IN THE MATTER OF STUDENT LEASES/PANDEMIC/FRUSTRATION OF CONTRACT

OPINION

FACTS AS SUBMITTED

1. Landlords have leased premises to students

2. Pandemic has interfered with College and University attendance, but online attendance is proceeding with lab and some class attendance subject to course.

3. Students have abandoned units with suggestion that due to pandemic the lease agreement is frustrated.

ISSUES

4. Does the pandemic constitute a frustration of a student lease agreement?

REVIEW

Frustrated Contracts Act

5. The relevant section of the Frustrated Contracts Act states the following;

Application of Act
2 *(1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged. R.S.O. 1990, c. F.34, s. 2 (1); 1993, c. 27, Sched.*

Based simply on this foundation section of the Act it is submitted that a student lease would not generally be frustrated (invalidated) by the covid pandemic insofar as the performance of the lease has not become impossible. In other words the property is still available and habitable, the tenant can reside there and attend school or not. The question is not convenience or cost but rather is it impossible to utilize the tenancy. It should be

noted that given the nature of the pandemic medical issues such as immune deficiencies or asthma could qualify as making something impossible)

The overall position of the Courts in respect to the frustration of a contract is outlined in the case of First Real Properties Limited v. Biogen Idec Canada Inc., 2013 ONSC 6281 (CanLII) which held;

[39] The test for frustration was defined by Binnie J. in Naylor Group v. Ellis-Don Construction Ltd., 2001 SCC 58, 2 S.C.R. 943, at paras. 53-55 as follows: Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from which was undertaken by the contract": Peter Kiewit Sons' Co. v. Eakins Construction Ltd., 1960 CanLII 37 (SCC), [1960] S.C.R. 361, per Judson J., at p. 368, quoting Davis Contractors ltd. v. Fareham Urban District Council, [1956] A.C. 696 (H.L.), at p. 729.

Earlier cases of "frustration" proceeded on an "implied term" theory. The court was to ask itself a hypothetical question: if the contracting parties, as reasonable people, had contemplated the supervening event at the time of contracting, would they have agreed that it would put the contract to an end? The implied term theory is now largely rejected because of its reliance on fiction and imputation.

More recent case law, including Peter Kiewit, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: Hydro-Québec v. Churchill Falls (Labrador) Corp., 1988 CanLII 37 (SCC), [1988] 1 S.C.R. 1087; McDermid v. Food-Vale stores (1972) Ltd. (1980), 1980 CanLII 1076 (AB QB), 14 Alta. L.R. (2d) 300 (Q.B.); O'Connell v. Harkema Express Lines Ltd. (1982), 1982 CanLII 3198 (ON SC), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; Petrogas Processing Ltd. v. Westcoast Transmission Co. (1988), 1988 CanLII 3462 (AB QB), 59 Alta. L.R. (2d) 118 (Q.B.); Victoria Wood Development Corp. v. Ondrey (1978), 1978 CanLII 1447 (ON CA), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G.H.L. Fridman, The Law of Contract in Canada (4th ed. 1999), at pp. 677-78.

[40] There is not one definition of frustration. There is this useful discussion by Mr. John Swan in his book, Canadian Contract Law, (Toronto: Lexis Nexis, 2006) at 600-601.

The problems of frustration are closely related to those of mistake: in each case the deal that the parties made turns out to be a different deal from that which they (or at least one of them) expected. The word "frustration"

deals with two typical situations: (i) where the performance of one party is more onerous – the degree necessary to provide relief being one of the difficult questions the law has to deal with – than had been envisaged by the parties when the contract was made; and (ii) where performance may have become impossible, as, e.g. by supervening illegality or by the destruction of the thing that was the subject of the contract. It is neither necessary nor helpful to focus on the precise meaning of "impossibility". Performance that is illegal may be literally impossible – at least in one sense of that word – but "practical impossibility" may be sufficient to provide an excuse. In any event, "impossibility" becomes hard to define in practical terms if performance, at least as envisaged by the parties, is only possible at huge expense.

Two well-known definitions of frustration have been offered. In Davis Contractors ltd. v. Fareham U.D.C. Lord Radcliffe said:

> *So perhaps it would be simpler to say at the outset that 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 the contract. Non haec in foedera veni. It was not this that I promised to do. There is, however, no uncertainty as to the materials upon which the court must proceed.*
>
> > *The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred.*

In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

In National Carriers Ltd. v. Panalpina (Northern) Ltd. [[1981] A.C. 675] Lord Simon of Glaisdale offered another definition:

> *Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient 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 case the law declares both parties to be discharged from further performance.*
>
> *These definitions have been approved by Canadian courts.*

[41] First Real in its closing brief relied on Professor Robertson's article, titled "Frustrated Leases: No to Never - But Rarely if Ever" (1982) 60 Can. Bar. Rev. 619, and in particular his summary of the reasons of The House of Lords in Cricklewood Property and Investment Ltd. v. Leightons Investment Trust Ltd., [1945] A.C. 221. From the article and Cricklewood, at para. 187 of the brief, the following point is made:

> *Frustration of a lease can only occur where the foundation of the contract is destroyed. In the lease situation the foundation of the agreement is that the landlord parts with the proprietary interest in the property which becomes vested in the tenant through the Offer to Lease. First Real vested its proprietary interest in Biogen through the grant of the ten (10) year term therefore completing the foundation of the agreement.*

[42] At para. 184 of the brief, there is the following statement: "The risk of the happening of a supervening event always passes to the tenant." This is not, however, Professor Robertson's view on the state of the law. The focus of the article was the change in the doctrine of frustration to leases which followed Panalpina. His view was that Lord Simon in Panalpina put "to rest the axiomatic allocation of risk to the lessee argument" (p. 624). It was important to separate a case where the lease was "primarily a conveyance" (see Cricklewood) from a case where the use of the premises was the foundation of the agreement. At pp. 623-624, there is this statement from Professor Robertson:

> *Accordingly, with regard to the doctrine of frustration within the leasehold context, the view is taken that insofar as a lease conveys and vests an interest in land then no question of impossibility of performance can arise; the tenant having received what in fact he has bargained for, namely a term of years. Of course, such an argument is premised on the assumption that the so-called object, venture, purpose or foundation of the agreement is for a term of years and nothing more. In Panalpina, Lord Wilberforce agreed that this may in fact be true yet there are as well cases where a tenant desires more than an estate, namely possession and use of the premises demised:*
>
> > *Why is it an answer, when he claims that this purpose is "frustrated" to say that he has an estate if that estate is unusable and unsaleable. In such a case, the lease or the conferring of an estate is a subsidiary means to an end, not an aim or end of itself.*
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> *Similarly, Lord Simon maintained that it is not realistic to argue that on the execution of a lease, the lessee got all that he bargained for. For example, in Panalpina the lessee did not bargain for a term of years but rather for the use of a warehouse owned by the lessor.*

His conclusion on the applicability of the doctrine of frustration to leases is that Panalpina "conclusively answers this question in the affirmative" (p. 630).

[43] First Real also relied on two British Columbia cases: Playboy Hairstyling Ltd. v. King and Tse Enterprises Ltd. (1995), 47 R.P.R. (2d) 282 and Lou-Poy v. Silva, [1983] B.C.J. No. 721. In both cases, however, the "supervening event" occurred before the contracts were entered into; they are distinguishable from this case.

[44] The discovery that the east wall was a weight bearing wall and would not receive the windows depicted in the offer to lease was an unforeseeable event which occurred without the fault of either party. There was no provision in the offer to lease to adjust the rights and obligations of the parties. The narrow window offered to Biogen meant that the performance of the agreement within the landlord's "cap" left Biogen with an office not fit for its desired purpose. This was at the heart of the agreement. To compel Biogen to proceed with the smaller windows would be to order Biogen to do something "radically different" from what the parties had agreed to (Naylor, at para. 55). The estimate was ten times the forecast cost for the windows. Performance of the agreement was impossible at that amount without disregarding the material aspects of their bargain. In my view, it would be unjust to hold Biogen to the offer in light of the new circumstances. The discovery that the wall was weight bearing was a "supervening event" which renders the agreement frustrated and unenforceable. (see ibid.).

[45] It is important to remember that in this case Mr. Francis and Mr. Parker, as reasonable and experienced businessmen, decided to ignore the offer to lease and re-negotiated its terms. They understood that they could not ask each other to abide by two material terms of the agreement: its term and the landlord's cap at $169,000. The fact that the parties conducted themselves as if the contract had been terminated by an altered situation is a factor that the court may consider in deciding if the contract had been frustrated. See Australian Dispatch Line Inc. v. Anglo Canadian Shipping Co. (1940), 1939 CanLII 242 (BC CA), 55 B.C.R. 177 (C.A.).

[46] For these reasons, the offer to lease is unenforceable. It was frustrated.

[47] In the result, the action will be dismissed.

It is submitted that based on the above decision the main issue is whether the contract/agreement can be performed. I would suggest in the case of the tenancy despite the pandemic the tenancy is available, and the tenant could stay. The fact that it may be more convenient or cheaper not to stay is irrelevant, the issue is can the tenancy proceed and in these cases it can. It should be noted that the basis for the tenant/student's rental of the unit is irrelevant as purpose of one party does not frustrate the intent of both.

Landlord Tenant Board

6. It is submitted that the LTB has echoed the above interpretation of frustration as illustrated by the case of Kenora (City) v. Eikre Holdings Ltd., 2018 ONSC 7635 (CanLII) which held;

[72] Section 19 of the Residential Tenancies Act provides:
The doctrine of frustration of contract and the Frustrated Contracts Act apply with respect to tenancy agreements.

[73] The Board, under the Residential Tenancies Act, can make a determination of whether a tenancy is frustrated.

[74] A decision was issued by the Board on September 28, 2010, in Toronto, File Number TSL-05808-10, on the issue of frustration. The City of Toronto had issued an order on September 28, 2010 to the effect that the residential complex was unsafe and that occupancy of the rental unit was prohibited. The Board cited s. 19 of the Residential Tenancies Act and explained:

> *Essentially the doctrine of frustration says that when a contract becomes impossible of performance, then the contract has come to an end. As the doctrine applies to residential tenancy agreements what this means is that when a residential complex cannot be physical lived in anymore because it has been condemned, the tenancy has come to an end by operation of law.*

[75] The Board issued an order declaring the tenancy terminated by operation of the doctrine of frustration.

[76] In London (City) v. Ordinal, 2010 ONSC 1998, the residential tenancy property was expropriated by the City of London. The tenant argued that he could not be evicted unless a ground could be established under the Residential Tenancies Act. He submitted that the Expropriations Act and the Residential Tenancies Act were in conflict and that the Residential Tenancies Act should prevail.

[77] Section 34(2) of the Expropriations Act provides:

> *Where all the interest of a lessee in land is expropriated … the lease shall be deemed to be frustrated from the date of the expropriation.*

[78] Section 35 of the Expropriations Act provides:

> *Where land has been expropriated, the compensation stands in the stead of the land, and any claim to or encumbrance on the land is, as respects the expropriating authority, converted into a claim to or upon the compensation and no longer affects the land.*

[79] Heeney J. held, at paras. 11-16 that both the lease and the relationship of landlord and tenant had been extinguished. He found that the Expropriations Act and the Residential Tenancies Act were not in conflict. Because the tenant's lease had been frustrated by law and because his leasehold interest had, in effect, been expropriated, he no longer had an interest in the land and it was not necessary to seek

termination of the tenancy under the Residential Tenancies Act. The tenancy no longer existed. Heeney J. made a declaration that the lease was deemed to be frustrated pursuant to s. 34(2) of the Expropriations Act, as of the date of expropriate.

[80] The Municipal Act, 2001, does not contain provisions similar to s. 34(2) and s. 35 of the Expropriations Act. There is no provision in the Municipal Act, 2001 that deems a lease to be frustrated because a closure order has been issued or that a claim of a tenant on the land shall be converted to a claim for compensation because the tenancy has been extinguished at law.

[81] Because the application before me does not request a declaration of frustration, it is unnecessary for me to decide that issue. I make no finding as to whether the tenancy agreements have been frustrated by the one year closure order or by the injunction under s. 440 of the Municipal Act, without prejudice to the landlord or tenants making an application under the Residential Tenancies Act to have the Board determine the question of frustration and possible termination of the leases.

Thus as indicted it is the ability to perform or exercise the tenancy not the frustration of the reason for the tenancy that is the imperative.

This position is further supported by the case of TEL-10643-10 (Re), 2011 CanLII 34537 (ON LTB) which states;

Has the original tenancy agreement been frustrated?

11. Section 19 of the Residential Tenancies Act, 2006, S.O. 2006, chapter 17 (the 'RTA') provides that:

Frustrated contracts

***19.** The doctrine of frustration of contract and the Frustrated Contracts Act apply with respect to tenancy agreements.*

12. For the purpose of this analysis, the following provisions of the Frustrated Contracts Act, R.S.O. 1990, chapter F. 34 (the 'FCA') are relevant:

Definitions

***1.** In this Act,*

"discharged" means relieved from further performance of the contract.

Application of Act

2. *(1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged.*

Adjustment of rights and liabilities

3. *(1) The sums paid or payable to a party in pursuance of a contract before the parties were discharged,*

(a) in the case of sums paid, are recoverable from the party as money received for the use of the party by whom the sums were paid; and

(b) in the case of sums payable, cease to be payable.

13. The body of jurisprudence surrounding the common law doctrine of frustration of contract is vast. However, frustration of contract is generally understood to arise when an unexpected event occurs which no party to the contract contemplated at the time of entering into the obligation and the unexpected event makes the performance of the obligation impossible.

14. Professor Fridman in The Law of Contract 4th ed. Carswell at page 677 writes:

The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party. What would appear essential is that the party claiming that a contract has been frustrated should establish that performance of the contract, as originally agreed, would be impossible. For example, if the subject-matter of the contract has been lost or destroyed, a court will be willing to determine that the contract is ended.

15. The complete destruction of the subject matter of the contract is not a pre-requisite for the doctrine to apply. For instance, frustration was held to have occurred in a case where the boiler of a ship exploded before the ship could commence service under a charter-party[1]. The same result occurred in a case where a ship was stranded for so long as to render her virtually non-existent as a carrier, although still identifiable[2]. However, in order to successfully invoke the doctrine of frustration in the case of a tenancy agreement there must be, at a minimum, serious damage that will require a prolonged period of repair. What constitutes serious damage and a prolonged repair period will turn on the facts of each case. Furthermore, as noted by Professor Fridman in the preceding excerpt, the event giving rise to the frustration cannot be self-induced.

16. Section 1 of the FCA defines "discharged" to signify "relieved from further performance." In the case of a tenancy agreement, frustration operates to discharge the contractual obligation to provide a rental unit. Thus, the frustration serves to terminate the tenancy.

17. In the matter before me, unit 211 was deemed uninhabitable by municipal authorities. Six months after the laundry room explosion, the unit remained under construction and had yet to be approved for occupation by city officials. In the circumstances, it is reasonable to conclude that the original tenancy was frustrated by a catastrophic and unanticipated event.

Thus, again it is suggested that it is clear that the fundamental issue of frustration is that the agreed contract CANNOT or is IMPOSSIBLE to perform. In the matter under consideration this is not the case thus if the tenant abandons the unit they are subject to any arrears and/or any rent due to the expiry of the lease.

CONCLUSIONS

In conclusion as indicated above while there are not yet any COVID cases on point the position of the Board and the Courts in respect to Frustration is clear insofar as the performance of the agreement must be impossible which is not the case with the pandemic unless the tenant has a medical issue that makes it impossible to continue the tenancy.

Thus, while there is an onus on the landlord to mitigate their damages by attempting to re lease if they cannot the tenant stands faced with the outstanding rent to the termination thereof.