBD before the earthquakes did not really believe they would not be going back to the city. They thought it was just a temporary situation. "Did we really know that we weren't going to be able to go back to town? No!"⁷⁸

Another tenant said she was warned that the cordon could be in place for a long time. She said:⁷⁹

Three days after the earthquake one of the members of the policing team informed me that we wouldn't be in our building for a year. He said "You will be in the red-zone for at least a year".

At that point she realised she could not afford to wait and see what would happen and she set about making plans to set her business up elsewhere.

(b) Landlords

Landlords' buildings were affected by the earthquakes. Their buildings were also inaccessible with all except one having a building located within the cordon.⁸⁰ However, landlords reported more damage to their buildings than tenants. Only four said the damage to their buildings was minor or repairable. Other problems included future earthquake strengthening, a lack of essential services and safety concerns about a damaged building nearby.

(c) Lawyers

One of the most common issues lawyers gave advice on concerned access to buildings within the cordon. Eleven of the 12 lawyers said they dealt with this issue. Another issue was whether rent was payable for an inaccessible building and many were also asked to advise on this. Other questions about similar issues to do with accessibility also arose. Eight lawyers had clients seek advice from them about access when the building needed

⁷⁸ FQ201.

⁷⁹ FQ208.

⁸⁰ The landlord who did not have a building within the cordon was situated on the outskirts of Christchurch. He still had earthquake-related lease issues to deal with.

earthquake strengthening. Six reported giving advice to clients whose buildings were inaccessible owing to safety concerns about a damaged neighbouring building.

We had a few in the central city which were smaller tenancies, single storey type things but they were within that horrible thing they called a fall shadow of, say, the likes of the Hotel Grand Chancellor or the Clarendon [Tower] where there was a risk that they could fall over and take out half a block at that stage. So some of these buildings were pretty much untouched but they just couldn't be accessed until these bigger ones were brought down.⁸¹

Whether a lease could be terminated in these circumstances was a significant problem.

I think the principal [issue] is are we able to terminate a lease because we can't get access to the property because of varying issues whether they be in the cordon, whether they be damage waiting for repair or whether they be next to a building that is about to fall on top of it?⁸²

Some lawyers argued that being unable to access the building made it "untenantable" and therefore the lease could be terminated.

There were a few cases where we argued that [the building] was inaccessible and our clients had to accept that [the lease] was terminated on the grounds that the building was now untenable because the tenant wasn't going to be able to get in there to carry out their full business use for such a period of time.⁸³

One lawyer said a number of his clients were in the business of hospitality. They were small businesses, had no access to their buildings within the cordon and therefore the equipment they needed to operate their businesses.⁸⁴ Without the business they could not afford to continue paying rent for buildings they could not access. They needed to terminate their leases in order to start new businesses elsewhere. For these tenants there was the added problem that when the cordon was eventually taken down there would be few workers or pedestrians in the city and therefore little demand for their services, even if they could return.

⁸¹ FQ004.

⁸² FQ009.

⁸³ FQ004.

⁸⁴ FQ004.

It is clear the cordon caused a significant disruption to leases because it rendered buildings inaccessible for a prolonged period. There was no simple answer.

The lease wasn't helpful so the two main things we discussed were could you terminate for frustration because of the non-access issues and that was the big issue and there was very little case law and certainty around that, and the other one was around the abatement issue – when are they entitled to abatement when it's in a cordon?⁸⁵

2 Other earthquake-related lease issues

At times lawyers were overwhelmed with all the earthquake-related lease issues that arose.⁸⁶ The leases did not cover them, nor could they have covered them all. A good example was given by a lawyer whose client had heavy equipment attached to the floor in his building.⁸⁷ The concrete slab was damaged in the earthquake and needed repairs. The landlord wanted the tenant to move his equipment out of the building for a period of three to four months while the repairs were undertaken. The tenant argued this was extremely difficult to do and instead thought it better to move to new premises permanently to avoid a double shift. He argued the building was untenable and the lease should terminate on the basis that the building was not compliant with the Building Code.⁸⁸ The landlord disagreed because he wanted the lease to continue.

In another case, a bespoke lease had a destruction clause that was essentially the same as that in the ADLS lease, except that it provided a time-frame for termination. It enabled the tenant to terminate the lease if the building was untenable for three months. Relying on this clause the tenant tried to terminate the lease after the end of the three-month period on the basis that the building was below the required Building Code standard which meant the premises were untenable.⁸⁹ The landlord, however, disagreed. He argued the premises were not untenable because the tenants had remained in the building and their occupation of it had continued past the three-month period for termination. The problem was the tenants had remained in the building for that time because they were unaware of the damage that had been sustained and that the building did not meet the standard required

⁸⁵ FQ010.

⁸⁶ A list of the earthquake-related lease issues that were raised by lawyers is in Appendix D.

⁸⁷ FQ006.

⁸⁸ The Building Code under the Building Act 2004.

⁸⁹ FQ007.

by the Building Code. The lawyer believed this was not an isolated problem. His view was that there were many buildings in Christchurch that were untenable but continued to be occupied because the tenant either had no alternative or was unaware of the true state of the building.⁹⁰

The issue of whether landlords are meeting their health and safety obligations if they have an earthquake-prone building has also arisen. An “earthquake-prone” building is defined as a building that is less than 34 per cent of the New Building Standard under the Building Code.⁹¹ Territorial Authorities have been required to adopt a policy in relation to earthquake-prone buildings within their districts.⁹² The Christchurch City Council’s policy sets out timeframes for earthquake strengthening of certain buildings that do not meet the current Building Code requirements.⁹³ After the earthquakes, a large number of buildings were occupied once they became accessible and yet may still have been within the policy time-frame for compliance. This also raises the question about whether an earthquake-prone building is untenable?⁹⁴

The lack of essential services after the earthquakes was another issue mentioned by a few participants. However, it did not seem to create too many problems. Only one lawyer reported advice being sought on a building that lacked essential services.⁹⁵ This may have been because the cordon prevented buildings being used for a prolonged period and therefore by the time tenants returned the services had resumed. Furthermore, power companies, in particular, were generally quick to fix problems. Water and sewerage were more problematic as the city’s infrastructure was badly damaged. However, few participants reported that the lack of these services meant they could not use their buildings.

⁹⁰ FQ007.

⁹¹ The Building Code is found in the Building Regulations 1992, s 3 and Schedule 1 (pursuant to the Building Act 2004, s 400).

⁹² Building Act 2004, s 131.

⁹³ Christchurch City Council *Earthquake-Prone, Dangerous and Insanitary Buildings Policy 2010* (10 September 2010). Note: The Policy is different from that adopted on 10 September 2010 in order to comply with the High Court declaration in *Insurance Council of New Zealand v Christchurch City Council* [2013] NZHC 51.

⁹⁴ The new Health and Safety at Work Act 2015 may now impose even greater demands on landlords. An investigation into these issues is outside the ambit of this thesis.

⁹⁵ A possible reason why few clients had problems relating to a lack of essential services may be because the buildings were behind the cordon and inaccessible anyway.

3 *The payment of rent*

(a) Tenants

Tenants generally pay their rent in advance and therefore most had already paid for the month following the earthquake. However, confusion arose about whether they should continue. There were a number of reasons. The initial reaction to the earthquake for many was one of shock and it took a while to comprehend what had actually happened. The focus for most people was on finding family and friends and dealing with personal issues arising from the disaster.⁹⁶ Buildings and businesses were secondary in importance. With access restricted to the CBD, tenants were unable to get information about the state of their buildings. They were unsure about the extent of damage to the city. They were also unsure how long the cordon would remain in place. Without this information, tenants did not know what to do and many continued to pay rent. One tenant said:⁹⁷

We paid rent for the month of March 2011. At the time information was very scant and we did not know the extent of the damage and felt we were obliged to continue paying rent. We are still trying to get the rent back from our landlord.

Another tenant paid rent because she was concerned about what would happen to her expensive specialised equipment she had in it. She said:⁹⁸

We weren't really sure that we weren't going to be able to use the building; we didn't really know that we were going to be cordoned for two years or whatever and we weren't sure what our insurance was on the goods in the building if we weren't paying rent.

Tenants said some landlords insisted on rent being paid. When one tenant tried to tell her landlord she was not going to pay rent, her landlord told her she had to.⁹⁹ She paid rent for eight months even though she did not have access to her building.

I contacted the landlord and said I have signed up a lease for another building. I said I understand we are not going to be able to get back into the building for some time so we would no longer be paying the rent. He said "Read your contract; your

⁹⁶ Many people in Christchurch had damaged houses and broken possessions as a result of the earthquake.

⁹⁷ FQ200.

⁹⁸ FQ201.

⁹⁹ FQ208.

contract states that if you don't pay you will have penalties to pay as well." I made a decision to continue paying the lease because the penalty was 25 per cent and we were paying nearly \$9000 a month for our lease so it was a lot of money to be penalised if we didn't pay it.

Another was about to move to new premises in the CBD after their old premises were damaged in the September earthquake. The lease was signed but had not commenced as they were about to move in. The earthquake changed those plans.¹⁰⁰

The February earthquake then meant that we weren't able to proceed with the move to the new premises. It effectively was within the red zone cordon on Hereford Street ... There was a great deal of uncertainty from the building owner's perspective whether the building would stay or go or be repaired and then we were led to believe that there was a likelihood that we would be asked to commence the lease ... The legal advice essentially said we couldn't get out of that particular lease because it wasn't frustrated because it had never started. Being a charity we weren't in the financial position to consider challenging that and with budgets coming up we had to make allowances that rent potentially could commence.

Some tenants did stop paying rent when they could not access their buildings.

I realised after a few days that there was going to be an automatic payment for rent. I thought well I'm not paying rent for a building that can't be used so I'll cancel the payment and worry about what happens after that. So I cancelled the payment.¹⁰¹

One tenant was unsure whether he could stop paying rent but decided to anyway. He discussed the problem with other tenants he knew and as most said they were not going to pay rent for an inaccessible building, he followed suit. He also alluded to another reason for not paying. He was worried about being liable for two leases and had a very real concern that he would run out of money if he had to keep paying for both.¹⁰²

The majority of tenant participants reported that their landlords did not actually seek rent from them over the time their building was inaccessible.¹⁰³ No reasons were given. Many had, however, heard of other tenants whose landlords had required them to pay.

¹⁰⁰ FQ204.

¹⁰¹ FQ206.

¹⁰² FQ212.

¹⁰³ Only one tenant said her landlord actually sought rent from her for an inaccessible building.

It was also interesting that most tenants reported the amount they were paying in rent for new premises after the earthquakes, was the same or lower than before. There were a number of reasons given. Tenants generally took on older premises or premises that were smaller in size than previously. As a consequence, most said the new premises were less than ideal being a temporary measure only. Moreover, the new premises were located in the suburbs or in parts of Christchurch that were not necessarily areas where tenants would have chosen to relocate to. In other words, tenants took premises where they could to ensure the survival of their businesses. They had few options and were “making do” with buildings that were not necessarily ideal for them.

(b) Landlords

Landlords reported that most of their tenants stopped paying rent after the earthquake. This cost was covered by loss of rents insurance which meant they did not have to seek rent from their tenants.

Landlords took a pragmatic approach to the payment of rent. A good example is one landlord’s story:¹⁰⁴

After the earthquakes all of the tenancies could still be occupied. All of the tenants bar one ceased paying rent. One of them continued to pay their rent and we then made an insurance claim for loss of rent and proceeded from there. Of the three tenants who were in this particular building during the period that the cordon was up, one of the leases expired anyway. The other two tenants didn’t want to continue leasing it, however they were obligated to do so because the building was still functional. So I reached commercial agreements with both those tenants where we found new tenants for both those sites and they simply paid the agent’s commission and I released them from their lease. It was a pretty pragmatic approach and quite simply they didn’t want to continue paying rent, so that’s fine, move on and find some new tenants.

Some landlords were sympathetic to the situation of tenants with inaccessible buildings. A spokesman for a large landlord company explained his view about what should happen, but did admit that he thought landlords would resist such a view:¹⁰⁵

¹⁰⁴ FQ308.

¹⁰⁵ FQ306.

If I was a tenant I would be now saying that in terms of my lease, if I can't get into the building, even though my premises are undamaged, then abatement of rent should apply. If I can get into the building, the building is not damaged but the streets are wrecked and the services are gone, then as far as I am concerned my quiet enjoyment has been affected and abatement of rent should apply.

Another landlord immediately abated the rent after the earthquake because he said "I heard some horror stories ... I [heard] that some tenants were being forced to pay rent because the landlord's loss of rent didn't kick in because the building wasn't damaged".¹⁰⁶ Another landlord suspended the rent immediately after the earthquake and the rent was gradually reintroduced as parts of the building were opened up for use.

The cordon was also a problem for landlords. If they could not access their building or if the necessary resources were not available, the time to repair might be outside the period of insurance cover. The Property Manager said one of his clients pressed his tenant for rent.¹⁰⁷ The cordon had prevented repair work from being carried out on his building and at the time of the interview, some three and a half years after the earthquake, the repairs were only just being undertaken but the insurance payments had well and truly finished.

Most landlords interviewed were not surprised or upset that tenants did not pay rent during the period they could not access their buildings. Some thought this was the right course of action because landlords could claim it from their insurance. Others took a moral view and supported tenants' views that rent should not be payable for an inaccessible building.

Some landlords had personal matters to deal with and whether or not their tenants were paying rent was not of utmost importance to them. One landlord said her tenants rang after the earthquake to say they had spoken to other restaurateurs in the city and together decided they would not pay rent while the cordon was in place.¹⁰⁸ This landlord had suffered personal tragedy in the earthquake and her commercial building was not a priority to her at that time. A few days later the tenants rang again to confirm they would reinstate their rent payments. The landlord believes this change of heart came from the fact that the tenants could see that access to their building would be reinstated earlier than other parts of the city and they could use this advantage to reopen their business while others were still closed.¹⁰⁹ Nevertheless, the tenants did have problems providing a route for their clients to

¹⁰⁶ FQ306.

¹⁰⁷ FQ310.

¹⁰⁸ FQ304.

¹⁰⁹ The building was inaccessible for two months.

get to the building and they experienced problems with a lack of foot traffic because the cordon made access difficult. This story shows the difficulties facing both landlords and tenants when they did not know what their legal rights were.

(c) Lawyers

Nearly half of the lawyers reported that their tenant clients had received requests from landlords for rent for the period of time their buildings were inaccessible.¹¹⁰ One lawyer talked about the advice he had given:¹¹¹

If the tenant said the building was untenable or in the red zone cordon then my advice was there should be a full abatement of rent. [In one case] the landlord asked for rent but couldn't provide any building reports to say the building was tenable and had full services. This could either have been because the landlord had to satisfy the insurance company it had done all it could to collect rent and/or did not have sufficient loss of rent cover (which shouldn't be the case as the tenant pays for it in the lease). The outcome was the tenant did not pay rent, the lease was terminated and the building is to be demolished.

In many situations, owing to the uncertainty in the law, the problem just had to be dealt with in a practical way. The general advice given by most lawyers to their tenant clients was “don't pay” rent for an inaccessible building. One lawyer said:¹¹²

The main issue was payment of rent and did the client have to pay when they couldn't access their building. A practical approach was taken that if the landlord couldn't prove the building was safe and tenable then the tenant stopped paying rent in an obvious act of terminating the lease ... The most important thing for a tenant is the continuity of business. They couldn't risk taking a wait and see approach. They had to secure alternative premises to keep their businesses going and take the risk that their first lease had terminated.

Other advice centred on obtaining a professional recommendation about the condition of the building. Clients were advised to focus on the issue of damage because it was covered

¹¹⁰ Five of the 12 lawyers.

¹¹¹ FQ000.

¹¹² FQ000.

in the lease rather than lack of access which was not. If damage could be found then the rent could at least be abated under the lease.¹¹³

Problems arose, however, if tenants' buildings were undamaged or had suffered minimal damage. In these situations the issue was one of access. One lawyer said he took the starting point that the tenant should not pay for an inaccessible building.¹¹⁴ However, other lawyers were not so optimistic about their clients' legal positions. One said he stressed to his clients that simply stopping rental payments could lead to an argument that the tenant had repudiated the lease which might expose them to an additional damages claim.¹¹⁵ Another reported advising his client that insurers were unlikely to pay out and landlords and tenants would just have to share the loss. They needed to be prepared for this outcome.¹¹⁶

Lawyers reported that the issues relating to an inaccessible building were not clear cut. In one case, a lawyer said he felt his client was being held to ransom.¹¹⁷ A landlord threatened to distrain his tenant's business assets when he stopped paying rent. The tenant then felt he had no choice but to continue to pay. A few months later, the landlord accepted the tenant could not operate its business from the building and did not seek further rent. Three and a half years after the earthquake the tenant was still unable to operate out of the building and was unlikely to be going back.

Only a small number of lawyers reported their landlord clients sought rent from their tenants while the building was inaccessible.¹¹⁸ One lawyer suggested that, generally, landlords had not pushed for rent owing to the magnitude of the event and their feelings of sympathy towards their tenants. However, the main reason is likely to have been the availability of loss of rent insurance.

Nevertheless, lawyers said they advised their landlord clients that tenants were not entitled to an abatement of rent solely because there was a lack of access. There might be a legal right to recover rent if it was unpaid in these circumstances. Despite this advice, however, few landlords have taken legal action. The most likely reason is that landlords' "loss of

¹¹³ ADLS lease, cl 27.

¹¹⁴ FQ000.

¹¹⁵ FQ004.

¹¹⁶ FQ011.

¹¹⁷ FQ011.

¹¹⁸ Only two out of the nine lawyers who had acted for landlords.

rent” insurance covered the payments and landlords were not out of pocket. Another reason is the uncertainty in the law; landlords busy with insurance claims were unlikely to want to test the waters by litigating the issue. A further deterrent to recovering unpaid rent in a natural disaster setting was the likely adverse publicity if they did.¹¹⁹ Legal action might also damage the relationship with a tenant that a landlord might want to retain:¹²⁰

There were some pragmatic reasons for not demanding rental; that is the landlord wanted to keep the tenant happy and interested in leasing the reinstated building or the landlord was able to recover loss of rents insurance.

Lawyers reported that their landlord clients had different approaches to how they treated tenants of inaccessible buildings. One said his landlords took a “wait and see” approach because they did not want to act in an aggressive way towards their tenants. Their efforts and enquiries tended to focus on whether they could cancel the lease. Another lawyer reported that his landlord client sought payment of a discounted rent and told the tenants to address the shortfall from their own insurance. Another lawyer said his landlords looked to recover their loss of rent from the insurer in the first instance, rather than the tenants. Landlords acted in a variety of different ways depending on their particular circumstances.

Lawyers also reported that landlords were well aware that the problem of an inaccessible building, although not the tenant’s fault, was not their fault either. However, a practical approach seemed to be the best approach. One lawyer said of his landlord client:

There was a very strong view that [the rent] was payable; that the cordon is not our problem, it’s your problem. But in most cases the commercial decision that was made was that these guys aren’t going to pay so you have to go and enforce it. Do you want to spend money enforcing it and damage your relationship and lose the tenant? I think the view was that reading the strict interpretation of the lease tenants were liable to pay but we just came to a commercial decision [that] it’s actually unfair to require them to pay and it’s just not a good look if you want to get them back. So landlords relied on loss of rent insurance.

Other problems highlighted after the earthquakes were the lack of any mechanism for determining rent abatement and the problem of a building that is only partially damaged. The lease provided that the rent was abated in a “fair and reasonable” proportion. The question is what is a “fair and reasonable” proportion? One lawyer said a registered valuer

¹¹⁹ FQ002.

¹²⁰ FQ004.

was needed to determine this.¹²¹ The other question was should a tenant be required to pay rent at all when a building is only partly damaged? It is difficult to see why a tenant should have to pay rent for a third of the total premises, even if they are able to be used, if the tenant is unable to operate the business from an area of that size.¹²²

4 Termination of the lease

(a) Tenants

Many tenants wanted to terminate their leases after the earthquakes. One lawyer said in his experience tenants wanted to end their leases, find new premises and stay put.¹²³

I don't see much point, from an economic point of view, of having leases that [mean the tenants] will go and lease somewhere else for six months while the work is done and then come back. It just seems, in most cases, tenants will want to find another place and keep going from the [new] place ... they would rather terminate and move on and go to a new place rather than fluffing around waiting for the building to be repaired.

There are good reasons why tenants wanted to terminate their leases. First and foremost, tenants did not want to be liable for two leases. In order to keep their businesses up and running they needed alternative premises. However, the concern was that, if they took on a new lease they would then be liable for two leases should they be required to return to the building in the CBD once it became accessible. If they could terminate their first leases they would have financial certainty.

Another reason tenants wished to terminate their leases was because it was clear the city would be closed for a long time. The severity of the damage to buildings in the CBD made it obvious that much demolition work had to be done. However, there was considerable uncertainty about exactly how long it would take. Tenants could not afford the "wait and see" approach. They had to keep their businesses going and that meant setting up elsewhere. They were also concerned that the damaged city would mean a loss of pedestrians and foot traffic which would detrimentally affect business if they had to return.

¹²¹ FQ009.

¹²² FQ000 and FQ010.

¹²³ FQ005.

This was exactly the situation for one tenant who quickly got her business up-and-running in the suburbs. She said:¹²⁴

I had signed up this lease (the new one) in the winter after the earthquakes but I was still legally liable for the other lease. But I thought I don't care, they can take me to court if they made me go back ... I wasn't willing to go back.

A major problem was that tenants did not know if they could in fact terminate their leases. A good example is the story of one tenant¹²⁵ whose building survived the earthquake, was green-stickered¹²⁶ but was inaccessible because it was located behind the cordon.

I contacted [the landlord] a couple of times to establish what our situation was. It was my understanding that when they re-established the Cashel mall precinct with the containers we were going to reopen because the building was green-stickered ... it was always green-stickered ... it was one of the first buildings in Christchurch to get green-stickered. The engineers considered it safe. We expected to go back in on 29 October [2011] when the Re-Start Mall opened. We had the shop cleaned ... we thought we were going to go back in because the building wasn't damaged and everything was fine. A week later, when we were about to open, the landlord said "you can't open ... we're not going to supply you with power and water and there's no sewerage". We can't operate [our business] without those facilities. [The landlord] said you can't operate but come December [2011] we'll have it open for you although there may not be any toilets and you can use the toilets at [a shop nearby]. Nothing happened in December. In January [2012] they promised a date, then March [2012] there were two dates they suggested I could probably open, then May/June [2012] ... still nothing. I went to see the landlord and he said I couldn't go in. They had rent insurance for 18 months, so it was quite obvious they weren't interested in us opening. So at that stage I got the stock out that I could. I lost a lot of money on stock I had put in the shop when I thought I would reopen because it had expired. Then in December 2012 they said I might be able to open ... but since then I haven't heard a thing from them.

Six months after the earthquake the tenant investigated terminating his lease. His lawyer told him he could not terminate so he waited for the building to reopen. During this time

¹²⁴ FQ210.

¹²⁵ FQ215.

¹²⁶ The building was "green-stickered" meaning it had been assessed by engineers and was deemed safe to be occupied. For further information on the stickering system used for assessing buildings after the earthquake see Chapter Six.

he had an offer to collaborate with another business. Sadly, this opportunity was lost because he was unsure whether he could terminate the first lease. He could not risk being liable for two leases if he was required to go back to the city. At the time of the interview,¹²⁷ it was nearly four years after the earthquake and the tenant was still waiting to find out whether he could return to his building.

There are a number of ways a lease can be lawfully terminated.¹²⁸ However, leaving the lease on the basis that the building is inaccessible is not one of them. A landlord could take action against the tenant for breach of his or her lease covenant to pay rent. After the earthquakes, not all leases were terminated in an official way or in a way that was clear to the tenant that the lease had come to an end.¹²⁹ Many tenants just had to assume their lease was over. When asked if his lease had been terminated one tenant responded, “Not officially. I just stopped paying rent and haven’t heard anymore, then [the] building was demolished”.¹³⁰ Another tenant said:¹³¹

I suppose so but not officially. The landlord never asked for more rent. I got new premises. I had to or my business would have died. The lease term would have ended now and the landlord still hasn’t repaired the building.

These leases were unregistered which meant the tenants were able to walk away from them.¹³² Landlords did not appear to take any action against tenant participants who did this.

For tenants whose landlords did eventually terminate their leases, it took a long time before this was confirmed. Several reasons were reported. The lack of access to the CBD to assess buildings meant there was much uncertainty about the state of the buildings.¹³³ It was also

¹²⁷ The interview took place in November 2014.

¹²⁸ Leases may be determined in a number of ways, for example on the expiry of the term; in a way determined by the lease (on the occurrence of an event or by use of a break clause); by frustration. For more information on other ways to determine leases refer to Bennion and others *New Zealand Land Law* (online ed, Brookers Ltd, Wellington) at LS18.

¹²⁹ For example FQ206 said that as at the date of the interview in June 2014 there had been no communication that the lease had been terminated.

¹³⁰ FQ206.

¹³¹ FQ214.

¹³² If the leases had been registered, the parties may not have been able to end them so easily; refer to Chapter Four which discusses registered leases.

¹³³ Most leases provide that they can be terminated if the building is untenable (for example the ADLS lease cl 26).

usual for building reports to take some time to be completed,¹³⁴ which meant there were delays in the dissemination of information to tenants.¹³⁵ Many tenants were left in limbo and unable to make future plans.¹³⁶

(b) Landlords

Landlords did not have much to report on the termination of their leases. They generally terminated the lease when it was clear the building was to be demolished. If there was an insurance claim landlords were liable to their insurance companies, especially about the disclosure of information in relation to the buildings.

(c) Lawyers

Soon after the earthquake, lawyers discovered that it was unclear whether a lease could be terminated if a building was inaccessible. There was uncertainty about whether it came within the test for untenability under the ADLS lease. There was also uncertainty about whether the doctrine of frustration could apply.¹³⁷ One lawyer explained:¹³⁸

It was a bit of a tightrope because if you couldn't prove untenability you would have essentially tried to cancel on an invalid ground which would have left you open to a claim that you had repudiated the lease by trying to incorrectly terminate it. So it was a bit of a tightrope to walk but in most cases it was the only option.

¹³⁴ There were a number of reasons why these reports took a long time to be completed. While the cordon was in place access to the CBD and to individual buildings within the cordon was very difficult. There was also a lack of those skilled in assessing buildings available to complete the number of reports needed which also caused delays.

¹³⁵ Tenants whose landlords gave them engineering or building reports, were the fortunate ones. Tenants were at the mercy of their landlords as to whether they received reports or any information on their building and therefore many did not receive any reports or information at all or if they did it was many months later that it was received.

¹³⁶ One tenant said the reason for the delay in termination of his lease was because he had to wait for the landlord and insurance company to reach an agreement on whether the building was able to be repaired. Another tenant tried to fight CERA's compulsory acquisition of the building.

¹³⁷ Most tenants did not know about the doctrine of frustration. Those who did know had heard about it from their lawyers.

¹³⁸ FQ004.

One lawyer had a client with a lease over a car-parking space.¹³⁹ This space was inaccessible during the cordon. The destruction and damage clauses of the lease were not applicable as there was no building on the property. Nevertheless, the car-parks could not be used. The tenant wanted to get out of the lease but there was nothing he could do to terminate it.

Lawyers found there were a variety of reasons given by their clients for terminating leases. The main two were the lack of access and the building being untenable.¹⁴⁰ Other reasons included the building being unsafe; uncertainty about how long it would take to get back into the building; the building being unable to be used for the tenant's purpose; substantial interference with the tenant's use of the building; and the length of time needed for repairs.

There were also reasons for not terminating leases. One lawyer reported that his landlord company client did not terminate its leases, even though its buildings were severely damaged and would clearly not be tenanted again.¹⁴¹ The reason for this decision was that the insurance company would pay out for loss of rent if the leases remained in force.

The landlord wouldn't have wanted to terminate because that could affect his insurance. I mean you can't then go to [the] insurance company and say I have just terminated the tenant's lease, I am out of pocket. They wouldn't have wanted to upset [the insurer] or run the risk of the insurer saying well by your own action you have deprived yourself of rent so you are not covered.¹⁴²

Lawyers reported that both landlords and tenants terminated the leases. Five lawyers reported that termination occurred by mutual agreement between landlord and tenant,¹⁴³ four reported it was mainly tenants and one said it was mainly landlords. One lawyer said, in his experience, landlords generally wanted to reserve their position in situations where the building was not totally destroyed and therefore were more reluctant to terminate their leases.¹⁴⁴

¹³⁹ FQ004.

¹⁴⁰ Six lawyers.

¹⁴¹ The rent was abated though pursuant to cl 27 ADLS lease, but the lease was not terminated until absolutely necessary.

¹⁴² FQ003.

¹⁴³ A total of 11 lawyers were interviewed.

¹⁴⁴ FQ000.

D Was it a fundamental assumption of the parties that the lease would subsist despite the happening of the earthquake?

(a) Tenants

The research shows that tenants thought their leases would end if they could not access their buildings for a prolonged period. They were surprised the lease did not provide for this situation. Tenants' concerns centred on the possibility they could be forced to return to their premises in the CBD when they had established themselves elsewhere. There were a number of reasons: the expense and inconvenience of moving, rebuilding the goodwill of the business in the new location and then having to move again and the concern that staff did not want to return to the city or their building after the trauma of the earthquake. A tenant said:¹⁴⁵

If I hadn't got new premises that would have been the end of my business. If the landlord had required me to go back into the building after its repair I don't know what I would have done.

Tenants who believed their buildings to be undamaged, initially thought they would be returning to the CBD. However, when it became clear they would not be going back for a long time they had no choice but to obtain alternative premises and enter into new leases. One tenant said:¹⁴⁶

In the first three months [after the earthquake] I thought we would go back into the building. I was waiting for the landlord to do the repairs and for the cordon to be lifted. So at the start I was reluctant to look for alternative premises. However after three months it became apparent that the building was not getting repaired¹⁴⁷ and the surrounding buildings and the state of the city was so bad that I realised I would not be going back for a long time. I took the next six months of insurance to get new premises and get established and back into business.

¹⁴⁵ FQ214.

¹⁴⁶ FQ214.

¹⁴⁷ The tenant said the back of her building had been demolished to allow the authorities to access another building behind it; the damage was not caused by the earthquake.

The potential liability for two leases was also a significant concern for tenants. They did not want, nor could they afford, two leases. The potential liability for two leases is discussed further on in this chapter.¹⁴⁸

All of these factors support the contention that tenants assumed their leases would end if their building was going to be inaccessible for a long time.¹⁴⁹

(b) Landlords

There were mixed views from landlords as to whether they thought the leases would terminate if a building became inaccessible. Some landlords took a moral view of the situation and believed the leases should terminate to release tenants from their obligations under them. Others thought the leases should not terminate because the risk of an inaccessible building was not the landlord's to bear.¹⁵⁰ These landlords thought the lease should remain in force and rent should remain payable.

E What hardship did the parties suffer when the lease was not terminated?

(a) Tenants

Tenants suffered hardship when they were unable to terminate their leases. They suffered financial hardship from relocation costs and having to pay for two leases. They also faced uncertainty about their future, not knowing if or when they would have to return to their buildings in the CBD.

After the cordon was erected and buildings became inaccessible tenants had no option but to find alternative premises. Commercial premises on the outskirts of Christchurch or in

¹⁴⁸ At page 198.

¹⁴⁹ All but two of the tenants interviewed said that termination of the lease would have best met their needs. The other two wanted to stay in their building because they wanted to stay at that location and retain their goodwill. Of these two, one tenant had no choice about termination of the lease as the building was taken by CERA for the new city plan, while the other had a green-stickered building that they were only excluded from for eight weeks.

¹⁵⁰ FQ301.

the suburbs were in great demand and the landlords of these buildings took advantage of the market, requiring displaced tenants to sign up for longer terms than usual.¹⁵¹

A spokeswoman for one tenant, a not-for-profit organisation, was asked how she managed to pay for two leases.¹⁵² She said to cover the cost she had no choice but to use funds that had been set aside for a new start-up project and the savings made from the wages of two staff members who had left Christchurch after the earthquakes. She admitted money was very tight and paying two leases meant the organisation was unable to do the things it wanted for the community it supported.

Many tenants did not have the means to test the legal position over their lease, particularly if there was a risk they might not be successful. They therefore decided it was better to just pay the rent however they could. A spokeswoman for a tenant said:¹⁵³

Being a charity we weren't in the financial position to consider challenging [the lease remaining on foot] and with budgets coming up we had to make allowances that rent potentially could commence.

For other tenants the liability for two leases was not the only problem. They had to deal with the uncertainty of not knowing whether they would have to go back to their building. One tenant was out of her building for eight weeks after the earthquake. She then returned, only to be told seven months later the building needed earthquake strengthening. She moved out again. It was a further three and a half years before she was told she had been released from her lease.¹⁵⁴

Many lawyers were also tenants of inaccessible buildings. They too were caught out with the uncertainty surrounding their own leases. One lawyer's story shows the problem that was all too common:¹⁵⁵

The other building we were supposed to be moving into was pretty much fine after February and then there was a question mark over it until about September. I think the June [earthquake] finished it off but it took all that time and we were in the

¹⁵¹ A number of tenants said they had to sign up leases for six year terms which were longer than their former lease and longer than they would have liked.

¹⁵² FQ208.

¹⁵³ FQ204.

¹⁵⁴ FQ205.

¹⁵⁵ FQ008.

difficult position personally of what do we do? Do we take another lease when we have got a 10 year lease term, an outlay of 10 years sitting out there, or what do we do? We didn't [take another lease] in the end. We felt it was too much of a risk and so we waited until September and then [the landlord] said [the building is] going to come down.

Tenants also suffered financial hardship as a direct result of not being able to terminate their lease. A tenant thought he would be returning to his building after the earthquake because it was green-stickered. When his landlord did not allow him to return and he sought legal advice, he was told he could not terminate the lease because the only problem with his building was that it was inaccessible. Consequently, the tenant missed an opportunity to collaborate with another business and relocate. His understanding was that he was liable for his lease and would be going back to the building¹⁵⁶ and he was financially unable to take the risk of being liable for two leases. Not being able to terminate the lease has meant this tenant has lost his business and suffered financial hardship. At the time of the interview in November 2014, the lease was still in force;¹⁵⁷ the tenant had not reopened his business and was still considering his legal options.

It was also a concern for a number of tenants that should they be required to return to their buildings in the CBD when the cordon was removed, their businesses would suffer (particularly those involved in hospitality). The workers had moved to the suburbs or outskirts of Christchurch and the cafes and others in hospitality had followed them, but it would be a while before they returned.¹⁵⁸ There was also the problem of a "damaged city" which meant that it was difficult for people to move around the CBD easily. Returning to the CBD would be challenging for businesses reliant on inner-city workers and the foot traffic from tourists and pedestrians. Yet they would still be required to pay rent and operating expenses.

(b) Landlords

Landlords also suffered hardship in the aftermath of the earthquakes. Those who did not have insurance or their insurance was insufficient to cover them for the duration of the cordon, suffered financial hardship if their tenants stopped paying rent. Landlords had

¹⁵⁶ FQ215.

¹⁵⁷ The lease was still in force but the tenant was not paying rent at that time.

¹⁵⁸ Tenants who had moved out of the city had signed up to leases for lengthy terms which meant they would not be returning to the CBD for some time.

continuing financial obligations to meet, such as mortgages and rates, which were not covered if they did not receive their rent.

Landlords who were well insured came through the aftermath of the earthquake well. They did not want to terminate the leases. Their insurance covered the loss of rent so they were not out of pocket. They were also able to maintain relationships with their tenants rather than falling out over rent.

F A Lack of Foresight

*One of the main problems was the uncertainty about the lease and that none of us had planned for that event and not being able to get back into the building.*¹⁵⁹

(a) Tenants

Prior to 2010, tenants did not foresee the possibility that earthquakes, such as those experienced in the Canterbury sequence, would strike Christchurch. When asked if they had ever considered the possibility that their building might be at risk from such earthquakes all tenants answered “No”, and two answered emphatically “No never”. One tenant said “I don’t think any of us ever thought of these things ... you never really believed [an earthquake] was ever going to happen”.¹⁶⁰ When asked if she ever expected the earthquakes another tenant said:¹⁶¹

No, never, most people wouldn’t. It’s just a disaster. I mean if you are in Japan maybe you would think there is a possibility but wouldn’t here even though we have got earthquakes.

Additionally, most tenants never considered the problems actually caused by the earthquakes would ever have happened to them. They had never thought their buildings might be demolished or damaged or be inaccessible owing to a cordon. They never thought about their buildings losing essential services or needing earthquake repairs or strengthening. Indeed one tenant commented:¹⁶²

¹⁵⁹ FQ200.

¹⁶⁰ FQ211.

¹⁶¹ FQ202.

¹⁶² FQ200.

I had never considered the city would be damaged in such a way by an earthquake. The main reason I would have thought the building may be damaged would be by a fire or maybe temporarily inaccessible due to flood.

The fact that tenants had never turned their minds to the possibility of a cordon is demonstrated in a number of ways. Tenants had not made provision for this problem in their leases.¹⁶³ Tenants' business interruption insurance cover was not, in many cases, long enough to cover the disruption. One tenant said:¹⁶⁴

We came out of it okay but it would have been nicer to have had a bit more cover in place. For the business interruption we didn't have a long enough indemnity period. [On one policy] we only had six months and six months would have been fine for a fire but not for a big earthquake. We have now increased [our policies] to eighteen months.

(b) Landlords

Prior to 2010 landlords did not foresee Christchurch as being at risk from earthquakes either.

Nobody ever thought an earthquake would happen in Christchurch. [If it happened] it would be a big earthquake in Wellington and then we would get the flow on effect from it.¹⁶⁵

Even a landlord who had considered earthquakes as part of a comprehensive business risk plan admitted "It is likely that the magnitude of the earthquakes and the extent of the damage elsewhere in Christchurch was not considered".¹⁶⁶

Landlords said the earthquakes, the erection of the cordon and inaccessible buildings were totally unexpected and unforeseen. That is probably why most landlords said they did not turn their minds to the thought of an earthquake affecting their building.¹⁶⁷

Landlords had also never considered the other problems that affected buildings after the earthquakes. They never thought their building might be demolished, require extensive

¹⁶³ The fact there was no provision in the lease is discussed earlier in Chapter Five.

¹⁶⁴ FQ200.

¹⁶⁵ FQ303.

¹⁶⁶ FQ301.

¹⁶⁷ Four out of the seven who answered this question.

repairs, be inaccessible owing to its location within a cordoned area and be inaccessible for earthquake strengthening or repairs, safety reasons or a lack of essential services.¹⁶⁸ One landlord commented that his thoughts were always about the risk of fire, not earthquakes,¹⁶⁹ and this was typical of many participants.

However, when faced with the earthquakes, landlords had different views on what to expect from their leases. Some expected it to cover the situation. One said:¹⁷⁰

I would have thought that the lease was put together and the insurance was covered in the past by a lawyer so I would have expected him to have written everything in that he felt was necessary.

Other landlords did not because, as one said, it was not something anyone expected. She said:¹⁷¹

The reality is that we humans don't tend to read an entire legal document and we may or may not get advice, and we certainly don't get advice on unexpected things because you don't expect them to happen.

Another landlord said:¹⁷²

Nobody could have foreseen that a whole city would be fenced off. Whether your building was damaged or not, you wouldn't be able to access it and if you could access it you couldn't use any of the services because your toilets wouldn't work, you wouldn't have water coming in, there was no power, gas pipes were ruptured or whatever so it's a whole new world I think.

A few landlords had considered earthquakes as a risk.¹⁷³ However, this was part of an overall business risk assessment completed as a formality of business rather than out of concern that an earthquake might strike. For one, the risk of an earthquake was considered in light of his responsibility to bring his buildings up to the required per centage of the Building Code. One landlord, a large international company, regularly completed a comprehensive risk plan for its insurance programme. It was an essential part of the

¹⁶⁸ Only one landlord said he had considered all of these issues in his business risk planning.

¹⁶⁹ FQ306.

¹⁷⁰ FQ302.

¹⁷¹ FQ304.

¹⁷² FQ306.

¹⁷³ Three landlords.

company's business risk planning for its health and safety responsibilities for staff, clients and the public. It had considered earthquakes as a potential risk, alongside a number of other risks, for insurance purposes.¹⁷⁴

(c) Lawyers

The earthquakes and their consequences were not foreseen by lawyers. One lawyer said:¹⁷⁵

No-one ever turned their mind to it. It is even like when we talk about the issue on Land Information Memorandums about liquefaction. It used to come up all the time and we used to [say] "Oh, yeah, there is the liquefaction thing but don't worry about it, its fine". I never would have turned my mind, when advising a landlord or a tenant in terms of a lease document, to the deficiencies or the inadequacies in a lease concerning an earthquake ... ever.

They never considered the possibility of a cordon being set up around the CBD. They did not contemplate inaccessible buildings on the scale that occurred and the consequences for leases. In answer to the question of whether the earthquakes were a foreseeable event, one lawyer said:¹⁷⁶ "No not on the scale we had ... I don't think anyone could have reasonably foreseen [what happened to Christchurch]." Another said:¹⁷⁷

No-one could have foreseen that 90 per cent of the central city would have been taken out and be inaccessible for such a long period of time and that they would have been rolling in army trucks on the corners to stop people getting in.

The fact the earthquakes and their consequences were unforeseen is supported by the fact that lawyers had not made any provision in the leases to cover these issues. One lawyer said:¹⁷⁸

The ADLS lease form in use at the time of the earthquakes did not anticipate the circumstances which arose after the earthquakes. This is not a criticism of the ADLS – no-one expected such on-going disruption.

¹⁷⁴ FQ301.

¹⁷⁵ FQ006.

¹⁷⁶ FQ005.

¹⁷⁷ FQ004.

¹⁷⁸ FQ004

It is also supported by the fact that lawyers were surprised to find the law in this area was uncertain and there was no simple answer to the problem of an inaccessible building.

However, with uncertainty comes pragmatism.

At the end of the day and the advice I gave people was “Well you need to weigh up which is the worst thing. Not being able to be in business at all and having to face something like this in the future [liability for two leases] or doing nothing and losing your business and then who knows about the premises”. That was probably one of the hardest things - that people were coming to you for an answer and there was no answer.¹⁷⁹

G The Demands of Justice

*I am in limbo land. I don't know whether I am going to have to go back into the building and start the business again or do I just carry on waiting? I can't [get on with my life]. I am just waiting to hear from [the landlord].*¹⁸⁰

(a) Tenants

There are several factors that support the contention it is in the interests of justice for tenants to terminate their leases after the Canterbury earthquakes. First, the financial impact it had on small and medium sized businesses, as previously mentioned; second, the need for certainty about their future (how long would it be before the building was accessible and whether they had to return); and finally a quick resolution of the problem (tenants should not be left to “wait and see”). One tenant said “The ability to terminate due to exceptional circumstances would have been a very useful thing to have up your sleeve”.¹⁸¹

Tenants were concerned about the financial impacts of the earthquake. They were particularly concerned about their potential liability for two leases. Prior to the earthquakes most tenants had leases with terms of three years or less.¹⁸² After the earthquakes,

¹⁷⁹ FQ008.

¹⁸⁰ FQ215.

¹⁸¹ FQ212.

¹⁸² Refer to Part B where the length of the terms of leases of the tenant participants prior to the earthquakes is discussed.

landlords of buildings outside the CBD were insisting on longer terms of six years or more.¹⁸³ It was likely that landlords of these buildings were aware that tenants would return to the CBD when the cordon was taken down and wanted to keep them for as long as possible. However, these longer terms were likely to exceed the amount of time the cordon was in place.

Most tenants had business interruption or other type of insurance.¹⁸⁴ Of those with insurance, more than half said that it did not impact on the decisions they made regarding their lease after the earthquake.¹⁸⁵

Those who took action and obtained alternative premises generally did so out of necessity. It was either take the risk of being liable for two leases or lose the business. Those who were more cautious, being concerned about the financial impact on them if they did get stuck with two leases, often missed out on business opportunities or new premises. One tenant said he initially did nothing about obtaining an alternative place to work from because he thought he had to return. However, looking back, he is very pleased he did set up in new premises when a friend gave him an opportunity to. He said:¹⁸⁶

Well I missed the boat because I thought I was going back in and I was just in a very fortunate position that one of my good friends and clients had some space. And what would my alternative have been? I don't know to tell you the honest truth, and I don't even like to think about it.

(b) Landlords

Many landlords were sympathetic to their tenants' position and agreed they should not have to pay rent for a building they could not access. One landlord who refunded his tenants' rent payments for February and March 2011 said:¹⁸⁷

¹⁸³ Landlords of buildings in the suburbs and on the outskirts of Christchurch were seeking terms of six years or more to secure tenants for a longer period of time than they otherwise might have achieved. These longer terms meant it was more likely a tenant would still have their second lease when their building became accessible again.

¹⁸⁴ Eleven tenants had insurance.

¹⁸⁵ Eight out of 11 tenants.

¹⁸⁶ FQ306.

¹⁸⁷ FQ305.

[The buildings] were untenable so in my books how can you charge somebody rent when they can't operate their business. My business is to rent premises from which they can operate from. If they can't operate I took the view that I would claim insurance later.

Although insurance cover meant landlords generally did not seek rent from their tenants, they were still aware of their right to seek it. Landlords too had their own financial obligations. One said:¹⁸⁸ "As a landlord if I didn't have loss of rents, I could have forced the tenant to pay because I'd need the income. I have to pay the mortgage."

One landlord had 12 buildings within the cordon and all needed to be assessed after the earthquakes. Initially, he did not know whether the buildings were to be repaired or demolished; it took six months to determine this. During that time he was told not to discuss the future of the buildings with his tenants. He found this difficult as they had a strong relationship. He said:¹⁸⁹

My insurance company was saying "You can't say to your tenants your building is stuffed, you are never coming back" because the insurance company felt that was pre-empting a decision that wasn't for me to make.

However, one landlord argued that the risk of an inaccessible building should not sit with landlords.¹⁹⁰ He said that placing all the risk on the landlord is an unwarranted inequitable transfer of risk. Landlords have to recoup the investment they have made in the building and they do this through their rent. He said:¹⁹¹

I have this very simplistic view that the landlord's obligations are quite simple and that is to provide the building, to give [tenants] quiet enjoyment and to maintain the structure of the building and I think it's only where earthquakes intercept with [those things], that I think the landlords should assume some risk.

The uncertainty around the parties' legal rights in the case of an inaccessible building meant that landlords were left to do the best they could in the circumstances. As long as they had their rent covered, they were not out of pocket and could meet their own financial obligations. Landlords might argue that if the doctrine of frustration does apply to

¹⁸⁸ FQ309.

¹⁸⁹ FQ305.

¹⁹⁰ FQ301.

¹⁹¹ FQ301.

terminate the lease they will be adversely affected. If there is no lease in force they may not be able to claim loss of rent payments under their insurance. This will have a serious financial impact on them.

H Other problems

1 Tenants had limited rights

*“It is clear to me that tenants have very few rights”.*¹⁹²

The research has revealed that tenants had few rights in relation to their buildings after the earthquakes. There were two main problems: an inability to access the CBD or their buildings and an inability to obtain information about their buildings. The lease did not assist.

Tenants were excluded from the CBD by the erection of the cordon. Access was restricted to authorised personnel only. Landlords were able to apply for access rights through CERA’s¹⁹³ business access scheme. Tenants were not. They were left in the unenviable position of being reliant on others to gain access to their buildings which was made all the more difficult if relations with their landlord were strained. Even if tenants had been able to enter the CBD, there was the problem of whether their buildings were red or yellow-stickered by the authorities which would also have prevented access.¹⁹⁴

Tenants also had difficulty in obtaining information about their buildings. Landlords, as land owners, were able to get information from engineers, CERA and the authorities. However, they had no obligation to pass it on to tenants. Tenants did not know whether their buildings were to be retained, repaired or demolished and therefore *whether* their lease would end or *when* it would end.

¹⁹² FQ203.

¹⁹³ CERA is an acronym for the Canterbury Earthquake Recovery Authority which was set up after the earthquakes and is discussed in more detail in Chapter Six.

¹⁹⁴ The red, yellow and green stickering system was set up as a quick way of identifying buildings that were unsafe to enter, safe to enter but only for short periods of time or safe to enter and occupy. For more information on the stickering system for buildings introduced after the earthquakes refer to Chapter Six.

Most tenants were aware their landlords had obtained a report on their building. However, few were shown these reports.¹⁹⁵ Some asked the landlord for the building report but it was not forthcoming. Others were able to obtain the report indirectly through their property managers or insurance assessors.

Sharing of information on the status of buildings was important to tenants. It helped them with future planning. It also helped to maintain a good relationship with landlords. Those who did not receive information felt disengaged from the process. They said they felt left in the dark and powerless because they did not have the facts about the state of their buildings, the insurance situation and decisions being made about the future of the buildings. One tenant said: “We found out but it was very convoluted, like we were at the end of a run of information, [and not] privy to that primary information”.¹⁹⁶ Another said:¹⁹⁷

We were only able to get copies of the engineering reports and CERA information through our landlord so we felt we did not have direct access to official information that would have helped our decision making. We felt powerless and unable to get information and advice that we needed.

This same tenant said he had enjoyed a good relationship with his landlord during the course of his lease, but that changed after the earthquakes:¹⁹⁸

The landlord would not respond to our communications, did not give us any information about the building or its status. He referred us to his lawyer rather than speaking to us directly. It was only after he had resolved his own insurance situation with the building that he was prepared to speak with us.

Another tenant said of his experience:¹⁹⁹

I rang the company [landlord] every month looking for an update. They did give us a release eventually but there was a lot of time where they obviously were in a position to do so and chose not to reveal that to us. There was still talk about engineers reports, insurance issues around who was going to pay for what, that the building could stay up, that we would have access in October when they opened

¹⁹⁵ Four out of 11 tenants reported being given or shown a report on the building.

¹⁹⁶ FQ211.

¹⁹⁷ FQ200.

¹⁹⁸ FQ200.

¹⁹⁹ FQ204.

up that part of Hereford Street. Those were all conversations and messages that I was getting on my phone calls; the building's fine. The reality was the building wasn't. It has gone now but that was quite a stressful time.

The majority of landlords interviewed said they had obtained a building, engineers or other report on their building. Yet less than half had shown these to their tenants. Although not actually disclosed, landlords may not have had a choice about sharing information on their buildings. It was alluded to in an interview with one landlord that his insurance company did not want him to disclose any information to his tenants about the state of the building. A lawyer also said that landlords wanted to keep their options open and therefore were reluctant to release sensitive information about their buildings.

It is clear that the lack of information sharing between landlords and tenants was a problem. If landlords have the power to decide whether or not they will disclose information to tenants, there is an imbalance of power.²⁰⁰ Neither the ADLS lease nor the Property Law Act 2007 specifically requires landlords to disclose building reports or other associated information to tenants.²⁰¹ Therefore, tenants are left in the unenviable position of being reliant on their landlords for information that will affect their businesses and their futures.²⁰² This is a problem that needs to be addressed.²⁰³

²⁰⁰ This issue is also discussed in Chapter Eight. Landlords were not always those in control of the release of information on their buildings. Insurance companies were often the parties who were unwilling to release information pertaining to an insurance claim.

²⁰¹ It seems likely that landlords and their lawyers assumed that as there was no express term requiring the parties to share information, they did not need to. Could it there be a general term implied into a lease that both parties must keep the other informed of matters pertaining to it? See for example *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 at 708 where Mahon J recognised that a special duty of disclosure might arise from contractual relationships and might be held to be created by the terms of the contract itself.

²⁰² Tenants could have commissioned their own reports on the buildings but these would have been expensive and, owing to the cordon and limited resources, difficult to obtain.

²⁰³ Refer to Chapter Nine for recommendations for reform.

2 A lack of understanding about the law

(a) Tenants

Tenants were unclear about their legal rights after the earthquakes. They did not have a good understanding of the provisions in their leases, nor did they understand the law. One tenant said:²⁰⁴

I did not look at the terms of the lease. I just assumed that anyone in their right mind would know that if you can't occupy a building then you shouldn't have to pay rent. It was only later that I realised from stories in the press that some tenants had to keep paying their rent. The building might be able to be used but the cordon prevented them from using it, so they were liable to pay.

Most tenants reported that the provisions in their leases did not help them to understand their legal rights.²⁰⁵ The main reason was that the lease did not expressly cover the situation of an inaccessible building. One tenant said "We wanted to terminate our lease and advised the landlord of this, but we were uncertain whether our termination was effective, which made it difficult for us to move forward and sign a new lease".²⁰⁶

Tenants are not to blame. The law was unclear and their leases did not cover the problem. A common reaction was as one tenant said:²⁰⁷

I don't see why the tenant should have to pay rent for a building that cannot be accessed or used. It is up to the landlord to provide the necessary environment we pay our monthly rent for. The landlord has got more money than the tenant.

Only half the tenant participants said they sought legal advice from a lawyer. One had legal advice on a pro-bono basis. These tenants were told the law was unclear. In some cases the advice was that their lease remained in force and they would have to return to their building.²⁰⁸

²⁰⁴ FQ214.

²⁰⁵ Thirteen out of 14 tenants.

²⁰⁶ FQ200.

²⁰⁷ FQ207.

²⁰⁸ FQ205 and FQ215.

Those tenants who did not seek legal advice said it was because they could not afford a lawyer.²⁰⁹ These tenants tried to research the law themselves or talked to others in a similar predicament in an attempt to find answers. One tenant said that, in her experience, it was the landlord's lawyer who prepared the lease so she did not use a lawyer. One tenant said "I did not find out my legal rights. I just assumed I didn't have to pay for a building I couldn't access".²¹⁰

If tenants did not have a lawyer prior to the earthquakes, it would have been hard to get legal advice afterwards, in that lawyers were busy with their own clients and their own personal issues arising out of the earthquakes.

Another reason why tenants did not understand their leases was because those who had lawyers generally relied on them to act in their best interests and advise them of anything they should know about the lease. The lawyers had clearly not considered the possibility of a cordon and an inaccessible building, otherwise they would have provided for it in the lease.

Tenants also appeared to think the law would reflect the morality of the situation.

It just seemed common sense to me that if you were paying for something... it's like you pay to rent a car but the car is not available for you to rent so you don't pay; you pay rent on a building and if it's not available for you to tenant you shouldn't have to pay rent for it for whatever reason unless we did something to make it untenable.²¹¹

(b) Landlords

Most landlords did not find the provisions in their leases helped them to understand their legal rights either. One landlord commented "I don't think any lease really did in terms of access",²¹² another said "the damage and destruction provisions were not good enough".²¹³ Two landlords were not even concerned about their legal rights because their insurance covered any loss of rent.

²⁰⁹ Six out of 13 tenants.

²¹⁰ FQ214.

²¹¹ FQ208.

²¹² FQ306.

²¹³ FQ305.

The majority of landlords did not consider the law to be clear in relation to an inaccessible building and sought legal advice. However, one landlord, who was legally trained, believed the law was clear enough:²¹⁴

The law for the landlord remains reasonably clear. Although there are questions of degree in relation to “untenantability” it is clear that the lease will continue to perform in accordance with its terms. The allocation of risk from natural events is a matter that should be dealt with contractually and the limited “outs” through “untenantability” are appropriate.

Generally the solutions had to be worked out between the parties. Without clear legal guidelines the parties adopted a “free for all” approach where they had to be pragmatic and make up their own rules for the situation. The Property Manager said he had a couple of cases where tenants did not want to go back into their buildings. There was nothing in the lease to cover this, so he took what he thought was a fair approach to the problem and made up his own rule: if the tenants were out of the building for a year the tenant had the choice of whether to go back in or not; if it was under a year then they would be held to the lease. He did not experience any problems with this approach, but did admit that he may not have been as accommodating if the insurance companies had not paid out. With insurance covering the loss of rent, landlords had more options open to them to negotiate with tenants and release them from their leases if that worked for the landlord.

(c) Lawyers

Prior to the earthquakes, lawyers said they were unlikely to have gone through the lease clause by clause with their clients because it was a standard form document. The usual procedure might have been to have mentioned the destruction and damage clauses in a standard letter about the lease. Unless the client wanted to spend time and money on a full explanation of all clauses, it was unlikely the lawyer would have explained the lease in detail. Some clients would have been familiar with the ADLS form of lease if they had used the document before.²¹⁵ One would expect landlords to be in this category as they are in the business of leasing. Nevertheless, lawyers said the explanations given were dependent upon the individual circumstances; a new business owner taking a lease of premises for the first time is more likely to require his or her lawyer to go through the lease clause by clause than a longstanding landlord or tenant who has used an ADLS lease before.

²¹⁴ FQ301.

²¹⁵ FQ001.

The finding that landlords and tenants were uncertain about their legal rights after the earthquakes is supported by the data collected from lawyers. There was a plethora of earthquake-related lease issues that arose.²¹⁶ The most common issue, and ranked by lawyers as the most important,²¹⁷ was the problem of an inaccessible building. This issue alone created major uncertainty.

The unusual issues that arose meant lawyers had to refresh their knowledge of the law. Nevertheless, at the time of the interviews the majority of lawyers²¹⁸ did not consider that the general law governing earthquake-related lease issues was clear. Furthermore, lawyers did not consider the ADLS lease to be effective in clearly setting out the legal rights of commercial landlords and tenants in relation to earthquake-related lease issues,²¹⁹ or in providing solutions.

The meaning of “untenantable” in the context of the leases was important. Lawyers said they did consider this when advising their clients on inaccessible buildings.²²⁰ All but one lawyer did not consider the clause to be clear in its application though. The lawyers expressed their dissatisfaction thus:

I would prefer it if the lease clarified the length of time that must pass when a building is unable to be used before the lease is deemed to be terminated on the grounds of untenability, that is 20 per cent of the balance of the then current term.²²¹

²¹⁶ For a list of earthquake-related lease issues that were reported by lawyers refer to Appendix D.

²¹⁷ In the questionnaire lawyers were asked to rank the earthquake-related lease issues that had arisen for their clients in order of importance, with a rating of one being most important and increasing in number as the issues lessened in importance. One lawyer commented that the importance of these issues did change over time; in the days immediately after the earthquakes the focus was very much on access/tenantability issues. As time went on, issues to do with earthquake strengthening and the new building standards were more of a priority. Lawyers were interviewed in 2013 and 2014, several years after the earthquakes, and the way they ranked the issues should be read in light of this fact.

²¹⁸ Eight of the 11 lawyer participants.

²¹⁹ Nine of the 11 lawyer participants.

²²⁰ Clause 27 in the ADLS lease is discussed in Chapter Five and set out in full in Appendix B.

²²¹ FQ004.

The law around untenability in New Zealand was not well developed and relied mainly on overseas decisions which were inconsistent in regards to how long [the] premises could not be used before it was untenable.²²²

The law relating to tenantability was identified very early after 4 September as inadequate.²²³

[The law was not clear] in the sense it is applied to specific facts, so no hard/fast rule to apply to all situations.²²⁴

Limited judicial discussion available (although more now); objective test but very fact-specific so not automatic in terms of an answer.²²⁵

No-one knows whether a given set of circumstances is equivalent to “untenable”.²²⁶

Lawyers gave a lot of different advice to their clients regarding the meaning of “untenable” in the context of the ADLS lease, advising on the factors of the test but often placing a different emphasis on each factor. These responses clearly show there was uncertainty about the test for determining when a building is untenable. Over half the lawyer participants said that a definition of “untenable” would make the law more effective.²²⁷ Nevertheless, it was acknowledged that formulating a definition is difficult. The facts of each case vary enormously and it is hard to have one test to cover all circumstances. One lawyer said the definition could not be too prescriptive.²²⁸ Another said there cannot be a definition because “we can’t legislate for all circumstances”.²²⁹ These views show it is difficult to balance the need for certainty with the risk that one test will not work in all cases.

Lawyers also looked at the doctrine of frustration when considering an inaccessible building.²³⁰ However, there were mixed views on whether the doctrine could apply.

²²² FQ004.

²²³ FQ006.

²²⁴ FQ009

²²⁵ FQ008.

²²⁶ FQ009.

²²⁷ Seven out of 11 lawyers.

²²⁸ FQ002.

²²⁹ FQ009.

²³⁰ Ten of the 12 lawyer participants considered the doctrine of frustration as a possible solution.

One lawyer argued the doctrine was unlikely to apply in the case of an earthquake because leases contemplate earthquake risk generally.²³¹ Most lawyers however, thought the reason the doctrine would not apply is because the threshold is very high. One said:²³²

There are doubts whether the doctrine could be applied to leases but on the basis that it was applicable, the case it would be applicable to was rare and [we were] unsure whether it would apply in the case of an earthquake.

Lawyers were not keen to test the issue in court.

Sometimes we would argue that the lease was terminated on several grounds with a stronger focus on untenability where we felt on safer ground (pardon the expression) but the frustration [argument] we never really pushed. I never saw anyone try and push that angle because it was just too difficult to argue and the only way you are really going to get someone to accept that was going to Court and nobody wanted to have more time and money tied up in that.²³³

Nevertheless, one law firm took the view that the doctrine of frustration could apply and that it was a possible solution for their clients.²³⁴

The varying opinions on whether the doctrine could apply show the uncertainty of the law in this area. A number of lawyers admitted they wore two hats at times; one for landlords and one for tenants. Depending on which hat they were wearing determined the advice they gave their client. One lawyer said:²³⁵

Some days we would be arguing one thing for a landlord and then arguing the complete opposite in the afternoon for a tenant and having success or failure either way.

Lawyers did not have the answers. They therefore had to advise their clients about how the law might apply. When asked whether clients were unhappy with this uncertainty, one lawyer said:²³⁶

²³¹ FQ009.

²³² FQ006.

²³³ FQ004.

²³⁴ FQ003.

²³⁵ FQ004.

²³⁶ FQ001.

I think they were probably surprised around frustration and thought it was going to work a bit easier ... As to tenantability ... you would have thought out of pure weight of numbers [of ADLS leases] that exist there would be clearer rules or expectations. But I think the reasons why people were probably happy about resolving the earthquake issues is that pragmatism won the day. Well, what were you going to do? You were going to have some uncertain proceedings in Court, testing the law, starting in the District Court, going to the High Court, going to the Court of Appeal; who really wants to do that? And I think that everyone was generally suffering personal issues as well; the last thing we want to do is fight.

A good example of the uncertainty facing tenants is the story one lawyer²³⁷ told of an interesting case he was dealing with, three and a half years after the earthquake.²³⁸ He explained it as a lease sitting in limbo. Since the February 2011 earthquake the building has been unoccupied. Both sides have had “without prejudice” discussions about the fact that neither will make a decision about what should happen. Each is waiting for the other party to take action. The tenant’s rent has been abated since the earthquake. However, the repairs are due to be finished shortly. Once that happens and the building becomes available, the tenant will be forced to make a decision – either start paying rent or argue termination. It will be an interesting outcome.

3 The relationship changed

The earthquakes and the resulting problems placed a huge amount of strain on landlords and tenants. It is not surprising to discover that a large number of tenants reported their relationship with their landlord had changed. Half of the tenant participants said their relationship had deteriorated and cited a lack of communication as being the main reason. Other reasons included landlords who had taken a “business-like” approach to the aftermath of the earthquakes which was perceived to be inappropriate and landlords asking tenants to leave buildings when the tenants did not want to go. One tenant explained the effect of the earthquakes on her relationship with her landlord:²³⁹

[It] changed after the February earthquake. The Landlord wanted us to leave the building. We said no. The Manager at the time did not like the fact we didn’t want to leave and wasn’t very pleasant. We had just finished the fit-out of the building

²³⁷ FQ010.

²³⁸ The date of the interview was September 2014.

²³⁹ FQ203.

and were established there having had to leave our other building after the September earthquake. We stuck our toes in as there was nothing wrong with the building, it was still usable. Our building was green-stickered so we were eventually allowed to stay.

Landlord participants did not report the same changes to their relationships as the tenant participants did. Only one landlord reported the relationship had changed and had worsened. This result could be indicative of the fact that landlords were in positions of power and, therefore, were in control of matters that make tenants feel the relationship was good or bad, such as the provision of information, whether they sought rent and whether they allowed tenants to end their leases.

I After the earthquakes

Since the earthquakes the majority of tenants have found new premises to rent. All have new landlords.²⁴⁰ Two tenant participants were able to move to other premises they owned. Of those who did not find new premises, three closed their businesses and one returned to their building when it became accessible.

One lawyer said he believed those tenants who got out of their leases early were the lucky ones.²⁴¹ The cover provided by insurance was for an average of 12 to 18 months. Engineering reports took a long time to be produced. Landlords and tenants had no way of knowing if or when they would be going back into the building. “Those people who made decisions early on that they were not going back, they were cancelling and [thinking] what will be, will be, [they] were the lucky ones”.²⁴²

The issues that arose for landlords and tenants after the earthquakes have been problematic. In the next chapter, the findings of this research are examined in light of the test for the doctrine of frustration. Did the unusual circumstances that arose for landlords and tenants in the aftermath of the Canterbury earthquakes, as highlighted in this chapter, meet the test? Can the doctrine of frustration be applied to terminate leases?

²⁴⁰ Ten tenants.

²⁴¹ FQ006.

²⁴² FQ006.

CHAPTER EIGHT

SHOULD THE DOCTRINE OF FRUSTRATION APPLY TO COMMERCIAL LEASES IN THE AFTERMATH OF THE CANTERBURY EARTHQUAKES?

I Introduction

Is the doctrine of frustration applicable to commercial leases in the circumstances that arose after the Canterbury earthquakes? From previous chapters it is known that the earthquakes caused significant damage to buildings in the city of Christchurch. The “red zone” cordon restricted access to the CBD and the buildings within its boundary. Tenants, therefore, wanted to terminate their leases because they did not want to pay rent for buildings they could not access or use.

In this chapter the findings from the research¹ are analysed and the test for the doctrine of frustration applied, to determine whether this common law remedy could have provided a solution for terminating leases after the earthquakes. It concludes by arguing that in many cases the test was met and the doctrine should have been applied to those leases.

II Meeting the test for the doctrine of frustration

It is clear the doctrine of frustration applies to commercial leases in New Zealand.² The leading authority on the doctrine in New Zealand is *Planet Kids Ltd v Auckland Council*.³ This decision was not available to landlords, tenants and lawyers at the time of the earthquakes as it was decided in 2013. However, it has helped to clarify the law to the extent that the Supreme Court has confirmed a multi-factorial approach to the test for determining when a contract is frustrated.

¹ The findings of the research were revealed in Chapter Seven.

² In Chapter Three there is a full discussion about the cases in which frustration has been alleged. The courts have accepted that the doctrine of frustration applies to leases following *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 however there are no cases in New Zealand in which a lease has been held to be frustrated.

³ *Planet Kids Ltd v Auckland Council* [2013] NZSC 147. This case is discussed in more detail in Chapter Two.

In *Planet Kids Ltd v Auckland Council* the contract was a settlement agreement. Therefore the Supreme Court did not have to deal specifically with the unique features of a lease-contract. The four cases in New Zealand that have considered frustration of a lease will be helpful; *Stack Shelf Company Number 16 Limited v Larsen*,⁴ *Māori Trustee v Prentice*,⁵ *GP 96 Ltd v FM Custodians Ltd* ⁶ and *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership) (In Liquidation)*.⁷ They may be referred to throughout this chapter but a more detailed discussion on the cases and their facts is set out in Chapter Three.

Having set out the findings from the interviews with tenants, landlords and lawyers in Chapter Seven, it is now possible to apply the data to the various elements of the test for frustration.⁸

A Was there provision in the lease?

A number of theories have been put forward as the basis for the doctrine of frustration.⁹ In recent times the courts have favoured the construction theory. Under this theory the true meaning of the contract must be ascertained from its terms and construction in light of the relevant surrounding circumstances that existed at the time the contract was made. Is the contract, on its true construction, wide enough to apply to the new situation?¹⁰

The ADLS lease¹¹ was the standard form lease in common use at the time of the Canterbury earthquakes. In Chapter Seven, the findings showed that a large number of participants had an ADLS form of lease¹² and the lawyers reported that the ADLS lease was that which was most commonly used by their clients. Therefore, the ADLS lease is the focus for the

⁴ *Stack Shelf Company Number 16 Limited and Mathers v Larsen* HC Rotorua CP31/90, 6 March 1991.

⁵ *Māori Trustee v Prentice* [1992] 3 NZLR 344.

⁶ *GP 96 Ltd v FM Custodians Ltd* (2011) 12 NZCPR 489.

⁷ *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)* [2015] NZHC 2647.

⁸ Set out in Chapter Two.

⁹ For a discussion on the theories refer to Chapter Two.

¹⁰ *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL) at 729.

¹¹ ADLS lease (2008, 5th edition) or earlier editions. Refer to Chapter Five for information on the other forms of lease in use at the time of the earthquakes. There were few participants who had these other leases which is why this thesis focuses on the ADLS lease, the most commonly used lease.

¹² Refer to Chapter Five (Types of leases) and Chapter Seven (Findings from research) for more information on an ADLS lease.

following analysis. Applying the construction theory it is clear the lease did not provide for the new situation that arose. It contained provision for what should happen if a building was destroyed or damaged; it did not provide for the situation in which a building was inaccessible. As the lease was silent about access, there was no ability for a tenant or landlord to terminate the lease in these circumstances.¹³

In applying the construction theory the enquiry is not only whether there is provision in the contract but also whether the contract is wide enough to apply to the new situation. In this case are the terms of the ADLS lease wide enough to apply to an inaccessible building? Again, it is clear they are not. An inaccessible building is a different problem to a building that has been damaged or destroyed, for example by fire or flood. There is nothing wrong with the building, it just cannot be accessed.

Where a building is destroyed or damaged the lease specifically places the risk of the supervening event on the landlord. It is likely, but not clear, that the risk of not being able to access a building would also have been borne by the landlord. In the most recent edition of the ADLS lease the new provision covering an inaccessible building does just that.¹⁴ It allows the parties the choice of terminating the lease. However, whether or not the parties would have provided for this in their leases prior to the earthquakes can only be speculation.

The other point to note is that even if parties had made provision for an inaccessible building their assumption would likely have been that the disruption would be short and in that case the lease would remain in force with rent abated until access was restored. Landlords and tenants never turned their minds to the possibility of a lengthy disruption as happened in Christchurch. The ADLS lease was not, on its true construction, wide enough to apply in the circumstances. One lawyer said this lease “did not anticipate the circumstances that arose and the on-going disruption”.¹⁵

The other standard form leases, the Property Council of New Zealand Office lease and the BOMA lease, did not provide for an inaccessible building either. Those surveyed said, of the few bespoke leases, they were generally based on one of the standard form leases and therefore it is very unlikely these had relevant provisions either.

¹³ The Property Law Act 2007 did not contain provision covering an inaccessible building.

¹⁴ The ADLS lease (2012, 6th edition) cls 27.5 and 27.6 (refer to Appendix B for the full clause).

¹⁵ FQ004.

There were also other reasons why tenants were unable to use their buildings after the earthquake. Many buildings were located near severely damaged buildings that were a hazard. It was therefore unsafe to use the building. Other buildings were in the “drop zone”¹⁶ of a dangerous structure. Access to these buildings was prohibited for safety reasons. Another problem arose from the fact that the earthquakes had damaged the city’s infrastructure affecting essential services within the CBD. Tenants could not return to their buildings without power and water. The lease did not provide for these situations either.

Finally, other problems have arisen too, not out of the cordon, but out of a tenant’s inability to use his or her building for a prolonged period of time: long term repairs and earthquake strengthening. Repairs to foundations of multi-storey buildings and other structural repairs are complicated and time consuming: there is no quick fix. A tenant who has returned to his or her building after the lifting of the cordon might find their landlord wants them to move out for a prolonged period while extensive repairs or earthquake strengthening are undertaken. The lease provides for work to be undertaken on the premises,¹⁷ but it is doubtful that it contemplates the length of time that might be needed for earthquake repairs and strengthening.

B What was the nature of the supervening event and how did it affect the lease?

As explained in Chapter Six, the Canterbury earthquakes were strong and damaging. The February 2011 aftershock was a significant event because it caused so much destruction and damage to buildings and infrastructure in Christchurch city. Thereafter, the cordon was erected which was an unprecedented response to the disaster.

In the days following the February 2011 aftershock there was little information about how long the cordon would remain in place. However, as reports emerged of the damage to the city it became clear that it would take a lot of work over a long period of time before the cordon would be removed. One of the defining aspects of the Canterbury earthquakes was the extent of the damage wrought on the city. One lawyer said he believes, looking back on it, the reason there were few residual issues between landlords and tenants is because

¹⁶ The “drop zone” of a building refers to the area around it which could be affected should the building fall or masonry/building elements of the building, fall.

¹⁷ ADLS lease (2008, 5th edition) cls 14 and 15.

the damage was so severe that in many cases the buildings were eventually demolished.¹⁸ Yet, immediately after the earthquake, no one would have known that.

Although the cordon was set up after the February 2011 event, there were other large aftershocks that occurred during the year that were also very damaging; June, October and December 2011. This string of large events meant there was a cumulative effect of not just one, but many, large earthquakes occurring over a lengthy period of time. While a building may have escaped harm in one of the large events, it is likely to have suffered damage at some stage during the movement of the ground with thousands of smaller aftershocks also experienced in the sequence.

The Canterbury earthquake sequence and its consequences affected commercial leases in Christchurch in a way that was unprecedented in New Zealand.

C Did the earthquakes render performance of the lease impossible or radically different?

The earthquakes rendered performance of a lease of an inaccessible building impossible or radically different from what the parties contemplated when they entered it. The lease was entered on the basis that the tenant would pay rent for the exclusive use of a building. The landlord would have expected to have received rent in return for providing a building for the tenant's use. When access could not be provided it completely and radically changed the terms upon which the parties had contracted. Now tenants were being required to pay rent for a building they could not use. It could also be argued that the cordon made it impossible for the landlord to fulfil his or her obligations under the lease to provide a building, and thus made performance of the lease impossible as well.

A lease is an executory contract. The obligations required to be performed are continuing. Just prior to the earthquakes there would have been part-performance of the lease by both parties. After the earthquakes only one party, the tenant, had the ability to continue to perform his or her obligations. In *Planet Kids Ltd v Auckland Council*,¹⁹ Glazebrook J said:²⁰

¹⁸ FQ000.

¹⁹ *Planet Kids Ltd v Auckland Council*, above n 3.

²⁰ At [77].

Where there remain significant aspects of a contract that can still be performed (despite the supervening event), the case is one of partial impossibility only. In such cases, a contract is only frustrated if the main purpose of the contract is defeated.

The example given was that of *Taylor v Caldwell*²¹ where the Court held the existence of the hall which burnt down was essential to the contract, even though there were still gardens available for the concerts. Glazebrook J went on to say that a contract can be frustrated even if it has been partially performed, although this is a factor that is relevant to the assessment of whether the case is one of “partial impossibility”.²² The situation in the *Planet Kids* case was determined to be one of partial impossibility.

In the matter of a lease, the contract has been partially performed at the time of the supervening event. This may also be a case of partial impossibility given that rent can always be paid. The question is then, has the main purpose of the lease been defeated.

D Did the earthquakes defeat the main purpose of the lease?

The earthquakes and their consequences defeated the main purpose of the lease. The purpose of the lease was to provide the tenant with a building for his or her exclusive use. Most of the leases in the research were for shorter terms of three to six years.²³ In these cases it is clear the use of the building was the primary purpose of the lease, while the interest in the land was secondary. It is the specific aspects of the building that are important to the tenant, not the land it sits on.²⁴ In other words, if the building was destroyed for example, the land on its own is of no use to the tenant. Therefore, the lease has been frustrated because the main purpose of the lease has been defeated.

In *Stack Shelf Company Number 16 Limited and Mathers v Larsen*,²⁵ the building was damaged, however, had the lease not contained a damage provision, it seems likely the High Court would have found the lease to be frustrated. Fisher J said that where the only valuable use of a site is the building, wholly occupied by the business, the doctrine of frustration may apply.²⁶ It is submitted that this is similar to the case for tenants in

²¹ *Taylor v Caldwell* (1863) 3 B&S 826.

²² At [78].

²³ Refer to the findings in Chapter Seven.

²⁴ Refer to Chapter Three for a discussion about commercial leases in the 21st century.

²⁵ *Stack Shelf Company Number 16 Limited and Mathers v Larsen*, above n 4.

²⁶ *Stack Shelf Company Number 16 Limited and Mathers v Larsen*, above n 4, at 5.

Christchurch. While the building was inaccessible it could not be used for the tenants' businesses nor could it be used for any other purpose.

This can be contrasted with the situation in *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership) (In Liquidation)*,²⁷ where the lease was for 999 years and the High Court held its main purpose was the interest in the land. In such a case the lease will not be frustrated even if the building is destroyed because the interest in the land remains.

It is also worthy to note the difference between frustration from lack of access and frustration that occurs when a building has been destroyed. In the latter situation, in a long lease like the one in *The Roman Catholic Bishop* case, the tenant continues to have the land on which a new building could be built (eventually). In the lack of access situation, the tenant has neither the building nor the land to use for any purpose. The earthquakes and the cordon have clearly defeated the main purpose of the lease.

E Was it a fundamental assumption of the parties that the lease would subsist despite the happening of the event?

It is clear from the research that it was a fundamental assumption by most tenants and some landlords that the lease would not continue if the building became inaccessible for a prolonged period. In light of this assumption, it is arguable the old "implied term" theory,²⁸ would have applied. Where both parties thought the lease would terminate in these circumstances, it would have been reasonable to imply such a term into the lease. Although this theory has been disregarded, the fact that it would have justified the application of the doctrine of frustration in the early days when the doctrine was first being developed, is not conclusive but lends weight to the argument that the doctrine of frustration should apply.

²⁷ *The Roman Catholic Bishop of the Diocese of Christchurch v RFD Investments Limited (In Receivership)(In Liquidation)* [2015] NZHC 2647.

²⁸ For more information on the "implied term" theory refer to Chapter Two.

F Will the parties suffer hardship if the lease is not frustrated?

In many cases tenants suffered hardship because they were unable to terminate their leases. Most tenants in Christchurch were small to medium-sized businesses.²⁹ Those interviewed said they could not afford to pay rent for a building they could not access or use as well as rent for alternative premises. Tenants also expressed concern about missing out on alternative premises owing to the uncertainty about the status of their lease. Other concerns were the loss of their businesses and loss of goodwill. If the lease was frustrated the tenant would have been released from it to enter into a new lease and set up business elsewhere. Termination would have given tenants the possibility of a more stable future than that of being tied to the uncertainty of an inaccessible city.

Landlords claimed on their insurance to cover the loss of rent. They may have suffered hardship if the leases were terminated because they would have lost the benefit of the leases. However, it is arguable that landlords were in a better position to protect themselves and should therefore, bear the burden of the risk of an inaccessible building. This point is discussed next.

G Was the risk allocated to one of the parties?

In *Māori Trustee v Prentice*³⁰ the High Court held the defendant, having taken legal advice, had taken on a commercial venture and had knowingly run the risk the rent could be increased. Therefore, when an unforeseen event meant the rent was substantially increased, Williams J held the lease was not frustrated. In other words the lease provided that the rent could be increased and therefore the risk of it being increased fell on the defendant.

The risk of the supervening event occurring in Christchurch was not allocated by the leases to either of the parties. Where the premises were destroyed or untenable, the landlord carried the risk; where the premises were damaged, the risk was shared.³¹

²⁹ See “The Small Business Sector Report 2014” *Ministry of Business, Innovation and Employment* (online: 978-0-478-41790-6); <www.mbie.govt.nz>; New Zealand Business Demography Statistics: At February 2015; www.stats.govt.nz; “Small Businesses in New Zealand: How do they compare with larger firms?” *Ministry of Business, Innovation and Employment* (Factsheet, New Zealand, May 2016); <www.mbie.govt.nz>.

³⁰ *Māori Trustee v Prentice*, above n 5.

³¹ ADLS lease (2008, 5th edition) cls 26 and 27.

Sometimes it is possible to tell from other provisions in the contract where the risk might be allocated. In the ADLS lease, tenants and landlords said they thought the clauses covering destruction or damage to premises³² were to cover fire or flooding. In either of these situations, the event is over in a short time, the damage can be assessed quickly and a decision made about demolition or repair. In contrast, the Canterbury earthquake sequence was an extraordinary event. It is unlikely a fire or flood would result in the CBD being cordoned off and access denied for a prolonged period. Therefore it is difficult to say that this risk was allocated by the lease. The situation was never contemplated by tenants, landlords or lawyers and the provisions in the ADLS lease were never intended to cover the situation that arose in Christchurch.

Even if it is possible to argue the risk was allocated, it is not conclusive. It might, for example, be argued the risk should have fallen on the tenant, akin to a purchaser of a fee simple in a conveyance, or the risk should have fallen on the landlord, as it does if the building is destroyed or rendered untenable, or as it has been done now under the new provision in the ADLS lease where access is a problem in an emergency.³³ In *Planet Kids Ltd v Auckland Council*,³⁴ Elias CJ said:³⁵

[I]n some cases risk allocation may not prevent an event within the type of risk being treated as frustrating the contract if it is of a scale that is outside the reasonable contemplation of the parties.

There is certainly a strong argument that even if the risk had been allocated, the risk of an event like the Canterbury earthquake sequence occurring would have been outside the reasonable contemplation of the parties. Therefore in this situation, had there been an allocation of risk it may not have prevented the earthquakes from frustrating the leases.

³² ADLS lease, cls 26 and 27.

³³ ADLS lease (2012, 6th edition).

³⁴ *Planet Kids Ltd v Auckland Council*, above n 3.

³⁵ At [15].

H Other factors

In The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation),³⁶ Davidson J said:³⁷

Ultimately, whether the lease has been frustrated is a contextual judgment. The relationship of the allegedly frustrating event to the purport of the lease and the extent of the impediment it provides to performance will help determine the outcome.

In cases where the contract is a lease it has been shown that the length of the term of the lease, the length of the disruption and the length of the remainder of the term from the date the lease may resume, are important factors in the overall assessment when determining whether it has been frustrated.³⁸ As seen in Chapter Five, these are also factors that are considered under the test to determine whether a building is “untenantable”. The reason for looking at these factors is to determine how significant the disruption is to the lease.

The application of the doctrine of frustration to a lease brings to an end the associated property rights and, therefore the courts are very cautious about finding there has been frustration. Short leases are more likely to be frustrated than longer ones. The High Court has said that short disruptions or disruptions that are uncertain in duration may not terminate a long lease because “... if the impeding event lasts for a relatively short part of the lease’s duration, the parties’ obligations cannot be said to be radically different if the event ends, and most of the lease term remains”.³⁹

The length of the remainder of the term of the lease is also relevant to the issue of whether the building is “untenantable”, and therefore is worthy of consideration because the same principles are likely to apply under the test for frustration. If there is a lengthy term remaining at the end of the disruption and resumption of the lease or when the lease is presumed to resume, the courts have held it is less likely the building will be considered to

³⁶ *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation)*, above n 7.

³⁷ At [70].

³⁸ Refer to Chapter Two.

³⁹ *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation)*, above n 7, at [69].

be untenantable⁴⁰ or the lease frustrated.⁴¹ However, there is no definitive test that can be used to work out the period of time that will be considered to be sufficient to satisfy these tests.⁴² This uncertainty did not help landlords and tenants after the earthquakes. One said:⁴³

At the time we would have wanted to apply something like that [the doctrine of frustration] as there was an uncertain time frame. At that time our building was unable to be used, therefore the contract unable to be fulfilled. But we didn't know how long this situation would continue or how long it needed to continue for the contract to be considered unable to be fulfilled.

The situation is more straightforward when there is only a short time until the term of the lease comes to an end. Tenants were well aware that it would be a long time before the city would be repaired and accessible. If the term of their lease was coming to an end during this period they could be fairly sure they would not be returning to their building and could then make future plans based on the assumption the lease would come to an end before access was restored. A lawyer said "if the period to [the] end of the current term was relatively short then, so long as rent had abated, tenant clients were relatively relaxed if it was unlikely they would be back in the building due to damage or cordon".⁴⁴

In *National Carriers Ltd v Panalpina (Northern) Ltd*⁴⁵ the lease was for a term of 10 years, the disruption approximately 18 months and the remainder of the term after the disruption, four years. The House of Lords held that, in light of the four years of the term still to run, the lease was not frustrated. This case can be distinguished on the basis that the average term of a commercial lease for a business in Christchurch at the time of the earthquakes was three to six years. While every case has to be decided on its own facts, the likelihood is that a disruption of six months to two and a half years for most leases would have been much more significant than the disruption to the lease in *National Carriers*.

It is also common for commercial leases to contain rights of renewal. In the context of determining the length of the term of a lease it is unclear whether rights of renewal are included in this calculation. This issue has been discussed in relation to the test for

⁴⁰ *DFC New Zealand Ltd v Samson Corporation Ltd* (1994) ANZ ConvR 216 (CA).

⁴¹ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

⁴² Refer to Chapters Two and Five in relation to the remaining term of the lease as a factor in the test for frustration and the test for "untenantable".

⁴³ FQ200.

⁴⁴ FQ005.

⁴⁵ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

“untenantable” in Chapter Five. In *GP 96 Ltd v FM Custodians Ltd*,⁴⁶ Chisholm J held the term of the lease included all rights of renewal. If this view is correct and is also applied to the calculation of the term of a lease under the test for frustration, it will have dire consequences for those who wish to use the doctrine to terminate their leases. Rights of renewal will increase the term of the lease to make the period of disruption small in comparison and therefore it will be rare for leases containing rights of renewal to be frustrated, on this calculation. As discussed in Chapter Five, it is submitted that this view does not seem right. The exercise of a right of renewal gives a tenant a new lease.⁴⁷ Furthermore, there is no guarantee the tenant will exercise his or her right to renew. Therefore rights of renewal should not be included in the calculation of the total term of a lease.

To conclude, the findings showed that the cordon was a significant disruption to the leases in Christchurch and in many cases would have met the test for frustration.

I The Demands of Justice

The final question to be considered as part of the overall enquiry into whether a lease has been frustrated is, what are the demands of justice? The Supreme Court confirmed that “The need to remedy injustice to the parties is the ultimate measure in assessing frustration”.⁴⁸

The law must be modern and flexible. The doctrine of frustration was developed to correct injustice. It should be a remedy the courts should use when the situation calls for it.

After the earthquakes landlords were not out of pocket even though many tenants stopped paying rent. Their loss of rent was covered by insurance and most had this protection. If the doctrine of frustration was applied to leases of inaccessible buildings landlords may not

⁴⁶ *GP 96 Ltd v FM Custodians Ltd*, above n 6.

⁴⁷ G W Hinde *Hinde on Commercial Leases* (3rd ed, LexisNexis NZ Ltd, Wellington, 2015) at 257 where the author says “A right of renewal normally contemplates the grant of a new lease and clear words are needed to displace this presumption.” This is supported by a substantial body of case law, referred to in the textbook.

⁴⁸ *Planet Kids Ltd v Auckland Council*, above n 3, at [9] per Elias CJ affirming *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep 517 at 112.

necessarily have lost their rent if their insurance covered it,⁴⁹ although they would have lost the benefit of the lease itself. They would, however, have retained the building as an asset to re-let in the future.

The majority of businesses in Christchurch were small to medium in size.⁵⁰ Those affected by the earthquakes and the closure of the CBD had to find alternative premises. The liability for two leases weighed heavily upon them. For a tenant, being able to apply the doctrine of frustration to their lease would have benefited them in several ways; it would have given tenants the ability to escape the burden of having to pay rent for a building he or she could not access, the ability to escape the burden of being liable for two leases and the ability to plan their future with certainty. It would also have assisted tenants to keep their businesses on foot which would have provided a number of benefits, to the tenant and the wider community recovering from the effects of a natural disaster, because their businesses would have provided goods, services and employment.

Some may argue that allowing the doctrine of frustration to apply after the Canterbury earthquakes would open the floodgates and permit a large number of leases to be terminated.⁵¹ That is unlikely for several reasons. First, each case is different and would have to be considered on its own facts. Second, small and medium-sized businesses would not have the budgets to engage in costly and lengthy litigation. Third, the decision as to whether the doctrine can apply to any given situation must be made on the facts of the case and the legal test for frustration, not on policy reasons and the potential number of claims. As Lord Wilberforce said in *National Carriers Ltd v Panalpina (Northern) Ltd*,⁵² “It is said that to admit the possibility of frustration of leases will lead to increased litigation. Be it so, if that is the route to justice”.⁵³ The doctrine of frustration is an infrequently used solution that should be able to be applied after a significant natural disaster, one that is rare and unlikely to be repeated.

When a tenant’s building is affected by fire or flooding, it might be the only issue he or she has to deal with so the focus can be on the business. The Canterbury earthquakes affected

⁴⁹ Although this will depend on the wording of the insurance policy and whether loss of rent insurance applies if there is no lease in force.

⁵⁰ “Small Businesses in New Zealand: How do they compare with larger firms?” *Ministry of Business, Innovation and Employment* (Factsheet, New Zealand, May 2016); <www.mbie.govt.nz>.

⁵¹ *GP 96 Ltd v FM Custodians Ltd*, above n 6.

⁵² *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

⁵³ At 696.

people on many different levels. It was not just their workplace that was affected. Their homes and their family and friends as well as their local community and city. Tenants need to be able to move on from the disaster and keep their businesses going. It was not fair to make them wait for answers. They needed to know whether they could terminate their leases and move elsewhere. Therefore, it is important in these situations in the future that the law is clear and provides solutions in times of crisis to ensure landlords' and tenants' problems can be addressed quickly. This will help to ensure a faster recovery from the disaster. As Lord Wright said in *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd*.⁵⁴

... the real principle which applies in these cases is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are [open] to them, and to be free from commitments which are stuck with sterility for an uncertain future period.

The Canterbury earthquakes were exceptional and their consequences, unprecedented. It is hard to see a situation more deserving of the application of the doctrine than this one. It is exactly the situation the doctrine was designed for; to assist in exceptional circumstances and at a time of great need and injustice.

III The situations where the doctrine has been held to apply

The doctrine of frustration has been held to apply in a number of situations and there are now established categories where the doctrine will be invoked.⁵⁵ The situation created by the Canterbury earthquakes may bring it within the following categories: the contractual obligations become impossible to perform; the purpose of the contract cannot be fulfilled; there is government intervention or a change in the law; contractual obligations become radically different. Each is considered in turn.

⁵⁴ *Denny, Mott and Dickson Ltd v James B Fraser and Co Ltd* [1944] AC 265 at 278; also referred to in Chapter Two.

⁵⁵ Refer to Chapter Two.

A Contractual obligations become impossible to perform

When contractual obligations become impossible to perform, a contract has been held to be frustrated. When the cordon was set up around the CBD of Christchurch and the buildings within the cordon became inaccessible, did the contractual obligations of landlords and tenants become impossible to perform?⁵⁶ If they did, the lease could be frustrated.

Landlords and tenants have contractual obligations to meet. Tenants have a contractual obligation to pay rent in return for the exclusive use of premises. After the earthquakes the tenants' contractual obligation was still to pay rent; that obligation did not become impossible to perform. Landlords had a contractual obligation to provide a building for their tenants' occupation, use and quiet enjoyment. They did not prevent tenants having access to the buildings; in fact the buildings were there ready and waiting for use. In this way it could be argued the landlord's obligations were fulfilled and therefore the contractual obligations were not impossible to perform. The alternative argument is that the existence of the cordon meant landlords were unable to provide tenants with access and this meant they could not perform their contractual obligations to provide a building for use.⁵⁷ A building without access is no good to a tenant. Therefore the landlord's contractual obligation to provide premises was impossible to perform; the lease could be frustrated.

Most of the situations discussed in this thesis are those where the whole building was inaccessible. However, there were other situations where only parts of the building were inaccessible. Problems can arise if a landlord wants rent for a percentage of the building that can be used,⁵⁸ yet the tenant cannot operate his or her business out of a smaller area. Another situation is where the building can be used but owing to health and safety requirements it is not deemed safe should there be an emergency, for example, where the stairwell walls are not fire proof. In this case the landlord cannot allow the tenant to occupy the building. Where a cordon prevents access, repairs are likely to take a long time to be

⁵⁶ This was also discussed under the heading "Did the earthquakes render performance of the lease impossible or radically different?" at page 215.

⁵⁷ There may also be an implied obligation on the part of the landlord to ensure tenants can access upper levels of buildings once inside; see *Liverpool City Council v Irwin* [1977] AC 239.

⁵⁸ For example, in relation to the partial destruction of a building the ADLS lease, cl 27.3, provides that "a fair proportion of the rent and outgoings shall cease to be payable" until completion of repairs or reinstatement.

completed. These situations are problematic and render contractual obligations impossible to perform.

In cases involving general contracts, the contract is usually at an end when a contractual obligation becomes impossible to perform. It is different with a lease. A lease is an executory contract which means the contractual obligations of the parties are ongoing. This is a different situation because if contractual obligations are unable to be performed at one point in time, they might still be able to be performed at a future date when the disruption ceases. In *National Carriers Ltd v Panalpina (Northern) Ltd*,⁵⁹ the House of Lords held that the length of the disruption was insufficient to frustrate the lease, compared to the overall term of the lease and the remainder of the term still to run. This means that, even if it is determined that the landlord's contractual obligation to provide premises is impossible to perform at one point during the lease, unless there is evidence to prove that the premises will not be accessible again for a significant proportion of the lease, a court will be unlikely to find the lease frustrated. Many tenants in Christchurch would have been able to prove that it would be a long time before their premises were available for use which would have supported their argument that their leases were frustrated.

B The purpose of the contract cannot be fulfilled

The second situation in which the doctrine of frustration has been held to apply is where the supervening event prevents the purpose of the contract being fulfilled as the parties intended, even though performance is possible. This is the very situation that presented itself to landlords and tenants after the Canterbury earthquakes. As discussed above, the common purpose of a lease is for rent to be paid in exchange for premises out of which the tenant can conduct their business. When buildings became inaccessible, the purpose of the lease could not be fulfilled because tenants could not access, occupy or use buildings for which they were paying rent.

In *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation)*,⁶⁰ Davidson J confirmed that, before looking at the context in which frustration is considered, it is important to ascertain the purpose of the lease. He said "The narrower the commonly contemplated purpose at the time of contracting, the

⁵⁹ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

⁶⁰ *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation)*, above n 7; the facts of this case are discussed in detail in Chapter Three.

greater the prospect of the lease's frustration".⁶¹ In that case one of the purposes contemplated by the lease had been defeated, but as there were other purposes for the land, the lease was not held to be frustrated.

Clearly, the enquiry as to the purpose of the lease must be completed on a case by case basis as parties enter leases for different purposes. However, a common purpose is the use of a building in which to conduct business. If the argument is that a lease is not frustrated if the building could have been put to another use, it is difficult to see how this would succeed in relation to an inaccessible building. There is simply no other use for such a building. Even if it could be used, for example as a storage facility, the tenant would still require access to it.⁶² Furthermore, unlike a building that has been destroyed, the land is not even available to be put to another use, if the property is within a cordon. Clearly the purpose of the lease could not be fulfilled in these circumstances.

The doctrine of frustration has also been held to apply where the supervening event is regarded as "striking at the root" of the contract. This is really just another way of looking at whether the purpose of the contract was frustrated. In *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*,⁶³ the House of Lords held the wartime restrictions suspending building were not sufficient to strike at the root of the arrangement. The Court did not consider the disruption to the lease, which was for a term of 99 years, to be sufficient to destroy the identity of the arrangement or to make it unreasonable to carry out its terms when the interruption came to an end.

There is a clear difference between *Cricklewood* and the situation that occurred in Christchurch. The disruption in that case, even if it had continued for a number of years, was insufficient to change the contract in any meaningful way given the lengthy term. In Christchurch the terms of the leases were much shorter, on average between three and six years and therefore the cordon in place for up to two and half years had a huge impact. Furthermore, the disruption to businesses and the loss of goodwill from having to move premises, were also factors that had a significant effect on tenants. It was not just a matter of the lease being put on hold for a while and then resuming after a period of time as in *Cricklewood*. All of these factors had such a significant effect on the lease that the disruption could be argued as striking at the root of the lease.

⁶¹ At [68].

⁶² See *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

⁶³ *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221.

C Government intervention or a change in the law

The third situation where the doctrine of frustration has been held to apply is where government intervention or a change in the law renders performance of a once legal contract, illegal. Could the presence of the cordon, making it illegal to enter the restricted area, be sufficient to frustrate the lease?

In some cases of government intervention, the disruption to the lease continues for the duration of the lease; for example, a change in zoning or a change in legislation making a certain business activity illegal.⁶⁴ In these cases there is a strong argument the lease has been frustrated. In other cases the government intervention may only be for a short period during the term of the lease; for example, the closure of the road in *National Carriers Ltd v Panalpina (Northern) Ltd*.⁶⁵ It is likely a court will consider the effect of the interruption on the lease and the length of the interruption in relation to the term of the lease, to determine whether there has been frustration as it would in any general investigation into the application of the doctrine.

In relation to leases in Christchurch, it could be argued that government intervention caused the disruption to the leases. The authorities set up the cordon and restricted access to the CBD and consequently tenants' buildings. They made it illegal to enter the CBD which meant that tenants could not legally access the area in which their buildings were situated. These actions could be argued to have frustrated the leases.

D Contractual obligations become radically different

The doctrine of frustration has been held to apply when the supervening event affects a contract and causes the parties' obligations to become "radically different" from that for which they originally contracted. Have Christchurch landlords' and tenants' obligations become radically different from what they contracted for when they entered their leases prior to the earthquakes?

⁶⁴ Refer to the "saloon cases" in the United States where leases of taverns and saloons were frustrated by the enactment of a law preventing the sale of liquor in the area. These are discussed in Chapter Three.

⁶⁵ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 2.

This question was addressed under the test for the doctrine.⁶⁶ There it was argued the contractual obligations had become radically different. In *Davis Contractors Ltd v Fareham UDC*,⁶⁷ the House of Lords determined that delay, and, as a consequence, a rise in the cost of completing the contract, did not amount to frustration. The Court said what is required, is a change in the significance of the obligation so that performance of the contract becomes different from that contracted for. This case can be distinguished. After the Canterbury earthquakes, landlords were unable to provide their tenants with access to their buildings which meant that they could not fulfil their obligations under the lease. It was not just a case of delay whereby the performance of the contract continued until complete, albeit over a longer period of time. Performance of the lease was completely thwarted for a significant period of time.

IV Is there anything to prevent the doctrine of frustration from applying?

There are clear situations in which the doctrine of frustration will not apply. The courts have held that in situations where the contract makes provision for the effects of the supervening event, where the frustration is self-induced, where mere delay disrupts a contract and where the supervening event was, or should have been, foreseeable, the doctrine of frustration cannot be invoked to end the contract.

The Christchurch situation does not fall within any of these situations. First, the Canterbury earthquakes and the resulting cordon were not self-induced. Second, the leases did not provide for the situation of an inaccessible building.⁶⁸ Third, the delay in the parties being able to perform their obligations under their leases was significant and could not be classed as “mere delay”. Fourth, although earthquakes in New Zealand are foreseeable, the characteristics of the Canterbury earthquakes and their consequences were so exceptional that this should not be a factor that works against a finding of frustration.

⁶⁶ Covered under the heading “Did the earthquakes render performance of the lease impossible or radically different?” at page 215.

⁶⁷ *Davis Contractors Ltd v Fareham UDC*, above n 10.

⁶⁸ This is suggested because there is the argument that clause 27 might cover an inaccessible building if it was damaged first and once repaired the problem of inaccessibility remained. The courts have not clarified whether this issue continues to be one covered by clause 27 or whether, after the repairs, the issue becomes a new and separate issue. It is more likely to be the latter.

A When the contract makes provision for the effects of the supervening event

It is trite law that the doctrine of frustration will not apply where there is provision in the contract that covers the frustrating event. As discussed previously, there was no provision in the leases to cover an inaccessible building.⁶⁹

There is one other situation that caused problems; that of an inaccessible building with minor damage. The provisions of the ADLS lease⁷⁰ covered the issue of a damaged building. However, in this situation, once repairs have been undertaken there may still be the problem of access. The question is whether the provisions of the lease are wide enough to encompass the issue of inaccessibility under the damage provisions or whether inaccessibility then becomes a separate issue not covered by the lease? The courts have not dealt with this issue⁷¹ and therefore the answer is unclear.

Courts and commentators have said that an express provision in the contract will not necessarily exclude the doctrine of frustration in cases where the clause does not cover all legal issues arising from the event.⁷² It is therefore reasonable to argue that the fact the building has minor damage and is able to be repaired in a short period, will not exclude the application of the doctrine because the damage clause is not wide enough to cover the issue of inaccessibility.

B When a contract is frustrated by “delay”

The general rule is that delay in the performance of a contract does not render it frustrated because all that has really happened is that performance of the contract has not occurred in the intended timeframe.⁷³ Nevertheless, delay has been held to frustrate a contract in some situations.⁷⁴ Here, the delay is required to be “over and above” what was contemplated by the parties at the time of entering the contract and abnormal in its cause, effects or its

⁶⁹ Refer to the discussion under Part II, Section A.

⁷⁰ ADLS lease (2008, 5th edition) cl 27.

⁷¹ *GP 96 Ltd v FM Custodians Ltd*, above n 6.

⁷² Refer to Chapter Two: *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435; *Jackson v Union Marine Insurance Co Ltd* [1873] LR 8 CP 572; [1874] LR 10 CP 125; HG Beale (ed) *Chitty on Contracts* (31st ed, Sweet & Maxwell, London, 2012).

⁷³ Refer to Chapter Two for the discussion on delay as a cause of frustration.

⁷⁴ A number of cases about the blocking of the Suez Canal were frustrated by delay. Refer to Beale, above n 69, vol 1 at [23-035] for cases on delay. There is also discussion on delay in Chapter Two.

expected duration. The delay must also make performance of the contract fundamentally different from that expected by the parties.

Alleging that a contract has been frustrated by delay raises a number of difficulties. One is determining how long the delay must endure before it is considered to affect the performance of the contract. To put it as a question, what is the amount of time that needs to pass before the parties can say the contract is frustrated? It is often difficult to determine that exact point in time. Where a supervening event frustrates a contract it is clear the date that the contract came to an end was the date of the frustrating event. However, where the case is one of delay, there must come a point in time when the delay is such that the contract has not been performed for so long, that it becomes frustrated. It is not always clear when that moment is reached.

The courts will say that delay has to be determined from the facts of the particular case. However, this makes it difficult for the parties to decide for themselves. Do they have to wait until the interruption is over before determining the delay was extreme enough to frustrate the contract? Or can the parties, with evidence to prove that the delay is likely to be significant, allege the contract is frustrated even though the total time of the delay is not quantified? Lord Sumner in *Bank Line Ltd v Arthur Capel & Co*,⁷⁵ said parties should not have to wait until the contract can again be performed in order to determine if the length of the delay caused it to be frustrated.⁷⁶ He did not consider it would be fair to the parties to be “left in suspense”.⁷⁷ Yet in *GP 96 Ltd v FM Custodians Ltd*,⁷⁸ Chisholm J felt unable to determine if the delay was sufficient because he did not have enough information on the timeframe for the cordon’s removal.

Overall, it is clear that there must be a consideration of all the circumstances of the case to determine whether the delay in question amounts to frustration of the contract. This includes examining what has occurred and what is likely to occur. In terms of a commercial lease, the courts will consider the term of the lease, the length of the disruption and the length of the remaining term.

Cordons were set up after the initial September earthquake. However, these tended to be smaller and localised around specific buildings that were dangerous or damaged. A few did

⁷⁵ *Bank Line Ltd v Arthur Capel & Co*, above n 69.

⁷⁶ At 454. Also refer to Chapter Two.

⁷⁷ At 454.

⁷⁸ *GP 96 Ltd v FM Custodians Ltd*, above n 6.

prevent access to some buildings but did not prevent access to the CBD as a whole which remained open for business. For those unable to access buildings in September, the delay they faced was then compounded by the earthquake in February and the complete closure of the CBD.

The February earthquake, although less in magnitude, was far more damaging than the September earthquake because its epicentre was much closer to the city. The cordon set up around the CBD was extensive and lasted for two and a half years although it was gradually reduced as areas were made safe. This particular cordon had a significant effect on landlords and tenants. Making the city safe by the demolition of hundreds of multi-storey buildings was a slow, laborious process. For tenants the delay in being able to access their buildings was significant. Consequently, for many landlords and tenants, this was a substantial interruption to their leases.

There is a significant difference between delay in completing performance of a contract (such as a contract to build a house) and delay caused by an interruption to an ongoing contract (such as a lease). For example, in *Davis Contractors Ltd v Fareham UDC*,⁷⁹ the delay was 14 months. This seems like a lengthy delay because it took nearly three times longer than anticipated to complete the contract. However, the House of Lords held the change in the obligations of the parties was not radically different from that which they contracted for. Hardship, inconvenience or material loss was not enough to frustrate the contract. It is easier to understand this case on the basis that a delay of 14 months to build a house that will be occupied for 10 or 20 years does not seem so severe. Compare that to the situation in Christchurch where tenants with leases of three to six years have experienced possible delays of up to two and a half years.⁸⁰ Their delay could have been a huge portion of the term of the lease with significant consequences including disruption to their business and loss of goodwill.

For many in Christchurch, the delay in being able to perform their obligations under their leases was “over and above” what was contemplated by them. It was more than what would be considered to be a normal delay after a fire or flood or a short term delay the lease was intended to cover. The delay was also abnormal in its cause, its effects and its expected

⁷⁹ *Davis Contractors Ltd v Fareham UDC*, above n 10.

⁸⁰ The research revealed that for tenants the shortest disruption to their leases caused by the cordon was six weeks and the longest was two and a half years. For landlords the shortest disruption to their leases was one to two months and the longest over two years; refer to Chapter Seven.

duration. It also made performance of the lease fundamentally different from that which was contemplated by the parties at the time they entered their lease.

C When the supervening event was foreseeable or foreseen

There are differing views on whether foreseeability is a factor that might exclude the application of the doctrine of frustration.⁸¹ In New Zealand in 1933, the High Court held that earthquakes are a foreseeable risk and parties should make provision in their contracts to cover such eventualities.⁸² In the United Kingdom, however, a different approach was taken. In 1964, Lord Denning held that the doctrine of frustration was not precluded even if, at the time of making the contract, the parties had turned their minds to the possibility that a supervening event might affect it. He held the view that the doctrine of frustration was not limited to supervening events that are unforeseen.⁸³ In his opinion, what was essential in a finding of frustration, was that the parties had not made provision for the supervening event in their contract.

Earthquakes in New Zealand are foreseeable.⁸⁴ They occur on a daily basis around the country although few would realise it.⁸⁵ Those living in Canterbury and around the South Island have, for many years, been warned of the impending rupture of the Alpine fault that runs along the Southern Alps.⁸⁶ An earthquake caused by this fault and the likely devastation that will occur is well documented and is considered to be foreseeable. Nevertheless, there is strong evidence to support the assertion that owing to the distinct and unique features of the earthquakes in the Canterbury sequence, they were not foreseeable and nor were their consequences. This evidence for this argument is set out in Chapter Six.

Even if the Canterbury earthquakes are considered to have been foreseeable because they occurred in New Zealand, this would not be fatal to the argument that the doctrine of frustration could apply. The Supreme Court has put forward the multi-factorial approach

⁸¹ Refer to Chapter Two.

⁸² *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australia) Ltd* [1933] NZLR 873 at 883.

⁸³ *Ocean Tramp Tankers Corporation v Sovfracht ("The Eugenia")* [1964] 2 QB 226 at 239.

⁸⁴ *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australia) Ltd*, above n 81. Refer also to Chapter Six.

⁸⁵ The majority of earthquakes are small and rarely felt; refer to the Geonet website that shows the earthquakes that occur on a daily basis around New Zealand; <www.geonet.org.nz>

⁸⁶ For more information on this fault refer to Chapter Six.

to determining frustration and the issue of foreseeability is but one of a number of factors to be considered. Furthermore, the Supreme Court specifically referred to the issue of foreseeability in the test for frustration and said that to exclude the doctrine the supervening event and its consequences must have been foreseeable. In *Planet Kids Ltd v Auckland Council*,⁸⁷ Glazebrook J said:⁸⁸

The degree of foreseeability required to exclude frustration is high. The supervening event must be one which any person of ordinary intelligence would regard as likely to occur. Further, not only must the supervening event be foreseeable but its consequences or effects on the contract must also be foreseeable.

Another fact that supports the contention that the Canterbury earthquakes were not foreseeable by landlords and tenants, is that the leases did not cover the problem of an inaccessible building that arose as a consequence of the disaster. This raises two interesting points. The first is that raised by Lord Denning in *The Eugenia*.⁸⁹ Contracts cannot be expected to cover every eventuality. In some cases it is not commercially practical in terms of the size of the document and the cost to prepare it. In others, as in *The Eugenia*, the parties may have turned their minds to the occurrence of a supervening event but decided against making provision for it (either because they could not agree or because the risk of the event occurring was low) with the intention that should the event occur the law would cover it. Lord Denning considered this conduct to mean that if the problem did arise the lawyers would deal with it. He did not believe this was fatal to an argument of frustration.

The second interesting point is that when the problem of an inaccessible building was discovered after the September earthquake, lawyers began drafting their own no-access clauses and a no-access clause was produced for the ADLS lease.⁹⁰ A simple solution was found in a short time. This is evidence of the fact that, prior to the earthquakes, there was a gap in the lease that could readily have been dealt with if needed but was never considered because no-one thought this situation would arise.

⁸⁷ *Planet Kids Ltd v Auckland Council*, above n 3.

⁸⁸ At [158] per Glazebrook J who gave the judgment on behalf of McGrath and Gault JJ. In *The Roman Catholic Bishop of The Diocese of Christchurch v RFD Investments Ltd (In Receivership)(In Liquidation)*, above n 7, Davidson J set out the parties' submissions on foreseeability but did not have to deal with the issue.

⁸⁹ *The Eugenia*, above n 82.

⁹⁰ ADLS lease (2012, 6th edition).

There is a strong argument that the issue of foreseeability is not a factor that will exclude the application of the doctrine of frustration to leases of inaccessible buildings affected by the Canterbury earthquakes.

D Is there a problem?

Is there a problem? The short answer is yes. The evidence is set out in Chapter Seven from the people directly affected by the earthquakes. The law was uncertain because the leases and the legislation did not provide for the problem of an inaccessible building.

Could the doctrine of frustration provide a solution? Most tenant and landlord participants had never even heard of the doctrine. Most tenants did not even seek legal advice. There was a lot of confusion about landlords and tenants legal rights in this situation.

Many lawyers thought the law on frustration too uncertain and the threshold for the doctrine too high, for it to apply. They warned their clients away from litigation. Only one law firm took the stance that the doctrine of frustration was applicable and a possible solution. The differing views about whether the doctrine could apply show how difficult it has been for lawyers to advise their clients.

IV Does the Doctrine of Frustration apply to Commercial Leases affected by the Canterbury Earthquakes?

Landlords, tenants and lawyers did not turn their minds to the possibility that the CBD of Christchurch could be cordoned off and become inaccessible for a prolonged period. Unless the courts determine otherwise,⁹¹ the ADLS lease and other leases examined in this thesis, did not provide for this situation. Nor did the legislation. It is surely in circumstances such as these that the common law is designed to step in and provide a solution.

The Canterbury earthquakes were extraordinary. Their consequences unprecedented, unforeseeable and unforeseen. They caused buildings to become inaccessible and this unexpected situation is precisely one that the common law should cover. The doctrine of frustration should be applicable to leases of these buildings. If there is any situation in which the doctrine of frustration should apply, it must surely be this.

⁹¹ For example, that the meaning of “untenantable” includes an inaccessible building.

CHAPTER NINE

REFORM

*“As tenants we found the uncertainty very difficult. We did not know if we could terminate our lease, or when we could terminate it”.*¹

I Introduction

In this thesis it is submitted that the doctrine of frustration should apply to terminate leases of inaccessible buildings in the extraordinary circumstances of the Canterbury earthquakes. However, determining whether a particular case meets the test for frustration in the future will continue to pose problems. Although the Supreme Court in *Planet Kids Ltd v Auckland Council*,² has provided guidelines to help with determining when a contract is frustrated, the doctrine has a very high threshold to meet and is used only in exceptional circumstances. Consequently, there will continue to be uncertainty about whether the doctrine applies in different situations and in these cases the issue may need to be determined by an authoritative body. Therefore, if the doctrine is offered up as a solution the parties must have a meaningful way of being able to determine if it applies.

The purpose of this chapter is to explore solutions that could work alongside the doctrine of frustration to provide a more comprehensive remedy for tenants and landlords in the future. First it looks at the results of the research to discover the solutions tenants and landlords thought would have best met their needs after the earthquakes and lawyers' views on changes that could make the law clearer. Following that, two options for reform are proffered with the advantages and disadvantages of each canvassed. Finally, a recommendation is made as to which could work best to enable the doctrine of frustration to be a meaningful solution in the future.

¹ FQ200.

² *Planet Kids Ltd v Auckland Council* [2013] NZSC 147 (SC).

II Change is needed!

“I have been shafted by the total lack of certainty of the situation. I am totally in the dark about what is to happen with my lease”.³

As seen in previous chapters, tenants and landlords were uncertain of their legal rights after the earthquakes. Their leases did not provide for an inaccessible building, nor did the legislation. It was also unclear whether the common law would assist and the doctrine of frustration apply. As the parties did not want, and often could not afford, the expense of court proceedings, they were left to resolve their earthquake-related lease issues in the best way they could. Most tenants stopped paying rent and tried to end their leases. Some landlords claimed rent from their tenants. These actions were taken because the law was uncertain. Change is needed to ensure that when another disaster strikes there are laws in place to ensure parties can be certain of their legal rights.

A What solutions would have best met the parties’ needs?

“I didn’t realise our landlord could charge rent for a building that could not be used”.⁴

In order to work out the most suitable way to deal with the issue of an inaccessible building, it is necessary to look at the solutions tenants and landlords said would have best met their needs. Most tenants wanted to terminate their leases.⁵ For them, termination would have brought to an end their obligations under the lease and would have allowed them to enter new leases without the burden of being liable for two.

Most tenants suspended their rent after the earthquakes and, therefore, this was also a popular solution for the future.⁶ As seen in previous chapters,⁷ when tenants realised they could not use their buildings, most took a pragmatic approach and stopped paying rent,⁸ even though there was nothing in their lease that permitted them to do so. In these circumstances they ran the risk of a claim against them for repudiation. In the future tenants

³ FQ215.

⁴ FQ214.

⁵ Eight out of the 10 tenants who answered the question.

⁶ Seven tenants.

⁷ Chapter Seven and Chapter Eight.

⁸ Twelve of the 14 tenants stopped paying rent. Only two tenants paid full rent which continued until the lease either terminated or expired: FQ208 and FQ213.

want to be sure that they can legally suspend their rent over the time a building is inaccessible.

Other solutions proffered, but not as popular, were the provision of alternative premises⁹ and the ability to renegotiate the terms of the lease.¹⁰ Two tenants favoured suspending the lease over the period of disruption with a view to continuing it at a later date. These tenants wished to return to their buildings because they wanted to retain the location and the goodwill associated with it. Some tenants also commented that they would have liked to enjoy more communication with their landlords. One suggested there should be a legal requirement that landlords act in the best interests of their tenants which might include an obligation to provide information to the tenant.¹¹

Landlords were generally in favour of solutions that ensured their financial commitments were being met. The solutions they said best met their needs were the payment of full rent and the continuation of the lease.

B How did the parties resolve their earthquake-related lease issues?

The way in which parties resolved their earthquake-related lease issues was often quite different from the way in which they would have liked to have resolved them. Most tenants stopped paying rent soon after the earthquakes which worked well for them.¹² However, many also tried to terminate their leases. When they discovered they could not terminate, leases generally came to an end at the expiration of the term or when the landlord agreed to terminate the lease. In many cases this was months and, in some cases, years later which was not what tenants wanted.

⁹ Only two tenants thought the provision of alternative accommodation would have worked for them because this solution is dependent upon the landlord being in a position to provide other premises.

¹⁰ Only one tenant thought renegotiation of the terms of the lease would have been the best solution; FQ205.

¹¹ FQ211.

¹² Tenant, landlord and lawyer participants all reported that most tenants stopped paying rent.

Of the landlords interviewed, a few continued to receive full rent¹³ and one received a proportion of the rent.¹⁴ Five landlords terminated their leases,¹⁵ mainly because the buildings were eventually demolished.

Lawyers confirmed that most of their clients wanted to terminate their leases,¹⁶ yet they had to continue with them.¹⁷ Some clients suspended their rent payments.¹⁸ Less common ways to resolve earthquake-related lease issues were the continuation of full rent or a proportion of the rent, the provision of alternative premises by landlords or renegotiation of the terms of the lease.

III Possible Solutions

Most of the tenants, landlords and lawyer participants thought the law needed to be changed to deal with the problems that arose after the earthquakes. One lawyer commented:¹⁹

[I thought the law was clear] but that was more of an assumption on my part. It was not something I had turned my mind to. I did initially hope that a careful review of the lease would reveal the golden answer, or consultation with experts in the profession. It became clear reasonably early on that there were some real issues here.

The application of the doctrine of frustration could provide a solution to bring a lease to an end in circumstances where it is frustrated. However, as mentioned previously, there will continue to be situations in the future where it is unclear whether the particular facts meet the test for the doctrine. In these cases other solutions are needed to clarify the law.

¹³ Three landlords continued to receive full rent.

¹⁴ FQ306 landlord abated the rent initially and then a proportion of the rent was introduced gradually as parts of the building were able to be accessed and used. FQ306 had a number of commercial leases.

¹⁵ FQ305, FQ306, FQ307, FQ308, FQ309.

¹⁶ Nine lawyers ranked “termination of lease” as the number one solution. All other lawyers ranked it in the top three solutions.

¹⁷ Eight lawyers said their clients continued with their leases. All lawyers had “continuation of lease” ranked in the top four solutions sought.

¹⁸ Nine lawyers said their clients suspended their rental payments and all lawyers had “suspension of rent” ranked in the top three solutions sought.

¹⁹ FQ008.

After the earthquakes, one of the major problems was that landlords and tenants were uncertain about their legal rights. This uncertainty arose for two reasons: a lack of access to legal services and the problem that the law was unclear. Addressing these issues is likely to help resolve the problems. Two suggestions for change are considered below. The first is to address the problems in legislation, either by the enactment of a new statute or by an amendment to existing legislation. The second is to make changes to the leases.

A Legislating for Change

One way to deal with uncertainty in the law is to enact legislation. The advantage of legislation is that it can come into force relatively quickly. In the development of case law the courts are dependent on cases coming before them with the particular issue that needs clarification. As seen previously, landlords and tenants are not moved to litigate their issues and therefore it is likely to take a long time for the law to be clarified if it is reliant on cases before the courts.²⁰

1 A New Statute

This thesis argues that the doctrine of frustration should apply to leases of inaccessible buildings after the Canterbury earthquakes. It is submitted the best way to assist landlords and tenant is to enact a new specialised statute, a Commercial Tenancies Act. This legislation could govern the rights and obligations of tenants and landlords and provide a specialised dispute resolution service by way of mediation and adjudication through a Tenancy Tribunal.

(a) A Commercial Tenancies Act

New Zealand does not have a statute that is dedicated to commercial leases. The Property Law Act 2007 contains provisions that apply to leases but, as discussed previously, they are not comprehensive.²¹ It is not clear why there is no specific legislation for commercial

²⁰ Refer to Chapter Eight where the research revealed there were no landlord or tenant participants that took court action. The lawyer participants also reported that their landlord and tenant clients did not go to court.

²¹ Refer to the discussion on the Property Law Act 2007 in this section and in Chapter Five.

leases, particularly in light of the fact there is specific legislation for residential tenancies.²² It could be because the standard form leases are well regarded and widely used and few issues with them. However, it is difficult to know because tenants are unlikely to seek legal advice or litigate their issues. Therefore, one option for reform is to enact a new statute that addresses the unique and specific needs of commercial landlords and tenants.

It would not be difficult to develop a new Commercial Tenancies Act because there is existing legislation in New Zealand that could be drawn upon as a model for the new Act: the Residential Tenancies Act 1986. Historically, tenancy legislation was enacted in order to protect tenants from the inequality of bargaining power in the landlord/tenant relationship.²³ However, these days a more balanced approach is taken and the emphasis is not only on the tenant. The Residential Tenancies Act 1986 defines the rights and responsibilities of landlords and tenants in residential tenancies and deals with dispute resolution by providing specialist mediation and adjudication services.²⁴

In Canada, British Columbia has both a Commercial Tenancy Act [RSBC 1996] c 57 and a Residential Tenancy Act [SBC 2002] c 78. The Commercial Tenancy Act is not a comprehensive piece of legislation having been enacted when British Columbia was being organised as a colony and adopting the laws of England. However, it is currently under review and there is a proposal for a new Act.²⁵ An interesting feature of the old Act is that it specifically sets out that the Frustrated Contract Act [RSBC 1996] c 166 and the doctrine of frustration of contract apply to leases so there can be no confusion.²⁶ However, it does not define a “frustrated contract” and continues to rely on the common law for this purpose.

The Report on the proposals for a new Commercial Tenancy Act in British Columbia recommends keeping the provisions that clarify that contractual principles apply to leases,

²² Residential Tenancies Act 1986.

²³ Refer to the now repealed Tenancy Act 1955 and the Rent Appeal Act 1973. See also D Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis NZ Limited, Wellington, 2012).

²⁴ Section 1(2).

²⁵ Members of the Commercial Tenancy Act Reform Project Committee *Report on Proposals for a New Commercial Tenancy Act* (BCLI Report no.55, October 2009).

²⁶ Commercial Tenancy Act [RSBC 1996] c 57, s 30. This section removes any doubt about whether the doctrine of frustration applies to leases in British Columbia which was, as seen previously, a problem for leases in England until the House of Lord’s decision in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675.

such as the application of the doctrine of frustration.²⁷ It suggests this will have the result of “resolving disputes in a way that better accords with the reasonable expectations of participants in the commercial leasing sector”.²⁸ A proposed draft Bill has been prepared and this could provide a starting point for a New Zealand statute.

A Commercial Tenancies Act could provide a comprehensive statutory code that governs the behaviour of commercial landlords and tenants. It could reform and restate the law relating to commercial leases including all of the case law developments to date such as the application of contractual remedies to leases. It could define the rights and obligations of landlords and tenants more comprehensively than is currently done which could be the default position should the lease not otherwise provide for them. This has three benefits: first, it would allow for a better determination of the rights and obligations of landlords and tenants without having to provide for them in the lease (as such changes might make the lease document wordy, long and costly); second, it would provide more protection for tenants by addressing the power imbalance in the landlord/tenant relationship; and third, it would clarify the law.

The Act could also establish a disputes resolution service and in particular a tribunal to expeditiously determine disputes between commercial landlords and tenants.

(b) A Disputes Resolution Service

Parties to residential tenancy agreements can resolve their issues through the Residential Tenancy Tribunal. However, parties to commercial leases do not have access to a specialist Tribunal; their only recourse is through the courts. The research showed that landlords and tenants were reluctant to use the courts to resolve their earthquake-related lease issues,²⁹ which suggests this may not be the most appropriate forum for them. Court proceedings are formal, expensive, often require representation by lawyers. A Tenancy Tribunal specialised in dealing with the particular issues that arise for commercial landlords and tenants may provide a more attractive solution. It could determine any issues the parties may have relating to the application of the doctrine of frustration.

²⁷ Members of the Commercial Tenancy Act Reform Project Committee *Report on Proposals for a New Commercial Tenancy Act* (BCLI Report no.55, October 2009) at 40 and 45.

²⁸ At 22 and 40.

²⁹ Refer to Chapter Eight where the research revealed there were no landlord or tenant participants that took court action. The lawyer participants also reported that their landlord and tenant clients did not go to court.

A Commercial Tenancy Tribunal could offer a specialist, informal, low cost, dispute resolution service for issues relating to commercial leases. It would not be difficult to set up because New Zealand already has a well-established precedent in the Tenancy Tribunal, established nearly 30 years ago under the Residential Tenancies Act 1986. This Tribunal was designed to have exclusive jurisdiction to examine issues and resolve disputes arising under a residential tenancy.³⁰ It is a “flexible and informal body, concerned as much with justice, as with the letter of the law”.³¹ Proceedings are referred, in the first instance, to a Tenancy Mediator whose function is “to attempt to bring the parties to a dispute to an agreed settlement”.³² If a party refuses to attend mediation or an agreed settlement is not reached at the end of the mediation process, the matter is referred to the Tribunal for adjudication.

The Tribunal has a broad jurisdiction that is exercised “in a manner that is most likely to ensure the fair and expeditious resolution of disputes between landlords and tenants of residential premises”.³³ It is required to determine disputes by applying general principles of law and the substantial merits and justice of the case, and is not bound to uphold strict legal rights or obligations.³⁴ Proceedings in the Tribunal are more informal than those of a judicial court; for example, the parties do not need legal representation and it is, in fact, discouraged.³⁵ The rules of evidence, too, are more flexible, in that the Tribunal may receive information that might assist it to deal with the matter whether or not that evidence is admissible in a court.³⁶ The parties have a right of appeal to the District Court and limited rights of appeal to the High Court and Court of Appeal.³⁷

It would not be difficult to set up a Commercial Tenancy Tribunal in a similar way. The constitution, administration, jurisdiction and procedures of the current Tribunal could be replicated for a new Tribunal. It could provide commercial landlords and tenants with an informal and inexpensive specialised dispute resolution service with the ability to deal with

³⁰ Section 77. It also has jurisdiction to deal with disputes between parties who have an interest in a unit title under the Unit Titles Act 2010; Unit Titles Act 2010, s171.

³¹ D Grinlinton *Residential Tenancies: The Law and Practice* (4th ed, LexisNexis NZ Limited, Wellington, 2012) at 245.

³² Section 88(1).

³³ Section 85(1).

³⁴ Section 85(2); nor is it bound to give effect to legal forms or technicalities.

³⁵ Section 93(2). Although legal representation is not encouraged in most proceedings, the Tribunal will allow it in special circumstances; Section 93(3)(a) and (b).

³⁶ Section 97(4).

³⁷ Sections 117 – 120.

issues specific to commercial leases. In particular it could provide landlords, and tenants especially, with access to justice in a way that they do not have under the current system.

A Commercial Tenancy Tribunal could address a number of concerns that appear to have arisen as a result of the court system. The first concern is cost. A Tribunal could provide a low cost service. The parties would not need legal representation and therefore the parties would not need to engage lawyers. For tenants in particular, the research showed that they simply could not afford legal advice³⁸ or to litigate disputes³⁹ and instead did their best to resolve any issues themselves. Although they are likely to be in a stronger financial position than tenants, landlords may also welcome dispute resolution services at an affordable cost through a Commercial Tenancy Tribunal.

The second concern that could be addressed by the establishment of a Commercial Tenancy Tribunal is that of access to justice. A Tribunal offering a low cost, quick and informal service might be more attractive to landlords and tenants than the current court system. If such a service was used more to resolve disputes, there would be an additional benefit in the form of more case law, which in turn could provide more certainty in the law.

Another reason why a Commercial Tenancy Tribunal is a good solution is because there would be no need to codify a test for the doctrine of frustration or a test for the term “untenantable” contained in the standard form leases.⁴⁰ Instead, the Tribunal can, like any other court, interpret, apply and develop the common law to meet the needs of landlords and tenants. In this way the law could be modern and flexible. A few lawyer participants were concerned that any attempts to define these terms may make them too restrictive and hinder the development of the law. This solution would address those concerns.

Finally, a Commercial Tenancy Tribunal would also be able to provide more flexible solutions that meet the needs of the parties than are available under the present system. For example, if a lease was frustrated, rather than the lease coming to an end it might be better for the parties to be able to negotiate new terms under the existing lease that work around the problem.

³⁸ The research showed that many tenants did not seek legal help after the earthquakes and the main reason was that they could not afford it. Refer to Chapter Seven where there is evidence that only half of the tenant participants sought legal advice.

³⁹ No tenant or landlord participants took court action. Eight lawyer participants also confirmed that none of their clients took court action.

⁴⁰ Refer to Chapter Five for information on the standard form leases.

There was little support for the idea of a Commercial Tenancy Tribunal by the research participants,⁴¹ the main reason being that it could not provide the rapid response needed in an emergency. However, a Tribunal could be set up to provide a quick service. First, a Tribunal as an expert in commercial leases could address disputes more quickly than a general court. Second, a Tribunal operating in a more informal and flexible way could act more quickly than a court that is bound by more restrictive processes and procedures. Third, in a large-scale emergency, Tribunals from other cities around New Zealand could be mobilised to attend the affected area and provide a back-up service to clear the large volume of cases. Fourth, a special list could be compiled of cases affected by the disaster, like the Christchurch High Court Earthquake Litigation List, that could receive priority treatment. For all of these reasons it is likely that cases heard in a specialist Tribunal could be dealt with more expediently than cases through the general court system.

The proposal to establish a Commercial Tenancy Tribunal is further supported by research that was conducted on the experiences of residential tenants and landlords after the earthquakes.⁴² Rental properties suffered significant damage⁴³ and the Tenancy Tribunal⁴⁴ was faced with numerous earthquake-related disputes between tenants and landlords.⁴⁵ Despite the number of claims there were very few appeals to the District Court. Toomey, suggested this meant parties in these proceedings were sufficiently satisfied with the decisions, they did not feel the need to appeal them. She concludes with the comment that “the Tribunal rose competently to the unexpected challenge”,⁴⁶ a positive reflection on the way the Tenancy Tribunal handled the issues for residential tenants and landlords arising out of a major disaster.

One of the most compelling reasons for a statutory framework is that it can set up a Commercial Tenancy Tribunal to sit alongside the common law and be a specialist body to develop the law for commercial tenants and landlord. It means the test for the doctrine of frustration is not restricted through codification and can continue to be able to develop. It

⁴¹ Only two tenants and two landlords thought a Tribunal might be a good idea. Three lawyers agreed it might work, although one expressed doubt that it could provide the solutions sought in the event of a large disaster.

⁴² Elizabeth Toomey “Residential Tenancies” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters NZ Ltd, Wellington, 2015).

⁴³ The problems included cracking to walls, floors and foundations and losing power, water and sewerage services.

⁴⁴ The Tenancy Tribunal established under the Residential Tenancies Act 1986.

⁴⁵ At 276.

⁴⁶ At 276.

also means the doctrine can retain its flexibility to apply to all sorts of situations, in particular those that are exceptional and unforeseen.

2 Existing Legislation

Another option to address the problem of an inaccessible building is to make provision by amending existing legislation such as the Property Law Act 2007 or the Frustrated Contracts Act 1944. This option seems to provide an easy solution; in fact it is problematic.

(a) Property Law Act 2007

Commercial leases are governed by the Property Law Act 2007,⁴⁷ which has certain provisions that will apply if a lease does not cover them.⁴⁸ The Act could provide a “no-access” provision which could be implied into leases that have not covered this problem. The main advantage of an implied “no-access” term contained in the Property Law Act 2007 is that it would apply to all leases, whether they are in a standard form or are bespoke. It would force the parties to turn their minds to the problem of an inaccessible building and either make provision for it in their own lease or choose to rely on the legislation to cover it.

There are, however, disadvantages to using legislation to provide a remedy in this way. First, it is difficult to draft a provision that will provide a solution for every case and every possible situation that might arise. Second, a statutory provision runs the risk of being too prescriptive and therefore inflexible, which might affect the availability of appropriate solutions. Third, problems may arise if the statutory provision attempts to clarify the law by providing a calculation to determine when a lease is frustrated. The case law has taken into account such things as the length of the disruption compared to the length of the term of the lease. Any test or calculation developed to determine whether the lease should be terminated is problematic because all leases are unique, all tenants have different needs and there are a number of other considerations that should have a bearing on the decision to end the lease.⁴⁹

⁴⁷ The relevant provisions of the Property Law Act 2007 are discussed in Chapter Five.

⁴⁸ Property Law Act 2007, Part 4.

⁴⁹ There are a number of factors that should also be taken into account in any determination about whether a lease should be terminated such as the size of the tenant’s business, the type of business, the availability of insurance and the wishes of the parties.

While some participants⁵⁰ thought that amending the Property Law Act 2007 could provide a solution, it was not an option favoured by the majority. For the reasons outlined above, it is submitted that a new statute and dispute resolution service is a better solution.

(b) Frustrated Contracts Act 1944

The other existing piece of legislation that could be amended to accommodate a solution is the Frustrated Contracts Act 1944. This Act deals with the adjustment of rights and liabilities of parties to frustrated contracts.⁵¹ It is discussed in more detail in Chapter Two. The Act applies to a contract that has become impossible of performance or is otherwise frustrated;⁵² yet it does not define a “frustrated contract”. Another possible solution is that Parliament could codify a test for frustration and insert it into this Act. If the test was clear, it could help to clarify the law.

There was much uncertainty about whether the doctrine of frustration could apply to leases after the earthquakes.⁵³ Most lawyer participants decided it did not apply because the doctrine was fact specific and the threshold too high to meet. Even if they thought it was a potential remedy, the uncertainty around its application meant that it would likely be challenged in court and, as one lawyer said, “In the majority of cases it was not an option which made financial sense to pursue”.⁵⁴

Lawyer participants were asked what changes they thought would make the law relating to frustration more effective. Half of those surveyed responded by saying the law needed to be more certain. They had two main questions; whether a lease could be a “frustrated contract” in New Zealand and the amount of time that must pass before a lease is frustrated. Some lawyers also thought it would be useful to clarify whether foreseeability is part of the test too. All of these matters could be dealt with in a statutory provision in the Frustrated Contracts legislation.⁵⁵

⁵⁰ Three tenants, one landlord and three lawyers said they thought the Property Law Act 2007 should cover this problem.

⁵¹ The Contract and Commercial Law Bill 2016 has recently been introduced to Parliament with the purpose of re-enacting, in an up-to-date and accessible form, certain legislation including the Frustrated Contracts Act 1944. Despite “modernising” the Act though, it remains largely unchanged.

⁵² Frustrated Contracts Act 1944, s 3.

⁵³ Refer to Chapter Seven.

⁵⁴ FQ004.

⁵⁵ Either the Frustrated Contracts Act 1944 or the proposed new Contract and Commercial Law Bill 2016.

However, providing a definition of frustration or a test for frustration is problematic. It could be too prescriptive and limit the application of the doctrine. Deane J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*⁵⁶ cautioned against codification for this very reason:⁵⁷

The actual application to leasehold interests of the common law doctrine of frustration and termination for fundamental breach involves some unresolved questions which are best left to be considered on a case by case basis whereby adequate attention can be focused on particular problems which might be overlooked in any effort at judicial codification.

Furthermore, the situations the doctrine of frustration has been developed to cover are those that by their very nature are exceptional and unforeseen. This makes drafting a definition or test to cover all circumstances extremely difficult. These difficulties were expressed by Stephen J in *Brisbane City Council v Group Projects Group Pty Ltd*:⁵⁸

It is no doubt true, as critics complain, that the various expositions of the true basis of the doctrine of frustration leave imprecise its actual operation when applied to the facts of particular cases. How dramatic must be the impact of an allegedly frustrating event? To what degree or extent must such an event overturn expectations or affect the foundation upon which the parties have contracted, or again, how unjust and unreasonable a result must flow or how radically different from that originally undertaken must a contract become (to use the language of some of the various expositions) before it is to be regarded as frustrated? The cases provide little more than single instances of solutions to these questions. These differences of application of the doctrine of frustration ... are perhaps inevitable in questions of degree arising when a broad principle must be applied to infinitely variable factual situations.

As mentioned earlier, there are a number of considerations that must also be taken into account in any test that is developed for frustration.⁵⁹ One lawyer suggested that “Attempting to define the exceptionally rare circumstances of frustration may be counter to the principle of “frustration”.”⁶⁰

⁵⁶ *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 57 ALR 609.

⁵⁷ At 635.

⁵⁸ *Brisbane City Council v Group Projects Pty Ltd* [1979] 145 CLR 143 at 162-163.

⁵⁹ These considerations were mentioned in the discussion about the Property Law Act 2007 above.

⁶⁰ FQ001.

Although lawyer participants sought clarification on the law relating to frustration, most did not believe that providing a definition of a “frustrated contract” would make the law more effective.⁶¹ A number recognised that it would be a very difficult task and questioned whether it could be done without being too prescriptive.

For the reasons outlined above, it is submitted that amending the Frustrated Contracts Act legislation to define a “frustrated contract” or to provide a test for frustration is not the best solution. Such action will limit the ability of the doctrine to assist in extraordinary circumstances and will hinder its development.

B Provision in the Lease

*“I just want the lease to provide certainty about what should happen after a natural disaster”.*⁶²

Lawyers were the first to make changes to leases in response to the issues that arose after the earthquakes. The main change was the insertion of a “no-access” clause. After the September 2010 earthquake, lawyers drafted their own “no-access” clauses and one reported using a force majeure clause.⁶³ Other lawyers tried to protect their clients by attempting to define the term “untenantable” in the standard form leases⁶⁴ to include a building that a tenant could not access. These attempts to clarify the law are now considered as possible solutions.

Most tenants, landlords and lawyers were keen for any solution to be contained in the lease. This could be achieved in a number of ways: using a “no-access” clause; defining the term “untenantable”; or using a force majeure clause. However, if there is provision in the lease to cover a tenant’s inability to access their building, the doctrine of frustration is precluded from applying. Therefore, any solution which involves developing a term for the lease may exclude the operation of the doctrine of frustration.⁶⁵ In this way providing the solution in

⁶¹ Only four lawyers thought defining a “frustrated contract” would make the law more effective.

⁶² FQ200.

⁶³ FQ002.

⁶⁴ The term “untenantable” is used in the ADLS leases and the BOMA lease. Refer to Chapter Five for more information on these leases.

⁶⁵ There are exceptions to the general rule that if a contract provides for the situation the doctrine of frustration cannot apply; refer to Chapter Two.

the lease would clarify the law for tenants and landlords, but exclude a contractual remedy that would have been available to them.

1 A “no-access” clause

In 2012 the Auckland District Law Society released a new edition of its standard form commercial lease, the ADLS lease (2012, 6th edition).⁶⁶ Under a new heading “No Access in Emergency”, two new clauses were added in response to the problems that arose after the February 2011 earthquake.⁶⁷ These clauses provided that, if there is an emergency and a tenant is unable to gain access to his or her premises to conduct business for a period specified in the lease, the landlord or tenant may terminate.⁶⁸ The parties can agree their own length of time but the default period is nine months. Termination may also occur if the party can establish with reasonable certainty that the tenant is unable to gain access during that time.⁶⁹

These new clauses have sought to address the issue of an inaccessible building; however, there are problems with them. The first is they only apply in an emergency, which leaves out a number of other situations for which provision is needed. For example, where buildings are affected by nearby buildings (as happened in the *National Carriers Ltd v Panalpina (Northern) Ltd* case⁷⁰ and, in Christchurch, when buildings were in the fall shadow of other dangerous buildings). The second is the clause specifies the default period to be nine months. For smaller businesses, nine months is simply too long to be held to a lease of an inaccessible building. Indeed, tenant participants said they would only want to wait a few months before terminating their leases in these circumstances,⁷¹ the main reason being that they simply could not afford to keep the lease on foot for any longer. Another reason was that damage to the CBD caused an exodus of businesses to the suburbs and

⁶⁶ ADLS lease is the standard form commercial lease produced by the Auckland District Law Society.

⁶⁷ ADLS lease (2012, 6th edition) cl 27.5 and 27.6. There is a more detailed discussion about the lease and these clauses in Chapter Five.

⁶⁸ Note that cl 27.6 applies where cl 27.5 applies and the premises are not totally or partially destroyed or damaged as provided for in cls 26.1 and 27.1.

⁶⁹ ADLS lease (2012, 6th edition) cl 27.6.

⁷⁰ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 26, the facts of which are set out in Chapter Two.

⁷¹ One tenant wanted two months (FQ214); others wanted three months (FQ205, FQ208, FQ213, FQ215) and one four months (FQ203).

outer areas of the city. For tenants with retail businesses this took away the city-based workers upon whom they were reliant for their income.

The third problem with the new clauses is that although tenants and landlords are able to negotiate the length of time that can pass before termination, their ability to do this is likely to be determined by the market place and the bargaining power they possess at the time they enter the lease. Landlords, for example, will not want the lease to terminate and will push for the longest period possible before the “no-access” clause can be invoked. Tenants, however, are likely to want a shorter length of time in order to terminate the lease if it is not in their best interests to continue with it. The length of time set out in the lease will depend on whichever party has more negotiating power. If it is the tenant, he or she can agree a time period that reflects the size of the tenant’s business and how long the tenant can afford to keep the lease on foot. If it is the landlord, he or she will likely require a much longer period that a tenant may simply not be able to afford.

There are also general disadvantages with providing a solution in the lease. The main one, as just mentioned, is the inherent imbalance of power that exists in a landlord and tenant relationship. Any “no-access” clause, as for all clauses in the lease, is subject to negotiation between the landlord and tenant and therefore can be amended or deleted. A landlord may not want to include a “no-access” clause in the lease that enables a tenant to terminate it. One lawyer believes that this may be a problem for the future.⁷²

What hasn’t happened yet is that negotiation of big office building leases which will occur over the next few years as the rebuild happens. However most of these leases won’t be ADLS leases. If premises are difficult to obtain or there is demand for them, any new earthquake-related clauses, for example, “no-access” clauses, will mean that there may be serious haggling in the negotiations. The landlord may say the new building is built to code and is earthquake safe so such clauses are not necessary. That will mean the general law will be relied upon. In the future if the buildings are fine the biggest issue will be access if there is a red zone cordon set up.

Despite the parties’ ability to negotiate amendments to their leases, the research revealed that this was not generally done in relation to the damage and destruction clauses prior to the earthquakes.⁷³ The standard form ADLS lease is widely used through-out New Zealand

⁷² FQ000.

⁷³ ADLS lease, cls 26 and 27.

because it is considered to be a fair lease. Not one participant reported any amendments or deletions to the standard destruction and damage terms of their leases.⁷⁴ An amendment to the new “no access” in emergency clause, widening its coverage to include all situations in which a building could become inaccessible, might be an acceptable solution to tenants and landlords.

Lawyers reported that, in their experience since the earthquakes, both landlords and tenants have been willing to accept “no-access” clauses.⁷⁵ Tenant participants were keen on including no-access clauses in their leases. Most landlord participants too, were accepting of these clauses because they were generally sympathetic to their tenants’ situations. One said:⁷⁶

The overall feeling is that they are fair; they are understandably fair. You’ve got to be practical and from a practical perspective I absolutely get it. I wouldn’t want to pay rent for a building I can’t use.

Another landlord commented that he had noticed a change in the way leases are now reviewed. He said, although he has accepted the change, the inclusion of “no-access” clauses have largely been driven by tenants:⁷⁷

What we have encountered is a greater emphasis in the market on the damage and destruction clauses together with attempts to negotiate into our standard lease provisions relating to an inability to access the premises.

Nevertheless, not all landlords have welcomed these new clauses. One said landlords’ legal rights have been detrimentally affected, as tenants look to protect their positions:⁷⁸

A tenant won’t sign a lease without an access clause in it and through potentially no fault of the landlord, the tenant can terminate the lease for issues beyond [the landlord’s] control. So tenants have much more power.

⁷⁴ Refer to Chapter Seven for evidence that there were no changes to the damage and destruction clauses in the in the ADLS lease.

⁷⁵ A no-access clause contained in a standard form ADLS lease is likely to be more readily accepted because this lease is considered to be a balanced and fair lease to both parties and is prepared by a team of land law experts (refer to the discussion on this lease in Chapter Five).

⁷⁶ FQ309.

⁷⁷ FQ301.

⁷⁸ FQ309.

One lawyer felt that not having a clause in the lease worked for some of his clients in that it made them find their own solutions. He said:⁷⁹

There is some merit in not having a document [ADLS lease] that over prescribes (or attempts to) solutions to unexpected events on a disaster scale. The absence of written solutions sometimes forces parties together to find more pragmatic solutions rather than just firing legal missiles at each other.

Having a solution contained in the lease seems sensible and is what tenants, landlords and lawyers want. The only problem will be in the drafting to ensure it can provide a workable solution without being too prescriptive and inflexible.

2 *Define “untenantable”*

Another possible solution is to widen the definition of the term “untenantable” contained in the standard form leases⁸⁰ to include a building that is inaccessible.⁸¹ If the building is untenantable the parties can terminate the lease.

The test to determine whether a building is untenantable is currently based upon a number of factors drawn from case law.⁸² One the courts have focused on is the comparison between the length of the lease, the length of the disruption and the remainder of the term when the disruption ceases. Lawyers have said it would be helpful if there was a calculation that could be done to determine whether the particular circumstances of the case meet the test. For example, it could be specified that if the disruption is more than a certain percentage of the term or the remainder of the term, termination of the lease is possible. Another possibility is to link “untenantable” to the Building Code requirements, so that if the building drops below a percentage of the Building Code it is deemed to be untenantable.⁸³

⁷⁹ FQ002.

⁸⁰ The term “untenantable” is contained in the ADLS lease 2008 and in the BOMA Office lease 1986, both of which are discussed more fully in Chapter Five.

⁸¹ ADLS lease, cl 26 provides that the parties can terminate the lease if the building is untenantable.

⁸² For a more in-depth discussion on the test for “untenantable” refer to Chapter Five.

⁸³ Jared Ormsby “Leases – Problems and Lessons Learned (Legal Issues and the Earthquakes)” (Centre for Commercial and Corporate Law Inc and School of Law, University of Canterbury, Conference, 29 August 2012).

After the earthquakes tenants, landlords and lawyers were trying to determine whether the standard form leases covered an inaccessible building. The damage and destruction provisions in the leases stated that termination could occur where the building was destroyed or untenable, but the meaning of “untenable” was not clear.⁸⁴ A lawyer said:⁸⁵

The law around untenability in New Zealand was not well developed and relied mainly on overseas decisions which were inconsistent with regard to how long a [building] could not be used before it was untenable.

Another lawyer explained that the limited availability of judicial discussion on the meaning of “untenable” and the fact the test is objective but fact specific, makes it difficult to know if the test is met.⁸⁶

A large number of lawyers said the provision of a definition of “untenable” would make the law more effective.⁸⁷ It was, however, acknowledged that this would not be easy to do. One said clarification was needed about how long the disruption needs to be to meet the test.⁸⁸ A number of others⁸⁹ thought the definition of an untenable building should include not just access issues but other problems experienced over the earthquakes such as a lack of essential services, a building that is damaged or situated close to an unsafe building, a building that has to undergo strengthening and repair work which will take a prolonged period and where health and safety obligations are compromised. Some also thought that specific types of damage to a building should also be covered, for example damage to essential features like stairs and lifts, flooding and cracking in floors and walls. One lawyer said:⁹⁰

We need a definition of what “untenable” means and a list of what it includes such as lack of access for x months, stairs have fallen down, no services etc. Also an understanding of timelines – at what point do repairs to a building or strengthening take so long that the lease is frustrated?

⁸⁴ The term “untenable” is used in clauses 26 and 27 of the ADLS lease and these clauses are worded the same in all editions. All 12 lawyers had reason to look at the meaning of this term.

⁸⁵ FQ004.

⁸⁶ FQ008.

⁸⁷ Eight of the 11 lawyers who answered this question.

⁸⁸ FQ011.

⁸⁹ Five lawyers.

⁹⁰ FQ000.

Other lawyers were not in favour of defining the term “untenantable”. Some thought it should not be defined,⁹¹ one explaining that any definition would be too prescriptive.⁹² Another lawyer did not believe the access issue should be included in the test for “untenantable” suggesting that this should be dealt with separately. These lawyers cautioned against any changes:⁹³

All of the above [the changes to the law on “untenantable”] must be tempered with the need for building owners to have certainty of contract – not weak leases that are easy to get out of.

However, as easy as it may sound, there are problems with this solution. First, not all leases use the term “untenantable” and therefore a definition would only assist those that do. Second, any definition of “untenantable” may be too prescriptive and remove the flexibility the courts currently have to determine the test for “untenantable”. It is difficult to predict all situations that might arise in the future and a definition is unlikely to be able to cover every eventuality. The third problem with defining “untenantable” is that to include the problem of access within this definition may not be a natural widening or extension of the definition. The ordinary dictionary meaning of “untenantable” is “unfit to be tenanted”.⁹⁴ In other words, a building that cannot be occupied. An inaccessible building is different. It may have minimal damage or no damage at all and could be occupied if it could be accessed.⁹⁵ These are two completely different situations and it could be argued that it would be an unnatural widening of the meaning of the term if it was extended to apply in this way.

3 *Force majeure clause*

The use of a force majeure clause is another way the lease could provide for an inaccessible building.⁹⁶ This type of clause usually covers exceptional events that affect the lease such as natural disasters, terrorism, war, civil unrest and provides for termination of the lease in

⁹¹ FQ009 and FQ008.

⁹² FQ002.

⁹³ FQ002.

⁹⁴ *Collins English Dictionary* (online ed) www.collinsdictionary.com/dictionary/english/untenantable>

⁹⁵ Or the damage is insignificant in that it would not prevent the tenant using the building.

⁹⁶ For more information on a “force majeure” clause refer to Chapter Three.

these circumstances.⁹⁷ Leases could include force majeure clauses that cover inaccessible buildings affected by a force majeure event.

However, a force majeure clause will not provide the complete answer to the problem of an inaccessible building. As for the “no-access” clause in the ADLS lease, a force majeure clause is designed to apply in a disaster or in extraordinary circumstances. This means it would only apply in an emergency of the kind specified. It would not address other problems of inaccessibility, for example, a building in danger from another building or a building requiring long term repairs or earthquake strengthening.

The standard form leases do not contain force majeure clauses. No tenant or landlord participant reported having a force majeure clause in their ADLS lease. Few participants thought this type of clause would be a good solution to the problems they experienced over the earthquakes.⁹⁸

Force majeure clauses are a good option for exceptional unexpected events but do not have the coverage for all the consequences of a disaster and therefore, it is submitted, are not the best solution to the problem of an inaccessible building.

A lawyer advised caution:⁹⁹

We need to be careful not to have a knee jerk reaction and legislate or amend standard form documents without full consideration of the wider impacts of those changes. [We] don’t want to be too prescriptive. The use of force majeure clauses is possibly an answer but [I] question the relationship with the no-access provisions.

⁹⁷ Refer to Chapter Three where force majeure clauses are discussed in more detail.

⁹⁸ Four tenants, one landlord and three lawyers thought a force majeure clause might provide a solution.

⁹⁹ FQ008.

C Insurance

*“It is hard to imagine what would have happened if we didn’t have the wide and general level of insurance cover”.*¹⁰⁰

Despite the fact that most tenants stopped paying their rent, few had disputes with their landlords.¹⁰¹ The main reason was that landlords had insurance to cover their loss of rent and therefore did not have to look to their tenants for it.¹⁰²

The research clearly showed that insurance played a significant role in how parties resolved their issues. Having insurance enabled commercial decisions to be made without the need to litigate or involve lawyers.¹⁰³ It allowed landlords “to be more realistic about the situation of a tenant and not try and hold them in premises as long as possible where the building was not tenantable”.¹⁰⁴ One lawyer said his impression was that the availability of insurance meant landlords were more willing to accept a termination on the basis of frustration.¹⁰⁵ It is clear that insurance removed the financial concerns of landlords and tenants and was thereby instrumental in allowing the parties to focus on dealing with their problems. One lawyer said “The financial pressure on landlords and tenants often dictated their flexibility or willingness to negotiate or compromise”.¹⁰⁶

Clearly insurance is essential. In situations where buildings have become inaccessible it is likely to be the case that neither party is at fault. In the Canterbury earthquake sequence it was the cordon set up to protect the public that prevented access and in *National Carriers Ltd v Panalpina (Northern) Ltd*,¹⁰⁷ it was the Council’s closure of the road. Therefore the issue becomes who should bear the risk and insure against it? Should it be the party who has the ability to insure? Or is it the responsibility of both parties as part of the cost of doing business?

¹⁰⁰ FQ001.

¹⁰¹ Only three tenants said they had a dispute with their landlord. However, a number of tenants said they had no communication with their landlords.

¹⁰² Most landlord participants reported having insurance cover; the only regret was that it was not for long enough. One landlord had loss of rent insurance for 12 months and said that it was not long enough; FQ309.

¹⁰³ FQ001.

¹⁰⁴ FQ002.

¹⁰⁵ FQ003.

¹⁰⁶ FQ006.

¹⁰⁷ *National Carriers Ltd v Panalpina (Northern) Ltd*, above n 26.

In the ADLS lease the landlord is responsible for insurance,¹⁰⁸ which includes cover for the building¹⁰⁹ as well as additional risks, one of which is loss of rent and outgoings.¹¹⁰ There is an argument that landlords should also be responsible for insuring against the risk their buildings might become inaccessible.¹¹¹ Landlords are in a better position than tenants to insure against that risk because they are usually in a stronger financial position. Landlords currently bear the risk of their premises being partially or totally destroyed or becoming untenable because in these circumstances the tenant is able to terminate the lease. In the case of a building that is damaged, both parties share the risk; the tenant has the benefit of an abatement of rent and the landlord has the benefit of keeping the lease on foot.

Against this is the argument that any problems relating to access of a building are external matters. Landlords are responsible for providing the building and any agreed services according to the terms of the lease. They would argue they are not responsible for events outside of their control that disturb access to the building. If there is an issue with access then that is a matter for the tenant in the same way that business interruption insurance for health or other reasons such as strike action, terrorist threats and civil unrest are the tenant's responsibility. This view is supported by one landlord who said he was not prepared to accept "no-access" clauses in his leases because he did not believe the problem of an inaccessible building was his risk.¹¹²

We do not agree to those changes as we are strongly of the view the landlord is only responsible for erecting the building and maintaining the essential services. A landlord should not provide a warranty as to continued occupation which many of the clauses sought in the post-EQ environment have the de-facto effect of becoming. The inability to access the premises does not directly relate to the fabric of the building and is in essence a business risk. Those business risks should be borne by the tenant and not the landlord.

An important lesson has been learned from the Canterbury earthquakes and that is the value of having insurance. In a disaster another way that landlords and tenants can be assisted is

¹⁰⁸ (2012, 6th edition), Second Schedule, cl 23.

¹⁰⁹ (2012, 6th edition), First Schedule, cl 14(1).

¹¹⁰ (2012, 6th edition), First Schedule, cl 14(2).

¹¹¹ This is on the assumption that there is insurance available to cover the situation of a tenant being unable to access the building. If there is no such cover available, it might be that "loss of rent" insurance is widened to include losses arising from an inaccessible building.

¹¹² FQ301.

by ensuring they are protected with adequate insurance. Therefore it could be sensible to impose an obligation on landlords and tenants to carry a certain amount of insurance cover for events that affect access to the building.

D Other issues

The research revealed two other issues that were of great concern to tenants after the earthquakes: the apparent unwillingness of landlords to share information and the length of time it took to resolve problems.

1 Information sharing

One issue highlighted in the research was the lack of information sharing between landlords and tenants. Although most participants said a report was completed on the building, the majority of tenants said they were not shown the report or only saw parts of it, even if it had been requested. Without information about the state of the building, tenants said they were unable to make fully informed decisions about their future. For example, a report might have helped a tenant to determine whether the building was untenable, in which case he or she could terminate the lease. Half of the lawyers interviewed said they thought there should be a legal requirement that landlords disclose information on their buildings to their tenants because, in their experience, this was something that was not done.¹¹³

Landlords and tenants have a special relationship because it is a continuing one based on trust. Sharing of information is important to this relationship. Sadly, a large number of tenant participants said their relationship with their landlord had changed for the worse since the earthquakes,¹¹⁴ mainly because they had no communication from their landlords. In contrast, most landlord participants said they had shared their reports with their tenants (which could have been a reason why they reported continuing good relations).

One way to resolve this situation might be to introduce a duty of good faith into the landlord/tenant relationship which would include a requirement to share information. The duty could be contained in existing legislation such as the Property Law Act 2007 or incorporated into a new Commercial Tenancies Act. It could be implied into every lease and the parties should not be able to contract out. One tenant suggested a duty of good faith

¹¹³ Six of the 12 lawyers thought there should be a requirement building reports be disclosed.

¹¹⁴ Seven tenants.

for landlords and tenants could be similar to the good faith relations requirement in the Employment Relations Act 2000.¹¹⁵ In that Act the duty of good faith requires the parties to the relationship to be “responsive and communicative”.¹¹⁶ He said:¹¹⁷

Employment law has a fair and just process, like a moral obligation. It would be great to see this [requirement] inserted into landlord and tenant relations. An outcome shouldn’t be determined by whether there is a moral obligation or not or by the personalities of the people involved.

However, the research also revealed that it was not always the landlord who withheld information. When insurance companies became involved they often controlled the dissemination of the information on the buildings and some landlords said they were not allowed to release material to their tenants if there was an insurance claim. It seems likely that insurance companies wanted to withhold information to keep all of their legal options open. Any new statutory requirement to disclose information would have to apply to all parties who have control over the relevant documents.

2 Problems need to be resolved quickly

One of the most common complaints from tenants was that their earthquake-related lease issues took too long to be resolved. They wanted to deal with their issues quickly but were unable to for various reasons: delays in obtaining building reports, their landlords’ failure to share information on the buildings and uncertainty about their legal rights.

Some delays can be addressed. The complaint about the lack of sharing of information could be dealt with through the introduction of a duty of good faith as described above, with a requirement that information must be disclosed within a reasonable time. The uncertainty around legal rights can be addressed by clarifying the law in a new Commercial Tenancies Act and by providing access to justice through a Tenancy Tribunal.

The delay caused by the cordon is more difficult to address. The cordon around the CBD was a necessary evil. It was also unprecedented. In any disaster there will be unexpected issues that arise and therefore some understanding and patience is required as a normal timeframe for the resolution of issues cannot be expected.

¹¹⁵ Employment Relations Act 2000, s 4.

¹¹⁶ Section 4 (1A)(b).

¹¹⁷ FQ208.

CHAPTER TEN

CONCLUSION

I Introduction

A significant earthquake occurring somewhere in New Zealand is a foreseeable event.¹ This is particularly the case in light of the risk the Alpine Fault poses to a large part of the country. With that in mind, the major earthquake in September 2010 was arguably foreseeable as were the aftershocks that followed because they naturally occur after any large event. Nevertheless there is an argument that the unusual and extraordinary features of the Canterbury earthquake sequence and, in particular, the February 2011 aftershock, made these particular earthquakes unforeseeable. The Supreme Court in *Planet Kids Ltd v Auckland Council*² said there must be a high degree of foreseeability to exclude frustration.³ It also said that it is not only the supervening event that must be foreseeable, but the consequences too that must be foreseeable.⁴ It is difficult to argue the consequences of the Canterbury earthquakes were foreseeable, the cordon and the inaccessible buildings, given that no provision had been made for them in the leases. But at the very least, the earthquakes and their consequences were unforeseen.

The erection of the cordon presented a problem for landlords and tenants. Tenants were unable to occupy or use their buildings because they could not access them. They therefore wanted to terminate their leases. There was uncertainty in the law because the leases did not provide for this situation and nor did the legislation. As a consequence, many landlords and tenants suffered significant financial hardship and stress.

The aim of this thesis was to discover whether the doctrine of frustration could apply to terminate leases in the exceptional circumstances of the Canterbury earthquakes. The conclusion reached is the doctrine could have, and should have, applied.

¹ *Hawke's Bay Electric-Power-Board v Thomas Borthwick and Sons (Australasia) Ltd* [1933] NZLR 873 at 883 per Blair J.

² *Planet Kids Ltd v Auckland Council* [2013] NZSC 147 (SC).

³ At [158] per Glazebrook J.

⁴ At [158].

II The Application of the Doctrine of Frustration

A The Test for the Doctrine

In Chapter Two it was shown that the doctrine of frustration was created to mitigate the effects of the rule as to absolute contracts. Its purpose was to provide a fairer solution in the case of a contract rendered impossible of performance and radically different, by a supervening event. Nevertheless, the doctrine is not often applied because of the high threshold that must be met and the courts' reluctance to interfere with a contract freely made between two consenting parties.

Although there is no definitive test for the doctrine, nor consensus by the courts as to its jurisprudential basis, it continues to be applied and developed. In New Zealand the leading case on frustration is the Supreme Court decision in *Planet Kids Ltd v Auckland Council*.⁵ This case was heard two years after the February 2011 earthquake and is therefore a relatively recent authority on the law relating to the doctrine of frustration in New Zealand. It has helped to clarify the law by confirming that to determine whether a contract is frustrated a multi-factorial approach should be taken. The Court set out the factors that should be taken into account, but the application of the doctrine to any given set of facts remains problematic and uncertain and will likely have to be determined by a court.

Chapter Three revealed that, after the creation of the doctrine of frustration, there was a lengthy period when it was unclear whether the doctrine applied to a lease. The current approach, having been promoted by courts throughout the Commonwealth, is to consider a lease as both a contract and an estate in land. Change began when landlords and tenants were allowed to avail themselves of contractual remedies in relation to their leases. Following this move, the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*,⁶ confirmed the doctrine of frustration is applicable to leases. In New Zealand a number of cases in the High Court have followed the House of Lords decision. However, there is yet to be a case in which a lease has been found to be frustrated.

In Chapter Four it was shown that the Land Transfer Act 1952 has provision for the registration of leases. In registering a lease under the Torrens system of land registration a tenant obtains an indefeasible interest in the land. However, this indefeasible registered

⁵ *Planet Kids Ltd v Auckland Council*, above n 2.

⁶ *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675 (HL).

interest presents a problem for the application of the doctrine of frustration. The doctrine operates to end the lease-contract but it may not be able to defeat the registered interest. It is unclear therefore, whether the doctrine can apply in these circumstances. In New Zealand at present, this is not a major problem because lease registration is voluntary and few leases are registered in practice.⁷ However, the point is that leases can be registered and therefore the interplay between registered leases and the doctrine of frustration remains an issue for landlords and tenants.

B There is no provision in the leases or legislation

Chapter Five examined the standard form leases that were in use at the time of the earthquakes. The leases provided for the possibility that the building might be destroyed or damaged. If the building was destroyed the lease would be terminated; if the building was damaged, the rent was abated until the building was reinstated. However, the leases did not provide for the situation where the building was inaccessible.

The ADLS lease was the most common standard form lease in use at the time of the earthquakes. This lease provided for termination where the building was destroyed or untenable. Although unclear, it seems unlikely that the test for “untenable” covers an inaccessible building. This means that the ADLS lease had no provision for the situation either.

The fact the leases did not provide for the problem of an inaccessible building means it is also unlikely that the risk was allocated to one or both parties. Other risks had been allocated, such as the risk of the building being destroyed, becoming untenable or being damaged. It is difficult to know what the parties would have intended to happen if they had thought to provide for the situation of an inaccessible building. It is certainly not something they had considered. It is clear from the research that most tenants would have wanted to terminate as they said they could not afford to cover the rent of a building they could not use. Landlords, on the other hand, were generally keen to keep leases in force and may not have agreed to a term that enabled the tenant to terminate the lease for inaccessibility. This suggests that negotiation would have played a key part in whether the lease had a term covering inaccessibility and therefore it is impossible to second guess what the parties would have provided.

⁷ There is nothing in the new Land Transfer Bill 2016 to suggest that there will be any legislative requirement to register leases in the future.

Chapter Five also revealed that the legislation did not cover an inaccessible building. Consequently, there is nothing in the leases or the legislation that would prevent the application of the doctrine of frustration.

C The Doctrine of Frustration Should Apply!

Chapter Six looked at the extraordinary nature of the Canterbury earthquakes. It showed that this sequence was unusual in a number of ways: large shallow earthquakes, their close proximity to a CBD of a large city, the size of the initial earthquake and a number of significant aftershocks, the thousands of smaller aftershocks that had a cumulative effect and the particular geography of the area that contributed to the devastating consequences. These unusual features meant that destruction in the city was significant and this, in turn, produced an unprecedented consequence; the erection of a cordon. This chapter showed how extraordinary the Canterbury earthquakes were and how unexpected the cordon and its effects were too.

The aim of Chapter Seven was to discover how the earthquakes affected landlords and tenants. It described the personal experiences of landlords and tenants, and also lawyers' experiences from their dealings with their landlord/tenant clients. This chapter set out how the research was undertaken and announced the findings.

The aim of Chapter Eight was to apply the findings from Chapter Seven to the test for the doctrine of frustration to discover whether the test had been met. The conclusion that has been reached, is that the circumstances of the landlords and tenants after the Canterbury earthquakes, as gleaned from the research participants, did meet the test. Landlords and tenants should be able to invoke the doctrine of frustration to terminate their leases in these exceptional circumstances. There is nothing to prevent the application of the doctrine because there was no provision in the leases or in the legislation that covered the situation of an inaccessible building. This is exactly the type of situation for which the doctrine of frustration has been designed to apply and indeed should apply.

III Reform

Chapter Nine concluded that, as the doctrine of frustration is applicable, then access to justice is required in order to allow it to be a meaningful solution to the problem of an inaccessible building. The research revealed that tenants did not want, nor could afford, to

resolve their problems through the court system. At present, this is their only recourse to justice. Therefore, few landlords and tenants have litigated their issues. The result is little case law on the issue of the application of the doctrine of frustration to leases and consequently the law remains uncertain and difficult to apply.

Chapter Nine offers suggestions for reform of the law. A new Commercial Tenancies Act is proposed that could clarify the law by dealing with a number of matters that arose out of the earthquakes. It could specify that the doctrine of frustration is applicable to leases to clarify that issue once and for all. It could also establish a dispute resolution service that is informal, quick and cost effective to allow tenants' access to justice in a way they have not experienced before. In this way, landlords and tenants could have a forum in which disputes about whether the doctrine of frustration applies to a lease in particular circumstances, can be resolved without the need for lengthy and expensive court proceedings.

Today, commercial leases are not the simple contracts they started out to be. They are commercial dealings involving complicated terms that cover the parties' numerous rights and obligations. The time has come for legislation to govern this relationship to address the imbalance of power that is inherent within it, as has been done for residential tenancies and employment relationships. This can be achieved through the enactment of a Commercial Tenancies Act.

IV Overall Conclusion

The research revealed an anomaly. After the earthquakes, many tenants who abided by the terms of their leases ended up in a worse financial situation than tenants who abandoned their leases. Those who felt bound to their leases and as a consequence did not set up their businesses elsewhere, did not fare well. Many missed out on securing alternative premises because they could not afford to be liable for two leases. Those tenants who made the decision early to abandon their cordoned buildings set up their businesses elsewhere and enter into new leases without any intention of returning to their old premises, seemed to suffer few adverse effects. There seems to be something inherently wrong with a situation in which tenants who followed the law did so to their detriment while those who disregarded it were better off. The law needs to be clear and applicable.

The doctrine of frustration should apply to leases. It should be applied as it was developed to apply; to mitigate the effects of an extreme event and alleviate the harsh consequences that would otherwise occur if the rule as to absolute contracts was applied. It is a remedy

to be used cautiously but it is helpful in times of emergency and need. It is difficult to apply but not impossible. The United States has for years recognised that leases can be frustrated, particularly where the purpose of the lease is frustrated. British Columbia also recognises that the doctrine of frustration is applicable to leases and has specifically legislated for this. If there is any time that the doctrine of frustration should apply to leases, it is to those affected by the Canterbury earthquakes. The parties had no other remedy. If the doctrine does not apply in these circumstances, the question must be asked whether there is any point in having the doctrine?

The September 2011 earthquake and the aftershocks were arguably unforeseeable, but if that is not accepted, they were definitely unforeseen. The consequences of these earthquakes, however, were unforeseeable. If landlords and tenants had turned their minds to the possibility that their building might become inaccessible, it is likely they would have made sure their lease covered it. The uncertainty that resulted from not knowing their legal rights after the earthquakes made for difficult times. Now such an event has happened, landlords and tenants around New Zealand are reminded that disasters do happen and they need to be prepared. For it is not a matter of *if* another large one will strike but *when* that time will come.

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GNS Science	 <www.gns.cri.nz>
Ministry of Business, Innovation and Employment	 <www.mbie.govt.nz>
Radio New Zealand	 <www.radionz.co.nz>
Statistics New Zealand	 <www.stats.govt.nz>
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APPENDICES

APPENDIX A

The Frustrated Contracts Act 1944

An Act to amend the law relating to the frustration of contracts

1 Short Title

This Act may be cited as the Frustrated Contracts Act 1944.

2 Interpretation

In this Act, **court** means, in relation to any matter, the court, tribunal, or arbitral tribunal by or before which the matter falls to be determined.

Section 2: replaced, on 19 December 2002, by section 3 of the Frustrated Contracts Amendment Act 2002 (2002 No 81).

3 Adjustment of rights and liabilities of parties to frustrated contracts

(1) Where a contract governed by the law of New Zealand has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section 4, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as the time of discharge) shall, in the case of sums so paid, be recoverable from him or her as money received by him or her for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:
provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him or her to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last preceding subsection applies) before the time of discharge, there shall be recoverable from him or her by the said other party such

sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,—

- (a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him or her to any other party in pursuance of the contract and retained or recoverable by that party under the last preceding subsection; and
 - (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.
- (4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.
- (5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.
- (6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

Compare: Law Reform (Frustrated Contracts) Act 1943 s 1 (Imp)

4 Provision as to application of this Act

- (1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after 1 November 1944, but not to contracts as respects which the time of discharge is before the said date.
- (2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.
- (3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect

in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the last preceding section of this Act to such extent (if any) as appears to the court to be consistent with the said provision.

- (4) Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the last preceding section of this Act as only applicable to the remainder of that contract.
- (5) This Act shall not apply—
 - (a) to any charter party, except a time charter party or a charter party by way of demise, or to any contract (other than a charter party) for the carriage of goods by sea; or
 - (b) to any contract of insurance, save as is provided by subsection (5) of the last preceding section; or
 - (c) to any contract to which section 9 of the Sale of Goods Act 1908 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

Compare: Law Reform (Frustrated Contracts) Act 1943 s 2 (Imp)

APPENDIX B

STANDARD FORM COMMERCIAL LEASES

THE AUCKLAND DISTRICT LAW SOCIETY LEASE

The ADLS lease (2008, 5th edition) cl 27:

Partial Destruction

- 27.1 If the premises or any portion of the building of which the premises may form part shall be damaged but not so as to render the premises untenable and:
- (a) the Landlord's policy or policies of insurance shall not have been invalidated or payment of the policy moneys refused in consequence of some act or default of the Tenant, and
 - (b) all the necessary permits and consents are obtainable,
- the Landlord shall with all reasonable speed expend all the insurance moneys received by the Landlord in respect of such damage towards repairing such damage or reinstating the premises or the building but the Landlord shall not be liable to expend any sum of money greater than the amount of the insurance money received.
- 27.2 Any repair or reinstatement may be carried out by the Landlord using such materials and form of construction and according to such plan as the Landlord thinks fit and shall be sufficient so long as it is reasonably adequate for the Tenant's occupation and use of the premises.
- 27.3 Until the completion of the repairs or reinstatement a fair proportion of the rent and outgoings shall cease to be payable as from the date of damage.
- 27.4 If any necessary permit or consent shall not be obtainable or the insurance moneys received by the Landlord shall be inadequate for the repair or reinstatement then the term shall at once terminate but without prejudice to the rights of either party against the other.

THE PROPERTY COUNCIL OFFICE LEASE

The Property Council Office lease (1986) cl 7.2:

Partial Destruction

- 7.2 Subject as is hereinafter provided, if the Premises or any part thereof or the access thereto becomes substantially inaccessible or at any time during the term hereof is damaged or partially destroyed but so that the same may be repaired and reinstated without having to be wholly rebuilt then:
- 7.2.1 provided the Lessor is not prevented by any Act ordinance regulation or by-law then in force or by the requirements of any mortgagee from so doing the Lessor shall with all convenient speed repair and reinstate the Premises or restore such access BUT in no event shall the Lessor be bound to expend more on restoration than it receives from its insurance policies; and
- 7.2.2 so long as no policy or policies of insurance effected on the Building shall have been vitiated or payment of the policy moneys refused in consequence of some act or default of the Lessee then a fair and just proportion (as the Lessor shall determine) of the rent and Operating Expenses hereby reserved according to the damage sustained shall as from the date of such damage or partial destruction be abated until the Premises shall have been repaired and reinstated or made reasonably fit for occupation; and
- 7.2.3 if any question shall arise as to whether by reason of any destruction damage or such inaccessibility the said term should be deemed to have ceased and determined as hereinbefore provided or what proportion of rent and Operating Expenses ought to be abated or for how long on account of such destruction or damage then such dispute shall be referred to arbitration.

Premises to be Vacated

- 7.3 If the Building shall be damaged by any cause as to render it impracticable for the Lessor to repair or reinstate the same without obtaining sole possession of the Premises or part thereof the Lessor may require the Lessee to vacate the Premises or part thereof as the case may be for such period as may be necessary for the purpose of such repairing or reinstating upon giving to the Lessee one month's written notice and upon the expiration of such notice may take possession of the Premises or such part thereof as may be specified in such notice for the said purpose and in such case the Lessee shall not be entitled to any compensation or damages therefor or in any way on account of the Lessor retaking possession or on account of any inconvenience or loss thereby occasioned to the Lessee and the rent and Operating Expenses hereby reserved and payable in respect of the Premises or such part thereof as aforesaid shall be abated for such period as the Lessee shall not occupy or have the right to occupy the Premises or such part thereof as aforesaid. This provision is deemed to take precedence over any Clause or provision in this Lease inconsistent with it.

Rental Determining Date

- 7.4 In determining the date to which rent and Operating Expenses shall continue to be payable by the Lessee under the preceding provisions of this Section consideration shall be given to the extent to which the Lessee shall be able to continue to trade or carry on business to a degree substantially unaffected until any demolition is required.

PROPERTY LAW LEGISLATION

The Property Law Act 2007

Property Law Act 2007 Section 218(1), Schedule 3, Part 2:

Clause 4 Payment of Rent

- (1) The lessee will pay the rent payable under the lease when it falls due.
- (2) However, if the leased premises or any part of them are destroyed or damaged by any of the causes specified in subclause (3) to the extent that they become unfit for occupation and use by the lessee, the rent and any contribution payable by the lessee to the outgoings on those premises will abate, in fair and just proportion to the destruction or damage, until those premises –
 - (a) have been repaired and reinstated; and
 - (b) are again fit for occupation and use by the lessee.
- (3) The causes referred to in subclause (2) are –
 - (a) fire, flood or explosion (whether or not the fire, flood or explosion is caused, or contributed to, by the lessee's negligence); or
 - (b) lightning, storm, earthquake, or volcanic activity; or
 - (c) any other cause the risk for which the lessor has insured the premises.
- (4) Despite subclause (2), the lessee is not entitled to the abatement referred to in that subclause if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of –
 - (a) the lessee; or
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.
- (5) Any dispute arising under this clause will be referred to arbitration under the Arbitration Act 1996

The Property Law Act 2007, s 219, Schedule 3, Part 3:

Clause 13 Lessee to keep and yield up premises in existing condition

- (1) The lessee will, -
 - (a) At all times during the currency of the lease, keep the leased premises in the same condition that they were in when the term of the lease began; and
 - (b) At the termination of the lease, yield the leased premises in that condition.
- (2) However, the lessee is not bound to repair any damage to the leased premises caused by –
 - (a) Reasonable wear and tear; or
 - (b) Any of the following:
 - (i) Fire, flood, or explosion (whether or not the fire, flood, or explosion is caused or contributed to by the lessee's negligence);
 - (ii) Lightning, storm, earthquake, or volcanic activity;
 - (iii) Any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (2)(b), the lessee is not excused from liability to repair any damage caused by any of the events referred to in that paragraph if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of –
 - (a) the lessee; or
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

The Property Law Act 1952

The Property Law Act 1952:

Section 106 Covenants implied in leases

- (a) That he will, at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightning, storm, tempest, earthquake, and fair wear and tear (all without neglect or default of the lessee) excepted:
Provided that this covenant shall not be implied in any lease of a dwellinghouse.

APPENDIX C

METHODOLOGY

The following parts of Appendix C relate to the methodology of the research. The first part discloses what was done to ensure that confidentiality was maintained for participants. The second part sets out the forms required to be used in the research as part of the requirements for ethics approval from the Human Ethics Committee, University of Canterbury. The third part sets out the questionnaires used in the research.

1 Confidentiality

All participants agreed to provide their personal information on the basis that it was kept confidential. This was important for many reasons. First, the information being obtained was private and in some cases sensitive. Second, the Human Ethics Committee wanted an assurance that participants would not know whether their particular landlord or tenant was also in the study. Third, participants needed to be able to fully and frankly disclose their circumstances and experiences without fear that it would affect them in any way (for example that anything they said would not affect their relationship with the other party to their lease, insurance or legal claims). Therefore, all documentation attributable to a participant was coded to ensure each person was unidentifiable. The key to the codes was kept in a securely locked cabinet at the University of Canterbury. The only person with access to the locked cabinet was the researcher.

The professional transcriber was a legal secretary. She was experienced in working in a legal office and was acutely aware of the importance of keeping all data confidential. However, to stress the importance of both, it was discussed with her and a confidentiality agreement was required to be signed prior to the commencement of the work.

All completed questionnaires and transcribed interviews were kept in securely locked cabinets at the University of Canterbury. The only person who had access to them was the researcher. The audio-recordings were kept on a computer at the University of Canterbury and on the researcher's external hard drive, which both require a password to access. All documentation relating to this research will be destroyed after 10 years.

2 Forms needed to comply with Ethics Approval

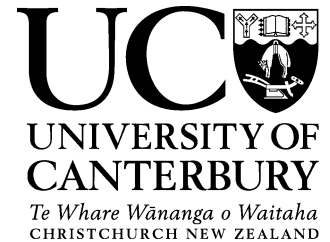
(a) Information Sheet for Landlord and Tenant Participants

School of Law

Telephone: +64 3 3667001 ext 3715

Email: toni.collins@pg.canterbury.ac.nz

August 2013



Information Sheet for Landlord and Tenant Participants

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Introduction and Purpose of this Study

I am a student undertaking study towards a PhD at the University of Canterbury. My research is focused on the experiences of landlords and tenants in the aftermath of the Canterbury earthquakes and the legal issues that have arisen as a consequence.

After the earthquakes many landlords and tenants discovered that their buildings were unable to be used. In some cases the buildings were damaged, lacked essential services or were unsafe. In other cases the buildings were located in the inaccessible “red zone” cordon of the central business district. In others, the buildings could be used but the repairs that will be required will prevent the buildings from being used for a period of time, with an uncertain timeframe for completion.

The aim of my research is to find out how parties to commercial leases have dealt with these issues. Anecdotal evidence suggests that the circumstances that now exist in Christchurch were not foreseen and consequently have not been provided for in leases. If there is no provision in the lease, parties have to rely on the general law. Unfortunately this area of the law appears to be unclear.

In this study I will investigate whether satisfactory outcomes were achieved by those parties who had made provisions in their leases for potential problems with their buildings in a disaster situation and compare them with those who did not. In both cases I will examine the current law to ascertain whether it provided effective solutions. If the research concludes that the law did not work well, I will investigate how it could have worked better and whether reform is needed.

What Are You Being Asked To Do?

You are invited to participate as a subject in this research project. If you agree to take part it will involve approximately two hours of your time. You will be asked to complete two questionnaires about your experiences in the aftermath of the earthquakes. The questionnaires seek to obtain information about any problems you experienced with your building, the issues you have had with your lease and/or with the general law.

The first questionnaire is a short document which should take approximately 5 minutes to complete. This will be followed by a second questionnaire which will take approximately one hour to complete. You can receive the questionnaire by email or by post. When you have completed it and returned it to me, if you choose to be interviewed, I will arrange a suitable time with you to go through your answers which will take approximately one hour. If you agree, data that is collected by interview will be recorded by an audio recorder and transcribed and kept in a confidential manner in the same way as the hard copy data is retained as set out later in this information sheet.

Participation in the Study is Voluntary

Please note that participation in this study is voluntary. If you do participate, you have the right to withdraw from the study at any time and withdraw any information you have provided. If you withdraw, I will do my best to remove any information relating to you from my database.

Confidentiality

You may be assured of the complete confidentiality of data gathered in this investigation. The identity of participants in this study **will not** be made public without their consent and I will take care to ensure anonymity in publications of the findings. You may also be assured that the other party to your lease, that is your landlord or your tenant, will not be given any information that could identify you, either directly or indirectly, as having been involved in this study, unless you consent to being identified.

What Will Happen to the Data Collected

To ensure anonymity and confidentiality all data will be securely stored in password protected facilities and locked storage at the University of Canterbury. It will be stored in these facilities for

ten years following the study and then destroyed unless you have given consent to its addition to the CEISMIC archive, as explained below. During the time that the School of Law is relocated during earthquake repairs to the building, the data will be securely stored in locked storage at my office in the Old Maths Building at the University of Canterbury. The only persons able to access the data will be me and my Supervisors.

If you agree, any data collected from you will be added to the CEISMIC archive of data on earthquake related matters that will be available to other researchers in the field. CEISMIC is a comprehensive digital archive on a broad range of earthquake-related research material, gathered by leading New Zealand cultural and educational organizations. For further information on the CEISMIC archive please refer to www.ceismic.org.nz. You will be asked for your agreement to do this on the Consent Form that you will be asked to sign if you agree to participate in this study.

Results of the Study

The results of this study will form part of my thesis and it is hoped that it will be published. The results will be reported nationally and internationally at conferences and in law journals. All participants may receive a copy of the thesis if requested.

The results of this research will be used to ascertain how effective the law has been for parties to commercial leases in the aftermath of a disaster. If the law is found to be ineffective, the research will be used to ascertain whether reform is needed and what form that should take.

Human Ethics Approval

This project has been reviewed and approved by the School of Law and the University of Canterbury Human Ethics Committee under the Low Risk process.

Complaints

If you have a complaint about the study, you may contact the Chair, Human Ethics Committee, University of Canterbury, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

Contacts

If you have any questions about the study, please contact me (details above) or my Supervisors:

Professor Jeremy Finn Direct Dial: 03 364 2780 email: jeremy.finn@canterbury.ac.nz

Professor Elizabeth Toomey Ph: 03 364 2987 extn 8793

email: elizabeth.toomey@canterbury.ac.nz

Consent Form

If you agree to participate in this study, please complete the attached consent form and return it to me.

I am looking forward to working with you and thank you in advance for your contribution to this research.

Toni Collins
PhD Student
University of Canterbury

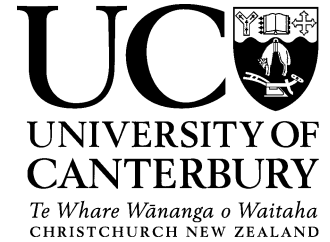
(b) Consent form for Landlords and Tenants

School of Law

Telephone: +64 3 3667001 ext 3715

Email: toni.collins@pg.canterbury.ac.nz

August 2013



Consent Form for Landlords and Tenants

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

I have read the Information Sheet for Landlord and Tenant Participants and have been given a full explanation about this project and an opportunity to ask questions. I understand what will be required of me if I agree to take part in this project.

I understand that my participation is voluntary and that I may withdraw at any stage and I may withdraw any information I have provided.

I understand that any information or opinions I provide will be kept confidential to the researcher and her supervisors' and that any published or reported results will not identify me, **unless** I consent to being identified as indicated at the end of this form.

I understand what CEISMIC is and have been given the website details (www.ceismic.org.nz) for more information. I understand that I can choose to consent to the data that is collected from me being added to the CEISMIC archive as indicated at the end of this form.

I understand that if I choose to answer the questionnaire by way of an interview, I can consent to an audio recording being taken of the interview.

I understand that all data collected for this study will be kept in locked and secure facilities at the University of Canterbury and will be destroyed after ten years.

I understand that I may receive a copy of the thesis if I request one. I have provided my email details below for this.

I note that the project has been reviewed and approved by the School of Law and the University of Canterbury Human Ethics Committee (Low Risk process).

I understand that if I require further information I can contact the researcher, Toni Collins (details above) or her Supervisors whose details have been provided to me on the Information Sheet.

If I have any complaints, I can contact the Chair of the University of Canterbury Human Ethics Committee, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

By signing below, I agree to participate in this research project.

Name: _____

Signature: _____

Date: _____

Email address: _____

- ☐ I wish to receive a copy of the thesis upon completion

CONFIRMATION OF CONSENT

Please indicate whether you consent or do not consent to the following, by placing a tick in the appropriate box.

1. I consent to any data that is collected from me being added to the CEISMIC archive of data on earthquake related matters that will be available to other researchers in the field.

☐

Yes

☐

No

2. I consent to an audio recording being made of the interview I have with the researcher.

☐

Yes

☐

No

3. I consent to the researcher identifying me in her thesis and published work.

☐

Yes

☐

No

4. I consent to the researcher identifying my business in her thesis and published work.

☐

Yes

☐

No

Please return this completed consent form to Toni Collins as soon as possible by email or return post.

Thank you.

(c) Information Sheet for Lawyer Participants

School of Law

Telephone: +64 3 3667001 ext 3715

Email: toni.collins@pg.canterbury.ac.nz

August 2013



Information Sheet for Lawyer Participants

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Introduction and Purpose of this Study

I am a student undertaking study towards a PhD at the University of Canterbury. My research is focused on the experiences of landlords and tenants in the aftermath of the Canterbury earthquakes and the legal issues that have arisen as a consequence.

After the earthquakes many landlords and tenants discovered that their buildings were unable to be used. In some cases the buildings were damaged, lacked essential services or were unsafe. In other cases the buildings were located in the inaccessible “red zone” cordon of the central business district. In others, the buildings could be used but the repairs that will be required in the future will prevent the buildings from being used for a period of time, with an uncertain timeframe for completion.

The aim of my research is to find out how parties to commercial leases have dealt with the issues. Anecdotal evidence suggests that the circumstances that now exist in Christchurch were not foreseen and consequently have not been provided for in leases. If there is no provision in the lease, parties have to rely on the general law. Unfortunately this area of the law appears to be unclear.

In this study I will investigate whether satisfactory outcomes were achieved by those parties who had made provisions in their leases for potential problems with their buildings in a disaster situation and compare them with those who did not. In both cases I will examine the current law to ascertain whether it provided effective solutions. If the research concludes that the law did not work well, I will investigate how it could have worked better and whether reform is needed.

What Are You Being Asked To Do?

You are invited to participate as a subject in this research project. If you agree to take part it will involve approximately two hours of your time. You will be asked to complete two questionnaires about your experience as a lawyer acting for landlords or tenants in the aftermath of the earthquakes. The questionnaires seek to obtain information about the issues that arose for your clients with their lease and/or with the law, in a very general way. They will not require you to disclose any information that would constitute a breach of client confidentiality or of the rules of professional conduct.

The first questionnaire is a short document which should take approximately 5 minutes to complete. This will be followed by a second questionnaire which will take approximately one hour to complete. You can receive the questionnaire by email or by post. When you have completed it and returned it to me, if you choose to be interviewed, I will arrange a suitable time with you to go through your answers which will take approximately one hour. If you agree, data that is collected by interview will be recorded by an audio recorder and transcribed and kept in a confidential manner in the same way as the hard copy data is retained as set out later in this information sheet.

Participation in the Study is Voluntary

Please note that participation in this study is voluntary. If you do participate, you have the right to withdraw from the study at any time and withdraw any information you have provided. If you withdraw, I will do my best to remove any information relating to you from my database.

Confidentiality

You may be assured of the complete confidentiality of data gathered in this investigation. The identity of participants in this study **will not** be made public without their consent and I will take care to ensure anonymity in publications of the findings. You may be assured that landlords and tenants will not be given any information which could directly or indirectly identify them to each other, or identify you as their lawyer, as having been involved in this study unless you consent to be identified.

What Will Happen to the Data Collected

To ensure anonymity and confidentiality all data will be securely stored in password protected facilities and locked storage at the University of Canterbury. It will be stored in these facilities for ten years following the study and then destroyed if you have not consented to its addition to the CEISMIC archive, as explained below. During the time that the School of Law is relocated during earthquake repairs to the building, the data will be securely stored in locked storage at my office in the Old Maths Building at the University of Canterbury. The only persons able to access the data will be me and my Supervisors.

If you agree, any data collected from you can be added to the CEISMIC archive of data on earthquake related matters that will be available to other researchers in the field. CEISMIC is a comprehensive digital archive on a broad range of earthquake-related research material, gathered by leading New Zealand cultural and educational organizations. For further information on the CEISMIC archive please refer to www.ceismic.org.nz. You will be asked for your agreement to do this on the Consent Form that you will be asked to sign if you agree to participate in this study.

Results of the Study

The results of this study will form part of my thesis and it is hoped that it will be published. The results will be reported nationally and internationally at conferences and in law journals. All participants may receive a copy of the thesis if requested.

The results of this research will be used to ascertain how effective the law has been for parties to commercial leases in the aftermath of a disaster. If the law is found to be ineffective, the research will be used to ascertain whether reform is needed and what form that should take.

Human Ethics Approval

This project has been reviewed and approved by the School of Law and the University of Canterbury Human Ethics Committee under the Low Risk process.

Complaints

If you have a complaint about the study, you may contact the Chair, Human Ethics Committee, University of Canterbury, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

Contacts

If you have any questions about the study, please contact me (details above) or my Supervisors:

Professor Jeremy Finn Direct Dial: 03 364 2780 email: jeremy.finn@canterbury.ac.nz
Professor Elizabeth Toomey Ph: 03 364 2987 extn 8793
email: elizabeth.toomey@canterbury.ac.nz

Consent Form

If you agree to participate in this study, please complete the attached consent form and return it to me.

I am looking forward to working with you and thank you in advance for your contribution to this research.

Toni Collins
PhD Student
University of Canterbury

(d) Consent form for Lawyers

School of Law

Telephone: +64 3 3667001 ext 3715

Email: toni.collins@pg.canterbury.ac.nz

August 2013



Consent Form for Lawyers

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

I have read the Information Sheet for Lawyer Participants and have been given a full explanation about this project and an opportunity to ask questions. I understand what will be required of me if I agree to take part in this project.

I understand that my participation is voluntary and that I may withdraw at any stage and I may withdraw any information I have provided.

I understand that I am participating in this research in my capacity as a lawyer who has acted for parties to commercial leases. I understand that I will not be asked to disclose any information that would constitute a breach of client confidentiality or of the rules of professional conduct.

I understand that any information or opinions I provide will be kept confidential to the researcher and her supervisors' and that any published or reported results will not identify me, **unless** I consent to being identified as indicated at the end of this form.

I understand what CEISMIC is and have been given the website details (www.ceismic.org.nz) for more information. I understand that I can choose to consent to the data that is collected from me being added to the CEISMIC archive as indicated at the end of this form.

I understand that if I choose to answer the questionnaire by way of an interview, I can consent to an audio recording being taken of the interview.

I understand that all data collected for this study will be kept in locked and secure facilities at the University of Canterbury and will be destroyed after ten years if I have not consented to its addition to the CEISMIC archive.

I understand that I may receive a copy of the thesis if I request one. I have provided my email details below for this.

I note that the project has been reviewed and approved by the School of Law and the University of Canterbury Human Ethics Committee (Low Risk process).

I understand that if I require further information I can contact the researcher, Toni Collins (details above) or her Supervisors whose details have been provided to me on the Information Sheet.

If I have any complaints, I can contact the Chair of the University of Canterbury Human Ethics Committee, Private Bag 4800, Christchurch (human-ethics@canterbury.ac.nz).

By signing below, I agree to participate in this research project.

Name: _____

Signature: _____

Date: _____

Email address: _____

- ☐ I wish to receive a copy of the thesis upon completion

CONFIRMATION OF CONSENT

Please indicate whether you consent or do not consent to the following by placing a tick in the appropriate box.

5. I consent to any data that is collected from me being added to the CEISMIC archive of data on earthquake related matters that will be available to other researchers in the field.

☐ Yes ☐ No

6. I consent to an audio recording being made of the interview I have with the researcher.

☐ Yes ☐ No

7. I consent to the researcher identifying me in her thesis and published work.

☐ Yes ☐ No

8. I consent to the researcher identifying my business in her thesis and published work.

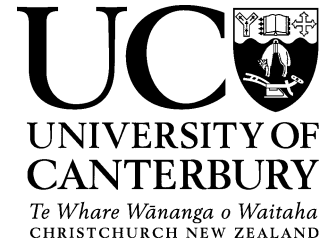
☐ Yes ☐ No

Please return this completed consent form to Toni Collins as soon as possible by email or by return post.

(e) Cover sheet for questionnaires

Telephone: +64 3 3667001 ext 3715
Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

The project is being carried out as research for a PhD thesis by Toni Collins whose contact details are set out at the top of this form. Toni will be working under the supervision of Professors Jeremy Finn and Elizabeth Toomey who can be contacted at the University of Canterbury as follows:

Professor Jeremy Finn Direct Dial: 03 364 2780 email: jeremy.finn@canterbury.ac.nz
Professor Elizabeth Toomey Ph: 03 364 2987 extn 8793
email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

3 Questionnaires

The questionnaires are set out in the following order:

- (a) Preliminary questionnaire for tenants;
- (b) Preliminary questionnaire for landlords;
- (c) Preliminary questionnaire for lawyers;
- (d) Full questionnaire for tenants with an ADLS lease;
- (e) Full questionnaire for landlords with an ADLS lease;
- (f) Full questionnaire for lawyers in relation to an ADLS lease.
- (g) Full questionnaire for landlords with another form of lease.

A full questionnaire was also drafted for any participants who had another type of lease. Only one participant, a landlord, did not use an ADLS lease. Therefore the full questionnaire for landlords with another form of lease has also been included.

(a) Preliminary Questionnaire for Tenants

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Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

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Ph: 03 364 2987 extn 879

email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

PRELIMINARY QUESTIONNAIRE FOR COMMERCIAL TENANTS

To ensure the full questionnaire you complete will be relevant to your circumstances, please first complete this preliminary questionnaire.

PART 1 : GENERAL INFORMATION

1. Identification Code:
2. Date Questionnaire completed:
3. What is the size of your business? Select all that are applicable:
 - ☐ International business
 - ☐ National business
 - ☐ Canterbury based business
 - ☐ Company
 - ☐ Partnership
 - ☐ Sole trader
 - ☐ Associated with the government (please explain how it is associated)
 - ☐ Other (please explain)
4. How many commercial buildings do you lease in New Zealand?
 - ☐ 1
 - ☐ 2 – 5
 - ☐ 5 - 10
 - ☐ More than 10
 - ☐ Other (please explain)

The questions for the next part of this questionnaire are designed to gather information about ONE BUILDING and ONE TENANT in that building. If you are a tenant in multiple buildings you are welcome to complete a questionnaire for each building.

PART 2: THE CANTERBURY EARTHQUAKES

5. In general terms how was the building affected by the earthquakes?
Select all that are applicable to your situation as at today's date:
- ☐ Not affected
 - ☐ Building demolished
 - ☐ Building damaged
 - ☐ Building inaccessible
 - ☐ Other reason (please explain)
6. Have you been prevented from using the building since the earthquakes? Select all that are applicable.
- ☐ I have been able to use the building
 - ☐ I have not been able to use the building since 4 September 2010
 - ☐ I have not been able to use the building since 26 December 2010
 - ☐ I have not been able to use the building since 22 February 2011
 - ☐ I have not been able to use the building since (please provide month and year)
 - ☐ I have not been able to use the building for a period of time (please specify the period eg from February 2011 to April 2011)
 - ☐ Other (please explain)

PART 3: THE LEASE

Type of Lease

7. What type of lease did you have on or before 4 September 2010?
- ☐ Auckland District Law Society (ADLS) Lease (Fifth edition 2008 or earlier)
 - ☐ Property Council Lease (BOMA) lease
 - ☐ Industry Lease
 - ☐ Ground Lease
 - ☐ Other (please specify)

Termination of lease

8. Has the lease been terminated at any time since 4 September 2010?
- ☐ No
 - ☐ Yes

Dispute with your Landlord

9. Have you have a dispute with your landlord about earthquake-related lease issues?

- ☐ No
- ☐ Yes

Insurance

10. Did you have business interruption insurance or any other insurance cover that was applicable to your circumstances after the earthquakes?

- ☐ No
- ☐ Yes

Thank you for completing this preliminary questionnaire.

Please return the completed preliminary questionnaire by email to toni.collins@pg.canterbury.ac.nz or post to Toni Collins, The University of Canterbury, School of Law, Private Bag 4800, Christchurch 8140.

Once I have received the preliminary questionnaire I will contact you regarding a convenient time to complete the full questionnaire.

(b) Preliminary Questionnaire for Landlords

Telephone: +64 3 3667001 ext 3715
Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

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Direct Dial: 03 364 2780

email: jeremy.finn@canterbury.ac.nz

Professor Elizabeth Toomey

Ph: 03 364 2987 extn 8793

email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

PRELIMINARY QUESTIONNAIRE FOR COMMERCIAL LANDLORDS

To ensure the full questionnaire you complete will be relevant to your circumstances, please first complete this preliminary questionnaire.

PART 1: GENERAL INFORMATION

1. Identification Code: PQ
2. Date Preliminary Questionnaire completed:
3. What is the size of your business? Select all that are applicable:
 - ☐ International business
 - ☐ National business
 - ☐ Canterbury based business
 - ☐ Company
 - ☐ Partnership
 - ☐ Sole trader
 - ☐ Associated with the government (please explain how it is associated)
 - ☐ Other (please explain)
 - ☐
4. How many commercial buildings do you lease to tenants in New Zealand?
 - ☐ 1
 - ☐ 2 – 5
 - ☐ 5 – 10
 - ☐ More than 10
 - ☐ Other (please explain)

The questions for the next part of this questionnaire are designed to gather information about ONE BUILDING and ONE TENANT in that building. If you have other commercially leased buildings with tenants you are welcome to complete a separate questionnaire for each.

PART 2: THE CANTERBURY EARTHQUAKES

5. In general terms how was the building affected by the earthquakes?

Select all that are applicable to your situation as at today's date:

- ☐ Not affected
- ☐ Building Demolished
- ☐ Building Damaged
- ☐ Building Inaccessible
- ☐ Other reason (please explain)

6. Has your tenant been prevented from using the building since the earthquakes?

Select all that are applicable.

- ☐ Tenant has been able to use the building
- ☐ Tenant has not used the building since 4 September 2010
- ☐ Tenant has not used the building since 26 December 2010
- ☐ Tenant has not used the building since 22 February 2011
- ☐ Tenant has not used the building since (please provide the month and year)
- ☐ Tenant has not used the building for a period of time (please specify the period eg from February 2011 to April 2011)
- ☐ Other (please explain)

PART 3: THE LEASE

Type of Lease

7. What type of lease did you have on or before 4 September 2010?

- ☐ Auckland District Law Society (ADLS) Lease (Fifth edition 2008 or earlier)
- ☐ Property Council Lease (BOMA) lease
- ☐ Industry Lease
- ☐ Ground Lease
- ☐ Other (please specify)

Termination of the lease

8. Has the lease been terminated at any time since 4 September 2010?

- ☐ No
- ☐ Yes

Dispute with your Tenant

9. Have you had a dispute with your tenant about earthquake-related lease issues?

- ☐ No
- ☐ Yes

Insurance

10. Did you have business interruption insurance, loss of rent insurance or any other insurance cover that was applicable to your circumstances after the earthquakes?

- ☐ No
- ☐ Yes

Thank you for completing this preliminary questionnaire.

Please return the completed preliminary questionnaire by email to toni.collins@pg.canterbury.ac.nz or post to Toni Collins, The University of Canterbury, School of Law, Private Bag 4800, Christchurch 8140.

Once I have received the preliminary questionnaire I will send you the second questionnaire for completion.

(c) Preliminary Questionnaire for Lawyers

Telephone: +64 3 3667001 ext 3715

Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

The project is being carried out as research for a PhD thesis by Toni Collins whose contact details are set out at the top of this form. Toni will be working under the supervision of Professors Jeremy Finn and Elizabeth Toomey who can be contacted at the University of Canterbury as follows:

Professor Jeremy Finn

Direct Dial: 03 364 2780

email: jeremy.finn@canterbury.ac.nz

Professor Elizabeth Toomey

Ph: 03 364 2987 extn 8793

email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

PRELIMINARY QUESTIONNAIRE FOR LAWYERS

To ensure the full questionnaire you complete will be relevant to your circumstances, please first complete this preliminary questionnaire.

PART 1: GENERAL INFORMATION

1. Identification Code: PQ
2. Date completed:
3. What is your main area of practice?
 - Commercial
 - Corporate
 - Insurance
 - Litigation
 - Property/Conveyancing
 - Other – please state
4. How long have you been practicing law?
5. What position do you hold?
 - Barrister
 - Partner in a firm
 - Associate in a firm
 - Solicitor in a firm
 - Practicing on own account
 - Other – please state
6. Who have you acted for in relation to earthquake-related lease issues?
 - I have acted for commercial landlords
 - I have acted for commercial tenants
 - I have acted for both commercial landlords and tenants

PART 2: THE CANTERBURY EARTHQUAKES

7. Have you had clients seek advice from you about any of the following situations (select all that are applicable):
- Building has to be or has been demolished
 - Building lacks essential services
 - Unable to access a building because it is in the red zone cordon
 - Unable to access a building because it needs repairs
 - Unable to access a building because it needs strengthening
 - Unable to access a building because of safety concerns around damage to a neighbouring building
 - Building can be used now but will have to be repaired in the future
 - Building can be used now but will have to be strengthened in the future to the Council's revised standards of the Building Code
 - Issues about zoning or permitted use
 - Other issues, please explain

PART 3: THE LEASE

8. What proportion of clients you advised on earthquake-related matters had the following forms of lease? (in approximate terms as a percentage or fraction)

Auckland District Law Society (ADLS) form of lease	
(Fifth Edition 2008 or earlier)	%
Property Council (BOMA) form of lease	%
Industry Lease	%
Ground Lease	%
Other (please specify)	%

Thank you for completing this preliminary questionnaire.

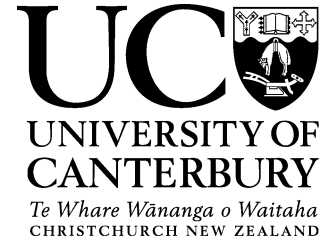
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Once I have received the preliminary questionnaire I will send you the second questionnaire for completion.

(d) Full Questionnaire for Tenants with an ADLS lease

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August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the
Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

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The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

QUESTIONNAIRE FOR COMMERCIAL TENANTS **WITH AN ADLS LEASE**

The information requested in this questionnaire relates to the commercial lease you had with your landlord prior to 4 September 2010.

This questionnaire is asking for information about your experiences as a tenant in the aftermath of the Canterbury earthquake. This research is NOT about insurance issues.

PART 1 : GENERAL INFORMATION

1. Identification Code: FQ
2. Date completed:

Questions about the building

3. What was the location of the building that you leased on 4 September 2010?
 - Christchurch central business district
 - Christchurch suburbs North
 - Christchurch suburbs East
 - Christchurch suburbs West
 - Christchurch suburbs South
 - Christchurch rural including Halswell, TaiTapu, Lincoln, Rolleston, Yaldhurst, West Melton, Kaiapoi, Rangiora
 - Canterbury rural (over 25km outside Christchurch)
 - Other (please specify)
4. How many tenants had a lease of the building (including your lease) as at 4 September 2010?
5. Did you have more than one commercial lease with your landlord? (this includes leases of other buildings)
 - No – go to question 6.
 - Yes - answer the following questions:
 - 5.1 Have your dealings over earthquake-related issues with this landlord been any different from your dealings with another landlord with whom you have only one lease?
 - I do not have a lease with another landlord
 - No
 - YesIf yes, please explain why the dealings have been different.

The questions for the next part of this questionnaire are designed to gather information about your experiences after 4 September 2010 in relation to ONE BUILDING. If you had a lease of more than one building at that time you are welcome to complete a separate questionnaire for each.

Relationship with your Landlord

6. How long had you been in a landlord/tenant relationship with your landlord on 4th September 2010 – that is the cumulative time of all the leases?
 - ☐ Less than one year
 - ☐ 1 – 2 years
 - ☐ 2 – 5 years
 - ☐ 5 – 10 years
 - ☐ Over 10 years
 - ☐ Other (please explain)

7. What do you know about your landlord's business?

Select any of the following that are applicable to your landlord (if you are able to):

 - ☐ International business
 - ☐ National business
 - ☐ Canterbury based business
 - ☐ Company
 - ☐ Partnership
 - ☐ Sole trader
 - ☐ Associated with the government
 - ☐ Other (please explain)
 - ☐ I do not know about my landlord's business

8. On a scale of 1 to 5 with 1 being “extremely good” and 5 being “poor” how would you describe the relationship you had with your landlord prior to 4 September 2010?
 - ☐ 1 Extremely good
 - ☐ 2 Very good
 - ☐ 3 Good
 - ☐ 4 Not very good
 - ☐ 5 Poor
 - ☐ Other (please explain)

9. Has the relationship with your landlord (as described above in question 8) changed since 4 September 2010?
- No – go to question 10
 - Yes – answer the following questions:
 - 9.1 Why has the relationship changed?
 - 9.2 How has the relationship changed – that is, has it got better or worse?

Relocation of Business

10. Did you have to relocate your business as a result of an earthquake?
- No – go to question 11
 - Yes
 - If yes, where did you relocate to?
 - Christchurch central business district
 - Christchurch suburbs North
 - Christchurch suburbs East
 - Christchurch suburbs West
 - Christchurch suburbs South
 - Christchurch rural including Halswell, TaiTapu, Lincoln, Rolleston, Yaldhurst, West Melton, Kaiapoi, Rangiora.
 - Canterbury rural (over 25km outside Christchurch)

Earthquakes

11. Prior to 4 September 2010 had you ever considered your building to be at risk from earthquakes such as those experienced in Christchurch since 2010?
12. Prior to 4 September 2010 had you ever considered that your building might be:
- | | |
|---|--------|
| ○ Demolished | Yes/No |
| ○ Requiring earthquake repairs | Yes/No |
| ○ Unable to be accessed because it is in an inaccessible area | Yes/No |
| ○ Unable to be accessed because it requires repairs | Yes/No |
| ○ Unable to be accessed because it requires strengthening | Yes/No |
| ○ Unable to be accessed for safety reasons | Yes/No |
| ○ Unable to be accessed because it lacks essential services | Yes/No |
| ○ Other (please explain) | |

PART 2: THE CANTERBURY EARTHQUAKES

I am interested in learning about the impact of the earthquakes on your building.

13. Did the earthquakes cause damage to the building?

- ☐ No
- ☐ Yes

If yes, answer the following question:

13.1 Which earthquake(s) caused the most damage to your building?
(referred to from now on in this questionnaire as the “**significant earthquake(s)**”)

Select those that are applicable:

- ☐ September 2010
- ☐ December 2010 (Boxing Day earthquake)
- ☐ February 2011
- ☐ June 2011
- ☐ December 2011
- ☐ Other (please explain)

14. How was the building affected by the significant earthquake(s)?

Select any of the following that are applicable to your situation as at today’s date.

- ☐ Building has to be or has been demolished.
- ☐ Building lacks essential services.
- ☐ Unable to access the building because it needs repairs.
- ☐ Unable to access the building because it needs strengthening.
- ☐ Unable to access the building because of safety concerns around damage to a neighbouring building.
- ☐ Building can be used now but will have to be repaired in the future.
- ☐ Building can be used now but will have to be strengthened to the Council’s Building Code requirements in the future.
- ☐ Other reason. (please explain)

15. Have you been able to use the building as a result of the significant earthquake(s)?

- ☐ Yes – go to question 16.
- ☐ No - answer the following questions:

- 15.1 Why have you not been able to use the building since the significant earthquake(s)?
- 15.2 How long were you unable to use the building (or if it is on-going, as at today's date, how long have you been unable to use the building?)
- Not applicable
 - Less than one week
 - 1- 4 weeks
 - 1-2 months
 - 2-6 months
 - 6-12 months
 - 1- 2 years
 - Over 2 years
- 15.3 Have you paid rent to your landlord for the period of time that the building has not been able to be used?
- No
 - Yes
 - Other reason
- Please explain your answer.

PART 3: THE LEASE - Auckland District Law Society Form of Lease (Fifth Edition or earlier) (You will need a copy of your lease to complete this part)

I am interested in learning about the impact of the earthquakes on you as a tenant.

Changes to the Lease

16. Prior to the earthquakes, were the sections covering damage or destruction to the building (clause 26) or the building being untenable (clause 27) changed in any way from the standard wording?
- No – go to question 17.
 - Yes - answer the following questions:
- 16.1 What changes were made?
- 16.2 Why were the changes made?

Term of Lease

17. What was the term of the lease including any rights of renewal?

18. If the building was unable to be used as a result of the significant earthquake(s), what was the length of the term still to run on the first day that the building was unable to be used (including any rights of renewal)?

- ☐ Not applicable
- ☐ Under one year
- ☐ 1-2 years
- ☐ 3-5 years
- ☐ 6-10 years
- ☐ More than 10 years

Provisions in Lease

19. Did the provisions in the lease help you to understand your legal rights in relation to your circumstances after the significant earthquake(s)?

- ☐ No
- ☐ Yes

If yes, which provisions?

Legal Advice

20. Did you seek legal advice about your lease after the significant earthquake(s)?

- ☐ No – go to question 21
- ☐ Yes

If yes, if you can you say what legal advice you received about your situation please do so.

Resolving earthquake-related lease issues with your Landlord

21. How did you resolve any earthquake-related lease issues?

Select any of the following that are applicable to your situation.

- ☐ Termination of the lease
- ☐ Suspension of rent
- ☐ Payment of a proportion of the rent
- ☐ Continuation of full rent
- ☐ Renegotiation of the terms of the lease
- ☐ Continuation of lease
- ☐ Other solution (please explain)

22. Did you have a dispute with your landlord over the lease as a result of the significant earthquakes?

- No – go to question 23
- Yes - answer the following questions:

22.1 What was the dispute about?

22.2 How did you resolve any issues with your landlord? Select any of the following that are applicable to your situation:

- Negotiating a solution with your landlord directly
- Using your lawyer
- Using the terms of the lease (please specify the clause used)
- Using the general law
- Using alternative dispute resolution such as arbitration or mediation
- Going to court
- Another way (please explain)

Termination of lease

23. Has the lease been terminated since the earthquakes?

- No - go to question 24.
- Yes - answer the following questions:

23.1 How was the lease terminated?

- By the Tenant
- By the Landlord
- By mutual agreement
- Other (please explain)

23.2 What was the reason given for termination of the lease?

- Building has to be or has been demolished
- Building lacks essential services
- Unable to access building because it is in the red zone cordon
- Unable to access building because it needs repairs
- Unable to access building because it needs strengthening
- Unable to access building because of safety concerns around damage to a neighbouring building
- Building can be used now but will have to be repaired in the future
- Building can be used now but will have to be strengthened in the future
- Issues about zoning
- Issues about permitted use

- Other reason (please explain)

23.3 Was there a specific clause in the lease used as the basis for termination?

- No - explain on what basis the lease was terminated.
- Yes – specify the clause relied upon.

23.4 How long after the significant earthquake(s) was the lease terminated?

- Less than 1 week
- 1- 4 weeks
- 1 – 6 months
- 7 - 12 months
- 1 – 2 years
- Over 2 years

23.5 Why did it take that period of time for the lease to be terminated?

Reports on the Building

24. To your knowledge, did the landlord obtain a building, engineers or other report on the building?

- No – go to question 25
- Yes - answer the following question:

24.1 Has the landlord shown or provided these reports to you?

- No
- Yes

Please explain your answer.

New Building to Lease

25. Have you found new premises to rent?

- No (please explain) - go to question 26
- Yes with the same landlord
- Yes with a different landlord

25.1 What alternatives did you have to staying in your building after the earthquakes?

25.2 Is the rent you are paying now:

- Higher than you were paying under your previous lease
- The same as you were paying under your previous lease

- Lower than you were paying under your previous lease

25.3 In the aftermath of the earthquake were you ever concerned that if you entered into a new lease you might be liable for two leases – the old and the new?

- Yes
- No

Please explain your answer

Insurance

26. Did you have business interruption insurance or any other insurance you relied upon after the significant earthquake(s)?

- No – go to question 27
- Yes - answer the following questions:

26.1 Did having insurance impact on the decisions you made regarding your lease after the significant earthquake(s)?

- No
- Yes

Please explain your answer.

26.2 Did your landlord seek rent from you for a period when your building was unable to be used after the significant earthquake(s)?

- No
- Yes

If yes, for how long did the landlord seek rent from you?

Understanding your legal rights

27. How did you find out what your legal rights were concerning your building after the significant earthquake(s)?

- From the terms of the lease
- I researched the law
- From my lawyer
- From my accountant or other professional advisor
- I did not find out my legal rights
- Another way (please explain)

THE LAW ON THE DOCTRINE OF FRUSTRATION

This next part will ask you questions about a legal doctrine called the doctrine of frustration. This is a legal rule or principle that when a contract becomes impossible of performance or the purpose of the contract has changed significantly from what the parties originally contracted for, frustration occurs and the contract comes to an end.

28. Have you heard of the doctrine of frustration?

- No – go to question 29
- Yes - answer the following questions:

28.1 When did you find out about the doctrine of frustration?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

28.2 What do you know about the doctrine of frustration?

28.3 Do you think the doctrine of frustration provides a remedy for resolving earthquake-related lease issues?

- No
- Yes

Please explain your answer.

28.4 If you consider the doctrine of frustration does provide a remedy for earthquake-related lease issues please rank from 1 to 5 how effective you consider it to be with 1 being “extremely effective” and 5 being “not effective at all”:

- 1 Extremely effective
- 2 Very effective
- 3 Effective
- 4 Not very effective
- 5 Not effective at all
- I do not consider the doctrine of frustration provides a remedy

THE LAW ON THE FRUSTRATED CONTRACTS ACT 1944

29. Have you heard of the Frustrated Contracts Act 1944?

- No – go to question 30
- Yes - answer the following questions:

29.1 When did you find out about the Frustrated Contracts Act 1944?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

29.2 What do you know about the Frustrated Contracts Act 1944?

29.3 Do you think the Frustrated Contracts Act 1944 provides a remedy for resolving earthquake-related lease issues?

- No
- Yes

Please explain your answer.

29.4 If you consider that the Frustrated Contracts Act 1944 does provide a remedy for earthquake-related lease issues please rank from 1 to 5 how effective you consider it to be, with 1 being “extremely effective” and 5 being “not effective at all”:

- 1 Extremely effective
- 2 Very effective
- 3 Effective
- 4 Not very effective
- 5 Not effective at all
- I do not consider the Frustrated Contracts Act 1944 provides a remedy

THE LAW ON “UNTENANTABLE”

30. In clause 26 of the ADLS lease about damage to premises, the term “untenantable” is used. Have you heard of the term “untenantable”?

- No – go to question 31
- Yes - answer the following questions:

- 30.1 When did you find out about the law on a building being “untenantable”?
- Before September 2010
 - After September 2010 but before February 2011
 - After February 2011
 - Another time, please specify when
- 30.2 What is your understanding of the law on when a building is “untenantable”?
- 30.3 Do you consider that any of the following situations would prevent you from using a building? (select any that you consider are applicable)
- Damage to the interior of the building
 - Cracking to floors and walls
 - Collapsed staircases
 - Flooding of building and/or basement
 - Lack of essential services
 - Lack of access to building
 - Health and safety of workers is compromised by the state of the building
 - Safety of the building is doubtful due to unsafe neighbouring building
 - The requirement for strengthening of building
 - The requirement for repairs to building
 - Other (please explain)

FORCE MAJEURE CLAUSES

A force majeure clause is a clause inserted into a contract to set out what should happen to the contract should there be a natural disaster, act of terrorism or war or other event beyond the control of the parties, sometimes referred to as “Acts of God”.

31. Have you ever heard of a force majeure clause?
- No – go to question 32
 - Yes – answer the following questions:

31.1 When did you find out about a force majeure clause?

 - Before September 2010
 - After September 2010 but before February 2011
 - After February 2011
 - Another time, please specify when

- 31.2 What is your understanding of a force majeure clause?
- 31.3 Do you think that the use of a force majeure clause in your lease would have provided a better solution for resolving earthquake-related lease issues than how you actually resolved your issues?
- 31.4 If you consider that a force majeure clause would have provided a solution for earthquake-related lease issues, rank how effective you consider it might have been on a scale of 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”.
- Extremely effective
 - Very effective
 - Effective
 - Not very effective
 - Not effective at all
 - I do not consider that a force majeure clause would have provided a remedy
32. In light of your experiences in the aftermath of the earthquakes do you consider that the law is clear regarding your legal rights as a tenant?
- Yes
 - No
- Please explain your answer.
33. In light of your experiences in the aftermath of the earthquakes do you consider that the law has provided effective solutions for the problems that you have encountered?
- I have not encountered any problems
 - Yes
 - No
- Please explain your answer.

PART 4: THE FUTURE

These are questions about how you would act in the future knowing what you know now.

34. In light of your experiences in the aftermath of the earthquakes, how thorough are you when reading the terms of your lease today compared to the time before the earthquakes?

35. In light of your experiences in the aftermath of the earthquakes, are there any changes you would make or have made to a new lease?

- No – go to question 36
- Yes - answer the following question:

35.1 What changes have you made or would you make? (please explain).

36. In light of your experiences after the earthquakes there may be additional clauses you might want in your lease to allow you to terminate in certain circumstances. Which of the following are clauses that you would like in your lease?

- The tenant can terminate the lease if the building becomes inaccessible for any reason for a period of six months
- The tenant can terminate the lease if the building requires repairs that are estimated to take six months or longer
- The tenant can terminate the lease if the building lacks essential services for a period of six months or longer
- Other clauses you would insert – please explain
- Do not agree to any changes – please explain

37. Do you think that the landlord you had over the time of the significant earthquakes, would agree to any of the changes suggested in question 36?

- No
- Yes

Please explain your answer.

37.1 If you have a new landlord since 4 September 2010, would this landlord agree to any of the changes suggested in question 36?

- I do not have a new landlord

- No
- Yes

Please explain your answer.

38. In light of your experiences in the aftermath of the earthquakes which of the following (if any) do you think **would have best met your needs?**

- Termination of the lease
- Suspension of rent
- Payment of a portion of the full rent
- Payment of full rent
- Continuation of lease
- Alternative accommodation
- Renegotiation of the terms of the lease
- Other remedy (please explain)

39. In your opinion does there need to be any change in the law to clarify the rights of parties to commercial leases in light of earthquake-related issues that arose after the Canterbury earthquakes?

- No – please go to question 40
- Yes - please answer the following question:

39.1 What changes would you like to see? Select those that are applicable:

- The use of force majeure clauses (these are clauses specifically setting out what the parties are liable for if a natural disaster should occur)
- Remedies contained in the lease
- Remedies contained in a statute
- A specialist Tribunal or Authority set up to determine lease issues arising out of extraordinary events like the Canterbury earthquakes; (for example the Weathertight Homes Tribunal (for Leaky Homes) or the Hawkes Bay Adjustment Court (for the Napier earthquake)
- Other remedies. (please specify)

40. Are there any other general comments that you wish to make about your experience as a tenant in the aftermath of the earthquakes?

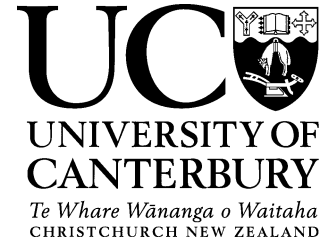
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When I have received the questionnaire I will contact you to arrange a suitable time to interview you about your answer

(e) Full Questionnaire for Landlords with an ADLS lease

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Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

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QUESTIONNAIRE FOR COMMERCIAL LANDLORDS **WITH AN ADLS LEASE**

The information requested in this questionnaire relates to the commercial lease you had with your tenant prior to the 4 September 2010.

This questionnaire is asking for information about your experiences as a landlord in the aftermath of the Canterbury earthquakes. This research is NOT about insurance issues.

PART 1 : GENERAL INFORMATION

1. Identification Code: FQ

2. Date completed:

Questions about the building

3. What was the location of the building on 4 September 2010?

- ☐ Christchurch central business district
- ☐ Christchurch suburbs North
- ☐ Christchurch suburbs East
- ☐ Christchurch suburbs West
- ☐ Christchurch suburbs South
- ☐ Christchurch rural including Halswell, Tai Tapu, Lincoln, Rolleston, Yaldhurst, West Melton, Kaiapoi, Rangiora.
- ☐ Canterbury rural (over 25km outside Christchurch)
- ☐ Other (please specify)

4. Did the building have more than one tenant (as at 4 September 2010)?

- ☐ No - go to question 5
- ☐ Yes - answer the following questions:

4.1 How many tenants had a lease of the building?

4.2 Did any of the tenants of the building have more than one lease with you?

Select **one** of the following that is applicable:

- ☐ No – go to question 5
- ☐ Yes - more than one lease in one building
- ☐ Yes - more than one lease in more than one building

- 4.3 Have your dealings over earthquake-related issues with a tenant who has multiple leases with you been any different from your dealings with a tenant who has only one lease with you?

- ☐ No
- ☐ Yes

If yes, please explain why the dealings have been different.

The questions for the next part of this questionnaire are designed to gather information about your experiences after the earthquakes in relation to ONE BUILDING and ONE TENANT in that building. If you had other commercially leased buildings with tenants at that time, you are welcome to complete a separate questionnaire for each.

Relationship with your Tenant

5. How long had you been in a landlord/tenant relationship with your tenant on 4th September 2010 – that is, the cumulative time of all leases with this tenant?

- ☐ Less than one year
- ☐ 1 – 2 years
- ☐ 2 – 5 years
- ☐ 5 – 10 years
- ☐ Over 10 years
- ☐ Other (please explain)

6. What do you know about your tenant's business?

Select any of the following that are applicable to your tenant (if you are able to):

- ☐ International business
- ☐ National business
- ☐ Canterbury based business
- ☐ Company
- ☐ Partnership
- ☐ Sole trader
- ☐ Associated with the government
- ☐ Other (please explain)
- ☐ I do not know about my tenant's business

7. On a scale of 1 to 5 with 1 being "extremely good" and 5 being "poor" how would you describe the relationship you had with your tenant prior to 4 September 2010?

- ☐ 1 Extremely good
- ☐ 2 Very good

- 3 Good
- 4 Not very good
- 5 Poor
- Other (please explain)

8. Has the relationship with your tenant (as described above in question 7) changed since 4 September 2010?

- No – go to question 9
- Yes – answer the following questions

8.1 Why has the relationship changed?

8.2 How has the relationship changed – that is, has it got better or worse?

Earthquakes

9. Prior to 4 September 2010 had you ever considered your building to be at risk from earthquakes such as those experienced in Christchurch since 2010?

10. Prior to 4 September 2010 had you ever considered that your building might be:

- | | |
|--|--------|
| ○ Demolished | Yes/No |
| ○ Requiring extensive repairs | Yes/No |
| ○ Unable to be accessed because it is in an inaccessible area | Yes/No |
| ○ Unable to be accessed because it requires repairs | Yes/No |
| ○ Unable to be accessed because it requires strengthening | Yes/No |
| ○ Unable to be accessed for safety reasons | Yes/No |
| ○ Unable to be accessed because it lacks essential services (power, water, sewerage) | Yes/No |
| ○ Other (please explain) | |

PART 2: THE CANTERBURY EARTHQUAKES

I am interested in learning about the impact of the earthquakes on your building.

11. Did the earthquakes cause damage to the building you leased?

- No – go to question 12
- Yes - answer the following question:

11.1 Which earthquake(s) were the most damaging in that they affected your ability to use or access the building? (referred to from now on in this questionnaire as the **“significant earthquake(s)”**)

Select any of the following that are applicable.

- ☐ September 2010
- ☐ December 2010 (Boxing Day earthquake)
- ☐ February 2011
- ☐ June 2011
- ☐ December 2011
- ☐ Other (please explain)

12. How was the building affected by the significant earthquake(s)?

Select any of the following that are applicable to your situation as at today's date.

- ☐ Building has to be or has been demolished
- ☐ Building lacks essential services
- ☐ Building cannot be accessed because it needs repairs
- ☐ Building cannot be accessed because it needs strengthening
- ☐ Building cannot be accessed because of safety concerns around damage to a neighbouring building
- ☐ Building can be used now but will have to be repaired in the future
- ☐ Building can be used now but will have to be strengthened to the Council's Building Code requirements in the future
- ☐ Other reason (please explain)

13. Has your tenant been prevented from using the building as a result of the significant earthquake(s)?

- ☐ No – go to question 14
- ☐ Yes- answer the following questions:

13.1 Why has the building not been used by the tenant since the significant earthquake(s)?

13.2 What was the length of time your tenant was unable to use the building? (or if it is on-going, as at today's date, how long has your tenant been unable to use the building?)

- ☐ Not applicable
- ☐ Less than one week
- ☐ 1- 4 weeks

- 1-2 months
- 2-6 months
- 6-12 months
- 1- 2 years
- Over 2 years

13.3 Has your tenant paid rent for the period of time that the building has not been able to be used?

- No
- Yes
- Other

Please explain

PART 3: THE LEASE - Auckland District Law Society Form of Lease (Fifth Edition or earlier)

(You will need a copy of your lease to complete this part)

I am interested in learning about the impact of the earthquakes on you as a landlord.

Changes to the Lease

14. Prior to the earthquakes, were the sections covering damage or destruction to the building (clause 26) or the building being untenable (clause 27) changed in any way from the standard wording?

- No – go to question 15.
- Yes - answer the following questions:

14.1 What changes were made?

14.2 Why were the changes made?

Term of the lease

15. What was the term of the lease, including any rights of renewal?

16. If the building was unable to be used as a result of the significant earthquake(s), what was the length of the term still to run on the first day that the building was unable to be used (including any rights of renewal)?

- Not applicable
- Under one year
- 1-2 years
- 3-5 years

- 6-10 years
- More than 10 years
- Other (please explain)

Provisions in Lease

17. Did the provisions in the lease help you to understand your legal rights in relation to your circumstances after the significant earthquake(s)?

- No
- Yes

If yes, which provisions?

Legal Advice

18. Did you seek legal advice about your lease after the significant earthquake(s)?

- No
- Yes

If yes, if you can say what legal advice you received about your situation please do so.

Resolving earthquake-related lease issues

19. How did you resolve any earthquake-related lease issues with your tenant? Select any of the following that are applicable to your situation.

- Termination of the lease
- Suspension of rent
- Payment of a proportion of the rent
- Continuation of full rent
- Renegotiation of the terms of the lease
- Continuation of lease
- Other solution (please explain)

20. Did you have a dispute with your tenant over the lease as a result of the significant earthquake(s)?

- No – go to question 21.
- Yes - answer the following questions:

20.1 What was the dispute about?

20.2 How did you resolve any issues with your tenant? Select any of the following that are applicable to your situation.

- Negotiating a solution with your tenant directly

- Using your lawyer
 - Using the terms of the lease (please specify the clause used)
 - Using the general law
 - Using alternative dispute resolution such as arbitration or mediation
 - Going to court
 - Another way
- Please explain your answer

20.3 What was the solution reached?

Termination of the lease

21. Has the lease been terminated as a result of the significant earthquake(s)?

- No – go to question 22
- Yes - answer the following questions:

21.1 How was the lease terminated?

- By the Tenant
- By the Landlord
- By mutual agreement
- Other (please explain)

21.2 What was the reason given for termination of the lease?

Select any of the following:

- Building has to be or has been demolished
- Building lacks essential services
- Unable to access building because it is in the red zone cordon
- Unable to access building because it needs repairs
- Unable to access building because it needs strengthening to the Building Code
- Unable to access building because of safety concerns around damage to a neighbouring building
- Building can be used now but will have to be repaired in the future
- Building can be used now but will have to be strengthened to the Building Code in the future
- Issues about zoning
- Issues about permitted use
- Other reason (please explain)

- 21.3 Was a specific clause in the lease used as the basis for termination?
- Yes - specify the clause relied upon
 - No - explain on what basis the lease was terminated
- 21.4 How long after the significant earthquake(s) was the lease terminated?
- Less than 1 week
 - 1- 4 weeks
 - 1 – 6 months
 - 7 - 12 months
 - 1 – 2 years
 - Over 2 years
- 21.5 Why did it take that period of time for the lease to be terminated?

Reports on the Building

22. Did you obtain a building, engineers or other report on the building after the significant earthquake(s)?

- No – go to question 23
- Yes - answer the following question:

22.1 Have you shown or provided these to the tenant?

- No
- Yes

Please explain your answer.

New Tenants

23. Have you found new tenants for your building?

- Not applicable – go to question 24
- No – go to question 24
- Yes - answer the following questions:

23.1 Was it difficult to get a new tenant for your building?

- No
- Yes

- 23.2 Is the rent the new tenant is paying:
- Higher than what the previous tenant was paying
 - The same as what the previous tenant was paying
 - Lower than what the previous tenant was paying

Insurance

24. Did you have business interruption insurance, loss of rent cover or any other insurance you used after the significant earthquake(s)?

- No – go to question 25
- Yes - answer the following question:

24.1 Did having insurance impact on the decisions you made regarding the lease? (for example you didn't require the tenant to cover the rent if it was covered by insurance).

- No
- Yes

Please explain your answer.

24.2 Did your insurance company require you to seek rent from your tenant for the period that the building was unable to be used?

- No
- Yes

Understanding your legal rights

25. How did you find out what your legal rights were concerning your building and your circumstances after the significant earthquake(s)?

- From the terms of the lease
- I researched the law
- From my lawyer
- From my accountant or other professional advisor
- I did not find out my legal rights
- Another way (please explain)

THE LAW ON THE DOCTRINE OF FRUSTRATION

This next part will ask you questions about a legal doctrine called the doctrine of frustration. This is a legal rule or principle that when a contract becomes impossible of performance or the purpose of the contract has changed significantly from what the parties originally contracted for, frustration occurs and the contract comes to an end.

26. Have you heard of the doctrine of frustration?

- No – go to question 27
- Yes - answer the following questions:

26.1 When did you find out about the doctrine of frustration?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

26.2 What do you know about the doctrine of frustration?

26.2 Do you think the doctrine of frustration provides a remedy for resolving earthquake-related lease issues?

26.3 If you consider the doctrine of frustration does provide a remedy for earthquake-related lease issues, please rank from 1 to 5 how effective you consider it to be with 1 being “extremely effective” and 5 being “not effective at all”:

- 1 Extremely effective
- 2 Very effective
- 3 Effective
- 4 Not very effective
- 5 Not effective at all
- I do not consider the doctrine of frustration provides a remedy

THE LAW ON THE FRUSTRATED CONTRACTS ACT 1944

27. Have you heard of the Frustrated Contracts Act 1944?

- No – go to question 28
- Yes - answer the following questions:

- 27.1 When did you find out about the Frustrated Contracts Act 1944?
- Before September 2010
 - After September 2010 but before February 2011
 - After February 2011
 - Another time, please specify when
- 27.2 What do you know about the Frustrated Contracts Act 1944?
- 27.3 Do you think the Frustrated Contracts Act 1944 provides a remedy for resolving earthquake-related lease issues?
- No
 - Yes
- Please explain your answer
- 27.4 If you consider the Frustrated Contracts Act 1944 does provide a remedy for earthquake-related lease issues, please rank on a scale of 1 to 5 how effective you consider it to be with 1 being “extremely effective” and 5 being “not effective at all”:
- Extremely effective
 - Very effective
 - Effective
 - Not very effective
 - Not effective at all
 - I do not consider the Frustrated Contracts Act 1944 provides a remedy

THE LAW ON “UNTENANTABLE”

28. In clauses 26 and 27 of the ADLS lease about damage to the premises the term “untenantable” is used. Have you heard of the term “untenantable”?
- No – go to question 29
 - Yes - answer the following questions:
- 28.1 When did you find out about the law on a building being “untenantable”?
- Before September 2010
 - After September 2010 but before February 2011
 - After February 2011
 - Another time, please specify when

- 28.2 What is your understanding of the law on when a building is “untenantable”?
- 28.3 Do you consider that any of the following situations would prevent a tenant from using a building? (select any that you consider are applicable)
- Damage to the interior of the building
 - Cracking to floors and walls
 - Collapsed staircases
 - Flooding of building and/or basement
 - Lack of essential services
 - Lack of access to building
 - Health and safety of workers is compromised by the state of the building
 - Safety of building is doubtful due to unsafe neighbouring building
 - The requirement for strengthening of building
 - The requirement for repairs to building
 - Other (please explain)

FORCE MAJEURE CLAUSES

A force majeure clause is a clause inserted into a contract to set out what should happen to the contract in the event of a natural disaster, act of terrorism or war or events beyond the control of the parties. Sometimes they are called clauses that deal with “Acts of God”.

29. Have you ever heard of a force majeure clause?
- No – go to question 30
 - Yes – answer the following questions:
- 29.1 When did you find out about a force majeure clause?
- Before September 2010
 - After September 2010 but before February 2011
 - After February 2011
 - Another time, please specify when

29.2 What is your understanding of a force majeure clause?

29.3 Do you think that the use of a force majeure clause in your lease would have provided a better solution for resolving earthquake-related lease issues than how you actually resolved your issues?

29.4 If you consider that a force majeure clause would have provided a remedy for earthquake-related lease issues, please rank how effective you consider it might have been on a scale of 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”:

- ☐ 1 Extremely effective
- ☐ 2 Very effective
- ☐ 3 Effective
- ☐ 4 Not very effective
- ☐ 5 Not effective at all
- ☐ I do not consider that a force majeure clause would have provided a remedy

30. In light of your experiences in the aftermath of the earthquakes do you consider that the law is clear regarding your legal rights as a landlord?

- ☐ Yes
- ☐ No

If no, please explain your answer.

31. In light of your experiences in the aftermath of the earthquakes do you consider that the law has provided effective solutions for any problems that you have encountered?

- ☐ I have not encountered any problems
- ☐ Yes
- ☐ No

Please explain your answer.

PART 4: THE FUTURE

These are questions about how you would act in the future knowing what you know now.

32. In light of your experiences in the aftermath of the earthquakes, how thorough are you when reading the terms of your lease today compared to the time before the earthquakes?

33. In light of your experiences in the aftermath of the earthquakes, are there any changes you would make or have made to a new lease?

- No – go to question 34.
- Yes - answer the following question:

33.1 What changes have you made or would you make? (please explain)

34. In light of tenants' experiences after the earthquakes there may be additional clauses they want in their leases to allow them to terminate in certain circumstances. Which of the following clauses would you would agree to being inserted in your lease?

- The tenant can terminate the lease if the building becomes inaccessible for any reason for a period of six months
- The tenant can terminate the lease if the building requires repairs that are estimated to take six months or longer
- The tenant can terminate the lease if the building lacks essential services for a period of six months or longer
- Other clauses you would insert – please explain
- Do not agree to any changes – please explain

35. In light of your experiences in the aftermath of the earthquakes, which of the following (if any) do you think **would have best met your needs?**

- Termination of lease
- Suspension of rent
- Payment of a portion of the full rent
- Payment of full rent
- Continuation of lease
- Alternative accommodation
- Renegotiation of the terms of the lease

- None of the above
- Other remedy (please explain)

36. In your opinion does there need to be any change in the law to clarify the rights of parties to commercial leases in light of earthquake-related issues that arose after the Canterbury earthquakes?

- No – go to question 37
- Yes - answer the following question:

36.1 What changes would you like to see? Select those that are applicable.

- The use of force majeure clauses (these are clauses specifically dealing with what will happen to the lease in a natural disaster)
- Remedies contained in the lease
- Remedies contained in a statute
- A specialist Tribunal or Authority set up to determine lease issues arising out of extraordinary events like the Canterbury earthquakes; (for example the Weathertight Homes Tribunal (for Leaky Homes) or the Hawkes Bay Adjustment Court (for the Napier earthquake)
- Other remedies (please specify)

37. Are there any other general comments that you wish to make about your experiences as a landlord in the aftermath of the earthquakes?

Thank you for completing this questionnaire.

Please return the completed questionnaire by email to toni.collins@pg.canterbury.ac.nz or post to Toni Collins, The University of Canterbury, School of Law, Private Bag 4800, Christchurch 8140.

When I have received the questionnaire I will contact you to arrange a suitable time to interview you about your answers.

(f) Full Questionnaire for Lawyers in relation to an ADLS lease

Telephone: +64 3 3667001 ext 3715
Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

The project is being carried out as research for a PhD thesis by Toni Collins whose contact details are set out at the top of this form. Toni will be working under the supervision of Professors Jeremy Finn and Elizabeth Toomey who can be contacted at the University of Canterbury as follows:

Professor Jeremy Finn

Direct Dial: 03 364 2780

email: jeremy.finn@canterbury.ac.nz

Professor Elizabeth Toomey

Ph: 03 364 2987 extn 8793

email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

QUESTIONNAIRE FOR LAWYERS

RE: ADLS LEASE (Fifth edition, 2008 or earlier)

The information requested in this questionnaire relates to earthquake-related issues that have arisen for clients who were parties to commercial leases during the 2010/2011 earthquakes in Canterbury. This research is NOT about insurance issues.

PART 1: GENERAL INFORMATION

1. Identification Code: FQ
2. Date completed:

PART 2: THE CANTERBURY EARTHQUAKES

3. Please list the earthquake-related lease issues that have arisen since September 2010 for clients who are commercial landlords and/or commercial tenants?
4. Please rank the earthquake-related lease issues (from the question above) in order of importance by placing a number next to each starting with number 1 to show the issue is the most important, going down in number as the issues are of less importance.

PART 3: THE LEASE

5. Do you think the ADLS lease covered the earthquake-related lease issues that arose?

Changes or amendments to clauses 26 and 27

6. What proportion of ADLS leases you saw in relation to earthquake-related lease issues had **changes or amendments to the standard form clauses 26 and 27** covering damage and destruction? (in approximate terms)
7. Without breaching confidentiality are you able to say in general terms what changes or amendments to the standard form clauses 26 and 27 of the ADLS lease you have seen.

Force majeure clauses

8. What proportion of ADLS leases you saw in relation to earthquake-related lease issues contained a **force majeure clause**? (in approximate terms)
9. Without breaching confidentiality are you able to provide any examples of force majeure clauses you have seen?

Other provisions

10. What proportion of ADLS leases you saw in relation to earthquake-related lease issues had some **other provision** that covered the circumstances that arose in the aftermath of the earthquakes? (in approximate terms)
11. Without breaching confidentiality are you able to provide any examples of the “other provisions” you have seen?

How effective was the ADLS lease

12. On a scale ranging from 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”, how effective do you consider the ADLS lease was in **clearly setting out the legal rights** of commercial landlords and tenants in relation to the earthquake-related lease issues.
 - 1 Extremely effective
 - 2 Very effective
 - 3 Effective
 - 4 Not very effective
 - 5 Not effective at all

Please provide further comments if you wish to.

13. On a scale ranging from 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”, how effective do you consider the ADLS lease was in **providing solutions** to the earthquake-related lease issues that arose for landlords and tenants in the aftermath of the earthquakes.
 - 1 Extremely effective
 - 2 Very effective
 - 3 Effective
 - 4 Not very effective
 - 5 Not effective at all

Please provide further comments if you wish to.

Term of the lease

14. Was the **length of the term of the lease** a factor you considered in relation to earthquake-related lease issues?

- ☐ I do not wish to comment
- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

15. Was the **length of the remainder of the term** of the lease at the date that the building was no longer able to be used, a factor you considered in relation to the earthquake-related lease issues?

- ☐ I do not wish to comment
- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

Right of renewal

16. What proportion of ADLS leases you saw in relation to earthquake-related lease issues contained a right of renewal? (in approximate terms)

17. If a lease contained a right of renewal, was this a factor you considered when giving advice to your clients about earthquake-related lease issues?

- ☐ Not applicable
- ☐ I do not wish to comment
- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

Termination of Lease

18. In your experience of acting for clients on earthquake-related lease issues, who were the leases terminated by?

Select one or more of the following:

- ☐ Mostly by landlords
- ☐ Mostly by tenants
- ☐ Landlords and tenants in equal numbers
- ☐ Mostly by mutual agreement between the landlord and tenant
- ☐ Not applicable

19. Without breaching confidentiality are you able to say in general terms what reasons were given for terminating the lease?

Rent

20. Have you had landlord clients seeking rent to be paid for the period that the building has not been able to be used?

- Not applicable
- No – go to question 21
- Yes - answer the following questions:

20.1 What general advice did you give landlords about pursuing rent during the period that the building was unable to be used?

20.2 Without breaching confidentiality were there any exceptions to the general advice you gave landlords about pursuing rent during the period that the building was unable to be used?

20.3 In general terms what action did most landlords take regarding rent during the period that the building was unable to be used?

Please provide further comments if you wish to.

21. Have you had tenant clients who have received requests from their landlords for rent for the period that they have been unable to use the building?

- Not applicable
- No – go to question 22
- Yes - answer the following questions:

21.1 What general advice did you give tenants about paying rent during the period that the building was unable to be used?

21.2 Without breaching confidentiality were there any exceptions to the general advice you gave tenants about paying rent during the period that the building was unable to be used?

21.3 In general terms what action did most tenants take regarding the payment of rent during the period that the building was unable to be used?

Please provide further comments if you wish to.

22. Were you a commercial landlord or a commercial tenant (as well as being a lawyer) on or before 4th September 2010?

- ☐ No – go to question 23
- ☐ A commercial tenant
- ☐ A commercial landlord
- ☐ A commercial tenant and a commercial landlord

22.1 Was your ability to give advice to clients about earthquake-related lease issues affected by your own experience as a commercial landlord and/or commercial tenant?

- ☐ No
- ☐ Yes

If yes how was your ability to give advice affected?

PART 4: THE LAW

Is the law clear?

23. What areas of the law did you consider when you first began advising clients on earthquake-related lease issues?

24. At the time of the first major earthquakes (the period between 4 September 2010 and 28 February 2011 approximately), did you consider that the general law governing earthquake-related lease issues was clear?

- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

25. When clients sought your advice on earthquake-related lease issues after 4th September 2010 did you refresh your knowledge of the law in relation to these issues?

Select all that are applicable.

- ☐ I do not wish to comment
- ☐ No – go to question 27
- ☐ Yes through my own research of the law
- ☐ Yes through research done by my law firm
- ☐ Yes through information from the New Zealand Law Society or local Law Society
- ☐ Yes through other means (specify)

26. As at today's date do you consider that the general law governing earthquake-related lease issues is clear?

- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

The Law on the Doctrine of Frustration

27. Was the doctrine of frustration something you considered when giving advice to clients about earthquake-related lease issues?

- ☐ I do not wish to comment
- ☐ No
- ☐ Yes

If yes please answer the following questions:

27.1 In general terms what advice did you give clients regarding the doctrine of frustration as it related to earthquake-related lease issues?

27.2 Do you consider that the doctrine of frustration provides a remedy for resolving some of the earthquake-related lease issues?

- ☐ I do not wish to comment.
- ☐ Yes
- ☐ No

Please provide further comments if you wish to.

27.3 If in your opinion the doctrine of frustration does provide a remedy, please rank how effective you consider it to be on a scale ranging from 1 to 5 with 1 being "extremely effective" and 5 being "not effective at all":

- ☐ 1 Extremely effective
- ☐ 2 Very effective
- ☐ 3 Effective
- ☐ 4 Not very effective
- ☐ 5 Not effective at all

Please provide further comments if you wish to.

- 27.4 What changes to the law on frustration of contract do you consider would make the law more effective? Select all that are applicable:
- The provision of a definition of a “frustrated contract”
 - Clarification about whether a lease can be a frustrated contract in New Zealand
 - Clarification about the length of time that must pass when a building is unable to be used, for the lease to be frustrated – for example:
 - during the red zone cordon
 - for safety reasons
 - when repair/strengthening work has to be carried out
 - Clarification about whether foreseeability is an issue that affects contracts that are potentially frustrated
 - Other changes (please explain)
- 27.5 Do you consider that the Frustrated Contracts Act 1944 provides effective solutions for earthquake-related lease issues?
- I do not wish to comment
 - No
 - Yes
- 27.6 If you consider the Frustrated Contracts Act 1944 provides effective solutions please rank how effective you consider it to be on a scale of 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”.
- 1 Extremely effective
 - 2 Very effective
 - 3 Effective
 - 4 Not very effective
 - 5 Not effective at all
 - I do not consider the Frustrated Contracts Act 1944 provides effective solutions for earthquake-related lease issues

The law on when a building is “untenantable”

28. Did you consider the meaning of “untenantable” in clause 27 of the ADLS lease when giving advice to clients concerning earthquake-related lease issues?
- I do not wish to comment – go to question 29

- No – go to question 29
- Yes

If yes please answer the following questions:

28.1 Do you think clause 27 of the ADLS lease is clear in its application to the circumstances of commercial landlords and tenants in the aftermath of the earthquakes?

- No
- Yes

Please provide further comments if you wish to.

28.2 In general terms what advice did you give clients regarding the meaning of “untenantable” in clause 27 of the ADLS lease as it applied to earthquake-related lease issues?

28.3 In relation to the law concerning a building being “untenantable”, what changes do you consider would make the law more effective? Please select all that are applicable:

- A definition of “untenantable”
- The definition of “untenantable” being changed to include for example:
 - lack of access to a building for a number of months or longer
 - damage to essential features like staircases
 - damage to a building by flooding in basements
 - damage to a building - cracks in floors and walls
 - lack of essential services
 - an unsafe building – it has been damaged itself or is situated close to an unsafe building
 - the requirement for strengthening and repair work to the building which will take a number of months or longer
 - health and safety obligations are compromised for workers in the building
- The requirement for disclosure of building reports to both parties to a commercial lease to enable decision-making about whether the building is untenable
- Other changes (please explain)

Other Law

29. Was there any other law that you considered when advising your clients on earthquake-related lease issues? Select all that are applicable:
- ☐ The law on the definition of “total destruction” (in the ADLS lease)
 - ☐ The law on permitted use
 - ☐ The law on zoning issues
 - ☐ The law on the time that it will take to repair and strengthen buildings in the future
 - ☐ Other, please explain

Resolution of Issues

30. What proportion of your clients resolved their earthquake-related lease issues themselves, without having to use your legal services or go to court? (in approximate terms)
31. What solutions have your clients been seeking for their earthquake-related lease issues? Select all that are applicable:
- ☐ Termination of the lease
 - ☐ Suspension of rent
 - ☐ Payment of a portion of the full rent
 - ☐ Payment of the full rent
 - ☐ Continuation of the lease
 - ☐ Renegotiation of the terms of the lease
 - ☐ Alternative accommodation
 - ☐ None of the above
 - ☐ Other (please explain)
32. If you answered question 31, please rank the solutions in order of “most used” to “least used” by placing a number next to each starting with 1 being the “most used” solution.

PART 5: THE FUTURE

33. Have you or your firm made any changes to leases since September 2010 in light of the earthquake-related lease issues that have arisen?

34. In your experience have parties been willing to accept changes to their leases since the earthquakes?

Commercial Landlords

- ☐ Not applicable
- ☐ Yes
- ☐ No

Commercial Tenants

- ☐ Not applicable
- ☐ Yes
- ☐ No

35. In your opinion does there need to be any change in the law to clarify the rights of parties to commercial leases in light of the earthquake-related lease issues that arose after the Canterbury earthquakes?

- ☐ No
- ☐ Yes

If yes, what changes do you think need to be made?

- ☐ The use of force majeure clauses
- ☐ Remedies contained in the lease
- ☐ Remedies contained in a statute
 - Frustrated Contracts Act 1944
 - Property Law Act 2007
 - Other, please state.
- ☐ A specialist Tribunal or Authority set up to determine lease issues arising out of extraordinary events like the Canterbury earthquakes? (for example the Weathertight Homes Tribunal or the Hawkes Bay Adjustment Court (for the Napier earthquake).
- ☐ Other remedies (please specify)

PART 4: General Questions

36. Do you consider that having or not having business interruption insurance had an impact on decisions made by landlords and tenants over earthquake-related lease issues?

- ☐ No
- ☐ Yes

Please explain.

37. Are there any other general comments about your experience in dealing with commercial landlords and tenants in the aftermath of the Canterbury earthquakes that you wish to make?

Thank you for completing this questionnaire.

Please return the completed questionnaire by email to toni.collins@pg.canterbury.ac.nz or post to Toni Collins, The University of Canterbury, School of Law, Private Bag 4800, Christchurch 8140.

When I have received the questionnaire I will contact you to arrange a suitable time to interview you about your answers.

(g) Full Questionnaire for Landlords with another form of lease

Telephone: +64 3 3667001 ext 3715
Email: toni.collins@pg.canterbury.ac.nz

August 2013



QUESTIONNAIRE

Research into the Experiences of Parties to Commercial Leases in the
Aftermath of the Canterbury Earthquakes

Please read the following note before completing the questionnaire.

You are invited to participate in the research project by completing the following questionnaire. The aim of the project is to examine the effectiveness of the law relating to commercial leases in the aftermath of the Canterbury earthquakes.

The project is being carried out as research for a PhD thesis by Toni Collins whose contact details are set out at the top of this form. Toni will be working under the supervision of Professors Jeremy Finn and Elizabeth Toomey, who can be contacted at the University of Canterbury as follows:

Professor Jeremy Finn

Direct Dial: 03 364 2780

email: jeremy.finn@canterbury.ac.nz

Professor Elizabeth Toomey

Ph: 03 364 2987 extn 8793

email: elizabeth.toomey@canterbury.ac.nz

They will be pleased to discuss any concerns you may have about participation in this project.

The questionnaire is anonymous, and you will not be identified as a participant in this study without your consent.

You may withdraw your participation, including withdrawal of any information you have provided, until your questionnaire has been added to the others collected. At that point and thereafter it may not be able to be retrieved.

If you complete this questionnaire you have consented to participate in the project, and you have consented to publication of the results of the project with the understanding that anonymity will be preserved, unless you have specifically consented to being identified as indicated on the consent form.

QUESTIONNAIRE FOR COMMERCIAL LANDLORDS

The information requested in this questionnaire relates to a commercial lease you had with a tenant prior to the 4 September 2010.

This questionnaire is asking for information about your experiences as a landlord in the aftermath of the Canterbury earthquakes. This research is NOT about insurance issues.

PART 1 : GENERAL INFORMATION

1. Identification Code: FQ
2. Date completed:

Questions about the building

3. What was the location of the building on 4 September 2010?
 - ☐ Christchurch central business district
 - ☐ Christchurch suburbs North
 - ☐ Christchurch suburbs East
 - ☐ Christchurch suburbs West
 - ☐ Christchurch suburbs South
 - ☐ Christchurch rural including Halswell, Tai Tapu, Lincoln, Rolleston, Yaldhurst, West Melton, Kaiapoi, Rangiora.
 - ☐ Canterbury rural (over 25km outside Christchurch)
 - ☐ Other (please specify)
4. Did the building have more than one tenant (as at 4 September 2010)?
 - ☐ No - go to question 5
 - ☐ Yes - answer the following questions:
 - 4.1 How many tenants had a lease of the building?
 - 4.2 Did any of the tenants of the building have more than one lease with you?

Select **one** of the following that is applicable:

 - ☐ No – go to question 5
 - ☐ Yes - more than one lease in one building
 - ☐ Yes - more than one lease in more than one building

- 4.3 Have your dealings over earthquake-related issues with a tenant who has multiple leases with you been any different from your dealings with a tenant who has only one lease with you?

- ☐ No
- ☐ Yes

If yes, please explain why the dealings have been different.

The questions for the next part of this questionnaire are designed to gather information about your experiences after the earthquakes in relation to ONE BUILDING and ONE TENANT in that building. If you had other commercially leased buildings with tenants at that time, you are welcome to complete a separate questionnaire for each.

Relationship with your Tenant

5. How long had you been in a landlord/tenant relationship with your tenant on 4th September 2010 – that is, the cumulative time of all leases with this tenant?

- ☐ Less than one year
- ☐ 1 – 2 years
- ☐ 2 – 5 years
- ☐ 5 – 10 years
- ☐ Over 10 years
- ☐ Other (please explain)

6. What do you know about your tenant's business?

Select any of the following that are applicable to your tenant (if you are able to):

- ☐ International business
- ☐ National business
- ☐ Canterbury based business
- ☐ Company
- ☐ Partnership
- ☐ Sole trader
- ☐ Associated with the government
- ☐ Other (please explain)
- ☐ I do not know about my tenant's business

7. On a scale of 1 to 5 with 1 being “extremely good” and 5 being “poor” how would you describe the relationship you had with your tenant prior to 4 September 2010?
- 1 Extremely good
 - 2 Very good
 - 3 Good
 - 4 Not very good
 - 5 Poor
 - Other (please explain)
8. Has the relationship with your tenant (as described above in question 7) changed since 4 September 2010?
- No – go to question 9
 - Yes – answer the following questions
- 8.1 Why has the relationship changed?
- 8.2 How has the relationship changed – that is, has it got better or worse?

Earthquakes

9. Prior to 4 September 2010 had you ever considered your building to be at risk from earthquakes such as those experienced in Christchurch since 2010?
10. Prior to 4 September 2010 had you ever considered that your building might be:
- Demolished Yes/No
 - Requiring extensive repairs Yes/No
 - Unable to be accessed because it is in an inaccessible area Yes/No
 - Unable to be accessed because it requires repairs Yes/No
 - Unable to be accessed because it requires strengthening Yes/No
 - Unable to be accessed for safety reasons Yes/No
 - Unable to be accessed because it lacks essential services (power, water, sewerage) Yes/No
 - Other (please explain)

PART 2: THE CANTERBURY EARTHQUAKES

I am interested in learning about the impact of the earthquakes on your building.

11. Did the earthquakes cause damage to the building you leased?

- ☐ No – go to question 12
- ☐ Yes - answer the following question:

11.1 Which earthquake(s) were the most damaging in that they affected your ability to use or access the building? (referred to from now on in this questionnaire as the **“significant earthquake(s)”**)

Select any of the following that are applicable.

- ☐ September 2010
- ☐ December 2010 (Boxing Day earthquake)
- ☐ February 2011
- ☐ June 2011
- ☐ December 2011
- ☐ Other (please explain)

12. How was the building affected by the significant earthquake(s)?

Select any of the following that are applicable to your situation as at today's date.

- ☐ Building has to be or has been demolished
- ☐ Building lacks essential services
- ☐ Building cannot be accessed because it needs repairs
- ☐ Building cannot be accessed because it needs strengthening
- ☐ Building cannot be accessed because of safety concerns around damage to a neighbouring building
- ☐ Building can be used now but will have to be repaired in the future
- ☐ Building can be used now but will have to be strengthened to the Council's Building Code requirements in the future
- ☐ Other reason (please explain)

13. Has your tenant been prevented from using the building as a result of the significant earthquake(s)?

- ☐ No – go to question 14
- ☐ Yes- answer the following questions:

- 13.1 Why has the building not been used by the tenant since the significant earthquake(s)?
- 13.2 What was the length of time your tenant was unable to use the building? (or if it is on-going, as at today's date, how long has your tenant been unable to use the building?)
- Not applicable
 - Less than one week
 - 1- 4 weeks
 - 1-2 months
 - 2-6 months
 - 6-12 months
 - 1- 2 years
 - Over 2 years
- 13.3 Has your tenant paid rent for the period of time that the building has not been able to be used?
- No
 - Yes
 - Other
- Please explain

PART 3: THE LEASE - (You will need a copy of your lease to complete this part)

I am interested in learning about the impact of the earthquakes on you as a landlord.

Changes to the Lease

14. Did your lease contain provision covering the situation you experienced after the earthquake?
- No – go to question 15.
 - Yes - answer the following questions:

14.2 What did the lease cover:

- ☐ Destruction of the building
- ☐ Damage to the building
- ☐ Lack of access to an undamaged building
- ☐ Lack of essential services to the building
- ☐ Repairs to the building
- ☐ Strengthening work to the building
- ☐ Force majeure clause
- ☐ Other provision that helped after the earthquakes (please explain)

If you are able to, can you provide a copy of those clauses?

Term of the lease

15. What was the term of the lease, including any rights of renewal?

16. If the building was unable to be used as a result of the significant earthquake(s), what was the length of the term still to run on the first day that the building was unable to be used (including any rights of renewal)?

- ☐ Not applicable
- ☐ Under one year
- ☐ 1-2 years
- ☐ 3-5 years
- ☐ 6-10 years
- ☐ More than 10 years
- ☐ Other (please explain)

Provisions in Lease

17. Did the provisions in the lease help you to understand your legal rights in relation to your circumstances after the significant earthquake(s)?

- ☐ No
- ☐ Yes

If yes, which provisions?

Legal Advice

18. Did you seek legal advice about your lease after the significant earthquake(s)?

- ☐ No
- ☐ Yes

If yes, if you can say what legal advice you received about your situation please do so.

Resolving earthquake-related lease issues

19. How did you resolve any earthquake-related lease issues with your tenant? Select any of the following that are applicable to your situation.

- ☐ Termination of the lease
- ☐ Suspension of rent
- ☐ Payment of a proportion of the rent
- ☐ Continuation of full rent
- ☐ Renegotiation of the terms of the lease
- ☐ Continuation of lease
- ☐ Other solution (please explain)

20. Did you have a dispute with your tenant over the lease as a result of the significant earthquake(s)?

- ☐ No – go to question 21.
- ☐ Yes - answer the following questions:

20.1 What was the dispute about?

20.2 How did you resolve any issues with your tenant? Select any of the following that are applicable to your situation.

- ☐ Negotiating a solution with your tenant directly
- ☐ Using your lawyer
- ☐ Using the terms of the lease (please specify the clause used)
- ☐ Using the general law
- ☐ Using alternative dispute resolution such as arbitration or mediation
- ☐ Going to court
- ☐ Another way

Please explain your answer

20.3 What was the solution reached?

Termination of the lease

21. Has the lease been terminated as a result of the significant earthquake(s)?

- ☐ No – go to question 22
- ☐ Yes - answer the following questions:

21.1 How was the lease terminated?

- ☐ By the Tenant
- ☐ By the Landlord

- By mutual agreement
- Other (please explain)

21.6 What was the reason given for termination of the lease?

Select any of the following:

- Building has to be or has been demolished
- Building lacks essential services
- Unable to access building because it is in the red zone cordon
- Unable to access building because it needs repairs
- Unable to access building because it needs strengthening to the Building Code
- Unable to access building because of safety concerns around damage to a neighbouring building
- Building can be used now but will have to be repaired in the future
- Building can be used now but will have to be strengthened to the Building Code in the future
- Issues about zoning
- Issues about permitted use
- Other reason (please explain)

21.7 Was a specific clause in the lease used as the basis for termination?

- Yes - specify the clause relied upon
- No - explain on what basis the lease was terminated

21.8 How long after the significant earthquake(s) was the lease terminated?

- Less than 1 week
- 1- 4 weeks
- 1 – 6 months
- 7 - 12 months
- 1 – 2 years
- Over 2 years

21.9 Why did it take that period of time for the lease to be terminated?

Reports on the Building

22. Did you obtain a building, engineers or other report on the building after the significant earthquake(s)?

- No – go to question 23
- Yes - answer the following question:

22.1 Have you shown or provided these to the tenant?

- No
- Yes

Please explain your answer.

New Tenants

23. Have you found new tenants for your building?

- Not applicable – go to question 24
- No – go to question 24
- Yes - answer the following questions:

23.1 Was it difficult to get a new tenant for your building?

- No
- Yes

23.2 Is the rent the new tenant is paying:

- Higher than what the previous tenant was paying
- The same as what the previous tenant was paying
- Lower than what the previous tenant was paying

Insurance

24. Did you have business interruption insurance, loss of rent cover or any other insurance you used after the significant earthquake(s)?

- No – go to question 25
- Yes - answer the following question:

24.1 Did having insurance impact on the decisions you made regarding the lease? (for example you didn't require the tenant to cover the rent if it was covered by insurance).

- No
- Yes

Please explain your answer.

- 24.2 Did your insurance company require you to seek rent from your tenant for the period that the building was unable to be used?
- No
 - Yes

Understanding your legal rights

25. How did you find out what your legal rights were concerning your building and your circumstances after the significant earthquake(s)?

- From the terms of the lease
- I researched the law
- From my lawyer
- From my accountant or other professional advisor
- I did not find out my legal rights
- Another way (please explain)

THE LAW ON THE DOCTRINE OF FRUSTRATION

This next part will ask you questions about a legal doctrine called the doctrine of frustration. This is a legal rule or principle that when a contract becomes impossible of performance or the purpose of the contract has changed significantly from what the parties originally contracted for, frustration occurs and the contract comes to an end.

26. Have you heard of the doctrine of frustration?

- No – go to question 27
- Yes - answer the following questions:

26.1 When did you find out about the doctrine of frustration?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

26.2 What do you know about the doctrine of frustration?

26.2 Do you think the doctrine of frustration provides a remedy for resolving earthquake-related lease issues?

26.3 If you consider the doctrine of frustration does provide a remedy for earthquake-related lease issues, please rank from 1 to 5 how effective you consider it to be with 1 being “extremely effective” and 5 being “not effective at all”:

- 1 Extremely effective
- 2 Very effective
- 3 Effective
- 4 Not very effective
- 5 Not effective at all
- I do not consider the doctrine of frustration provides a remedy

THE LAW ON THE FRUSTRATED CONTRACTS ACT 1944

27. Have you heard of the Frustrated Contracts Act 1944?

- No – go to question 28
- Yes - answer the following questions:

27.1 When did you find out about the Frustrated Contracts Act 1944?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

27.4 What do you know about the Frustrated Contracts Act 1944?

27.5 Do you think the Frustrated Contracts Act 1944 provides a remedy for resolving earthquake-related lease issues?

- No
- Yes

Please explain your answer

- 27.4 If you consider the Frustrated Contracts Act 1944 does provide a remedy for earthquake-related lease issues, please rank on a scale of 1 to 5 how effective you consider it to be with 1 being “extremely effective” and 5 being “not effective at all”:
- Extremely effective
 - Very effective
 - Effective
 - Not very effective
 - Not effective at all
 - I do not consider the Frustrated Contracts Act 1944 provides a remedy

THE LAW ON “UNTENANTABLE”

28. In some leases there are clauses about damage to premises which use the term “untenantable”. If the premises are untenantable then the lease can be terminated. Have you heard of the term “untenantable”?

- No – go to question 29
- Yes - answer the following questions:

28.1 When did you find out about the law on a building being “untenantable”?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

28.2 What is your understanding of the law on when a building is “untenantable”?

28.3 Do you consider that any of the following situations would prevent a tenant from using a building? (select any that you consider are applicable)

- Damage to the interior of the building
- Cracking to floors and walls
- Collapsed staircases
- Flooding of building and/or basement
- Lack of essential services

- Lack of access to building
- Health and safety of workers is compromised by the state of the building
- Safety of building is doubtful due to unsafe neighbouring building
- The requirement for strengthening of building
- The requirement for repairs to building
- Other (please explain)

FORCE MAJEURE CLAUSES

A force majeure clause is a clause inserted into a contract to set out what should happen to the contract in the event of a natural disaster, act of terrorism or war or events beyond the control of the parties. Sometimes they are called clauses that deal with “Acts of God”.

29. Have you ever heard of a force majeure clause?

- No – go to question 30
- Yes – answer the following questions:

29.1 When did you find out about a force majeure clause?

- Before September 2010
- After September 2010 but before February 2011
- After February 2011
- Another time, please specify when

29.2 What is your understanding of a force majeure clause?

29.3 Did your lease contain a force majeure clause?

- Yes - if you are able to provide a copy of the clause, please do so – continue on to question 29.4.
- No – please answer the following questions:

29.3.1 Do you think that the use of a force majeure clause in your lease would have provided a better solution for resolving earthquake-related lease issues than how you actually resolved your issues?

29.3.2 If you consider that a force majeure clause would have provided a remedy for earthquake-related lease issues, please rank how effective you consider it might have been on a scale of 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”:

- ☐ 1 Extremely effective
- ☐ 2 Very effective
- ☐ 3 Effective
- ☐ 4 Not very effective
- ☐ 5 Not effective at all
- ☐ I do not consider that a force majeure clause would have provided a remedy

29.4 Do you consider that the force majeure clause in your lease covered the earthquake-related lease issues you experienced?

- ☐ Yes
- ☐ No

Please explain your answer.

29.5 Please rank how effective you consider the force majeure clause in your lease was at providing a remedy for your earthquake-related lease issues on a scale of 1 to 5 with 1 being “extremely effective” and 5 being “not effective at all”:

- ☐ 1 Extremely effective
- ☐ 2 Very effective
- ☐ 3 Effective
- ☐ 4 Not very effective
- ☐ 5 Not effective at all

30. In light of your experiences in the aftermath of the earthquakes do you consider that the law is clear regarding your legal rights as a landlord?

- ☐ Yes
- ☐ No

If no, please explain your answer.

31. In light of your experiences in the aftermath of the earthquakes do you consider that the law has provided effective solutions for any problems that you have encountered?

- ☐ I have not encountered any problems
- ☐ Yes
- ☐ No

Please explain your answer.

PART 4: THE FUTURE

These are questions about how you would act in the future knowing what you know now.

32. In light of your experiences in the aftermath of the earthquakes, how thorough are you when reading the terms of your lease today compared to the time before the earthquakes?

33. In light of your experiences in the aftermath of the earthquakes, are there any changes you would make or have made to a new lease?

- ☐ No – go to question 34.
- ☐ Yes - answer the following question:

33.1 What changes have you made or would you make and why? (please explain)

34. In light of tenants' experiences after the earthquakes there may be additional clauses they want in their leases to allow them to terminate in certain circumstances. Which of the following clauses would you would agree to being inserted in your lease?

- ☐ The tenant can terminate the lease if the building becomes inaccessible for any reason for a period of six months
- ☐ The tenant can terminate the lease if the building requires repairs that are estimated to take six months or longer

- The tenant can terminate the lease if the building lacks essential services for a period of six months or longer
- Other clauses you would insert – please explain
- Do not agree to any changes – please explain

35. In light of your experiences in the aftermath of the earthquakes, which of the following (if any) do you think **would have best met your needs?**

- Termination of lease
- Suspension of rent
- Payment of a portion of the full rent
- Payment of full rent
- Continuation of lease
- Alternative accommodation
- Renegotiation of the terms of the lease
- None of the above
- Other remedy (please explain)

36. In your opinion does there need to be any change in the law to clarify the rights of parties to commercial leases in light of earthquake-related issues that arose after the Canterbury earthquakes?

- No – go to question 37
- Yes - answer the following question:

36.1 What changes would you like to see? Select those that are applicable.

- The use of force majeure clauses (these are clauses specifically dealing with what will happen to the lease in a natural disaster)
- Remedies contained in the lease
- Remedies contained in a statute
- A specialist Tribunal or Authority set up to determine lease issues arising out of extraordinary events like the Canterbury earthquakes; (for example the Weathertight Homes Tribunal (for

Leaky Homes) or the Hawkes Bay Adjustment Court (for the Napier earthquake)

- Other remedies (please specify)

38. Are there any other general comments that you wish to make about your experiences as a landlord in the aftermath of the earthquakes?

Thank you for completing this questionnaire.

Please return the completed questionnaire by email to toni.collins@pg.canterbury.ac.nz or post to Toni Collins, The University of Canterbury, School of Law, Private Bag 4800, Christchurch 8140.

When I have received the questionnaire I will contact you to arrange a suitable time to interview you about your answers.

APPENDIX D

LIST OF EARTHQUAKE-RELATED LEASE ISSUES

The following earthquake-related lease issues were raised by lawyers in their questionnaires as problems they were dealing with at the time. They are a good example of how many different issues arose for landlords and tenants in the aftermath of the earthquakes.

Questions:

- Do tenants have to pay rent and outgoings for premises that are undamaged but inaccessible?
- Do tenants have to pay rent for a building that can be repaired but is inaccessible?
- Are premises “untenantable” if they are inaccessible for a prolonged period of time?
- Is the lease “frustrated”?
- Can a lease can be terminated because the building is inaccessible?
- How much damage does there need to be before the premises are rendered “untenantable”?
- What is the length of time that must pass before premises are deemed to be “untenantable”?
- Can improvements rent be charged after earthquake repairs?
- Is building untenantable if it is defined as “earthquake prone” under the Building Act (ie it is below code)?
- What constitutes a “fair proportion” of rent and outgoings to be abated?
- Does the lease go back on foot once the original earthquake damage is repaired or once all the strengthening work is done?
- If earthquake strengthening changes the look and layout of the premises what impact should that have on rent? The tenants have gained a safer and stronger building but have lost floor space and it has affected the aesthetics of the premises.
- If the building does not meet the requirements of the Building Code then is it untenantable?
- Do tenants have to continue tenanting the building if the building needed extensive work to bring it up to Code because it would be disruptive to their business?

Other Issues

- The demolition of the building, the permitted use of the building and zoning issues.
- Landlords carrying out repairs to damaged buildings (access for landlords and tenants and the problem of being without premises);
- Landlords carrying out seismic strengthening;
- Landlord's health and safety obligations in relation to an earthquake prone building;
- Change of use issues;
- Insurance availability;
- Availability of information on buildings as to their damage and the repair time;
- Insurance claims; Insurance excesses;
- Ownership of fit-outs;
- Landlord not holding insurance cover for building;
- Liability for repairs when tenant's fit-out damaged in the course of the landlord's repairs;
- Perceived lack of standardisation in measurement techniques between competing DEEs;¹
- Liability for removal of tenants fixtures if building to be demolished;
- Tenant's ability to recover their equipment from premises;
- Delay in obtaining information about the building;
- Building consents and resource consents;
- Landlord's delay in sharing information with the tenant;

¹ Detailed Engineering Evaluation (DEE).

APPENDIX E

METHODOLOGY USED TO FIND THE NUMBER OF REGISTERED LEASES IN THE CBD OF CHRISTCHURCH FROM THE LINZ DATABASE

Vicinity Solutions is a geospatial consulting firm; <www.vicinitysolutions.co.nz>

This firm produced a map showing registered leases in the CBD of Christchurch from data obtained from the Land Information New Zealand database of the computer registers of all properties in New Zealand. The methodology used is set out below.

METHODOLOGY

1. The area investigated was the CBD of Christchurch. The boundary of the area was the four avenues being Bealey Avenue, Fitzgerald Avenue, Moorhouse Avenue and Deans Avenue. The records were filtered to find all registered leases within this boundary;
2. Leases with memorial text describing 99 or 999 year terms were excluded. The reason for excluding these leases is that the doctrine of frustration is very unlikely to apply to leases with lengthy terms;
3. The map describes the following:
 - All registered leases;
 - Leases with “right of way” within memorial text;
 - Leases with “easement” within memorial text;
 - Leases with “fencing” within memorial text;
 - Leases with “Heritage Hotel” within memorial text.

These terms within the memorial text were retained because they are all items that may appear on the computer register containing a registered lease.