"WHOSE RISK IS IT ANYWAY?"

We all know that frustration of leases is possible,
but why does it *never* happen?

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Introduction:

1. We all know that it is possible for a lease to be ended by the doctrine of frustration, because the House of Lords told us so in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*[1] We all have a working understanding of the doctrine of frustration, too. It is the "stuff happens" doctrine: when an unexpected and unforeseen event occurs which makes the further discharge of a contract either impossible or radically different from that which was envisaged, the contract is discharged.

2. We might all think that the Covid-19 pandemic is a prime example of "stuff is happening" which has made running retail, leisure or hospitality businesses from leasehold premises either impossible, or at least a radically different proposition from that envisaged when the contract was made. We might say the fundamental assumption underlying a lease of such premises was that customers would come through the door and spend money, which generates income at the premises from which the rent gets paid. Therefore, no customers; no rent; no point; no lease. Simple as that.

3. However, in *Bank of New York Mellon (International) Ltd. v. Cine-UK Ltd.*, the High Court declined to hold that the pandemic is a frustrating event.[2] One might say that, if the Pandemic is insufficient to frustrate a lease of retail, leisure or hospitality premises, what level of catastrophe does it take? Notwithstanding the *Panalpina* case, will frustration ever end a lease? That is a good question, which this talk will consider.

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1 [1981] AC 675 (HL).

2 [2021] EWHC 1013 (QB) (Master Dagnall). Frustration was *not* argued in the other recent "Covid case" involving real estate, *Commerz Real Investmentgesellschaft mbh v. TFS Stores Ltd.* [2021] EWHC 863 (Ch) (Chief Master Marsh).

Two Conveyancing Cases:

4. Before we get into the detail of frustration generally, and its specific application to leases, there are two illuminating conveyancing cases, which are worth the detour. The debate in *Panalpina* was very much concerned with whether the law of landlord and tenant operated differently from the general law of contract, because frustration of a lease would destroy the leasehold estate in land.[3] It might be thought that the law of freehold conveyancing would have numerous examples of sale and purchase agreements being frustrated, because that doctrinal issue does not arise: if such a contract is frustrated, the freehold estate stays with the seller.

5. Despite all the terrible things that have happened to the property market since World War One and the 1918 Spanish 'Flu pandemic, as far as I can see, there are only two reported cases relating to freehold sale and purchase contracts in which it has been argued that the contract was frustrated. In neither case did the argument succeed.

6. "Exhibit A" is *Amalgamated Investment & Property Co.Ltd. v. John Walker & Sons Ltd.*[4] In 1973, Amalgamated agreed to buy a warehouse in Commercial Road from Walker for £1.7m. Both parties understood and expected that Amalgamated would demolish it and redevelop the site. Two days after exchange of contracts, the warehouse was listed.[5] Amalgamated sought a declaration that the contract was discharged through frustration. The Court of Appeal declined because "disappointed expectations do not necessarily lead to frustrated contracts".[6]

7. Buckley LJ gave the first judgment and observed that a sale and purchase contract required the seller to provide the title to the land he had contracted to provide and required

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3 As Lord Wilberforce said at 672, "It *[the doctrine of frustration]* must be so applied with proper regard to the fact that a lease, ie a grant of a legal estate, is involved".

4 [1977] 1 WLR 164 (CA).

5 The warehouse building is still there, but is now converted for use as the Hult Business School and a branch of Benugo.

6 This quotation was applied by the trial Judge, Sir Anthony Plowman VC, and by Buckley LJ in the Court of Appeal, but actually comes from Lord Simons in *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] AC 696, 715 (HL).

the buyer to pay the agreed price. Listing of a building was not a matter of title, so Amalgamated was getting what it agreed to pay for. He went on to say that, because the seller's obligation was to provide a good title, the risk that the building might be rendered unusable for the buyer's intended purpose, must fall on the buyer, not the seller:[7]

> ... in my judgment, this is a risk of a kind which every purchaser should be regarded as knowing that he is subject to when he enters into his contract of purchase. It is a risk which I think the purchaser must carry, and any loss that may result from the maturing of that risk is a loss which must lie where it falls.

8. Lawton LJ went further, explaining that all risks as to the future for the property lay with the buyer once contracts had been exchanged:

> Anybody who buys property knows, and certainly those who buy property as property developers know, that there are all kinds of hazards which have to be taken into consideration. There is the obvious hazard of planning permission. There is the hazard of fiscal and legislative changes. There is the hazard of existing legislation being applied to the property under consideration - compulsory purchase, for example. ... All that adds up, in my judgment, to indicating that those who deal in property nowadays appreciate the existence of these kind of risks. At common law anyone entering into a contract for the purchase of real property had to accept the risk of damage to the property after the contract had been made. Damage to the property nowadays can arise from causes other than fire and tempest. Financial loss can arise from government intervention. This is a risk which people have to suffer.

9. The third judge was Sir John Pennycuick. Sir John went as far as to say that it would have been obvious to both parties that the only reason Amalgamated wanted to buy the property was to redevelop it and that the purchase price was predicated on that basis. However, as a contract for the sale and purchase of land is no more than an exchange of money for a title to the land, with no warranty as to the future use of the land, performance of the contract remained unchanged. Accordingly, the risks relating to the future use of that land must lie on the buyer, under the very terms of the contract. Sir John said:

> The contract ... is a contract for the sale and purchase of a specified property at a specified price. ... it was not a term or condition of the contract that the property should continue to be available for development at the date of completion; nor, I think, can such a condition be implied into the contract. The subject matter of the contract is simply a specified piece of land described in the contract and nothing more.

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[7] At 173. This is part of a longer passage in the judgment to the effect summarised above at 172-4. The quotations from Lawton LJ and Sir John Pennycuick are from pages 174-5 and 176.

10. The second example is *Universal Corporation v. Five Ways Properties Ltd.*[8] Universal agreed to buy a freehold property in London from Five Ways.[9] Universal, a Nigerian company, needed to remit the purchase funds from Nigeria but due to an unexpected change in the exchange controls, it was unable to do so in time to complete. By the time Universal was in funds, Five Ways had already rescinded the contract and forfeited the deposit. Universal brought proceedings for the return of its deposit, on the basis that the contract was frustrated by the change in exchange controls.[10]

11. Walton J appears to have dismissed the argument almost out of hand:

> ... quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.

In the Court of Appeal, Buckley LJ took the same approach he had taken in *Universal*. He approved what Walton J had said as "an accurate and proper statement" and held that the contract was neither incapable of performance, nor was performance of it significantly different from what was contracted for. Although it is implicit in his rather laconic judgment, Buckley LJ evidently thought that the risk of finance falling through lay on the buyer alone.[11]

12. In the absence of any specific provision, why does the risk of not having the money to pay the rent not lie on the tenant, in the same way that the risk of not being able to find the purchase price seems to fall on the buyer of land? Perhaps the answer lies in the mechanics of the law of frustration?

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8 (1979) 38 P&CR 687, 690 (CA) *per* Buckley LJ. The quotation from Walton J is taken from Buckley LJ's judgment on this page.

9 It was the reversion on Dorset House, a substantial block of flats with various commercial tenants on the ground floor, on the corner of Gloucester Place and Marylebone Road. The price was £885,000.

10 In the alternative, it brought a claim for the return of the deposit under the Law of Property Act 1925, section 49(2). On this issue, the Court of Appeal remitted the matter back to the High Court with a ruling on the exercise of the court's discretion thereunder which is probably no longer quite right, after *Omar v. El- Wakil* [2002] 2 P&CR 3 (CA) and *Midill (97PL) Ltd. v. Park Lane Estates Ltd.* [2009] 1 WLR 2460 (CA). That is another story.

11 Eveleigh LJ agreed and there was no third Lord Justice.

So, What Actually is Frustration?

13. The law of frustration is frustrating because everybody knows it exists but nobody is clear about its legal nature.[12] It certainly is a common law doctrine, which ought to make its operation predictable: not being an equitable doctrine, its operation is not a matter of discretion. The most commonly adopted explanation is that frustration rests on an implied term that, if "stuff happens", the contract is discharged.[13]

14. At first, the doctrine was stated is quite loose terms. In *Tamplin Steamship Co.Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* Lord Loreburn LC put the doctrine on the basis of a common assumption becoming falsified:[14]

> .. a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist and if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract.

As we will see, Lord Loreburn's test is now dead and needs to be left to lie down.

15. The modern leading case on frustration is *Davis Contractors Ltd. v. Fareham Urban District Council*, in which the test was far more tightly constrained. Davis agreed with the Council to build 78 council houses by a specified date. Due to a shortage in labour, Davis could not complete the build in time, although it did finish it. Davis argued that the contract was frustrated and sought payment for the completed build on a *quantum meruit* basis - which was (naturally) higher than the contract price.

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12 A clear and succinct explanation of the absence of any juridical basis for the law of frustration can be found in Lord Reid's speech in *Davis Contractors Ltd. v. Fareham Urban District Council* [1956] AC 696, 719-722 (HL) and Lord Wilberforce's speech in *Panalpina* at 693-4.

13 See Lord Reid and Lord Wilberforce, as above. Lord Reid's minority view of why an implied term analysis was wrong would be convincing, if it were not for the fact that his alternative explanation is an implied term. He thought that the doctrine was triggered when reasonable men in the position of the parties at the date of the contract would agree that the supervening event so changed the nature of further performance that the contract was discharged, which sounds awfully like an intervention by the "officious bystander".

14 [1916] 2 AC 397, 403 (HL).

16. The argument bombed, which gives rise to this thought: if not having enough labourers available in the market does not frustrate a building contract, why would not having enough customers ever frustrate a lease of a shop, a gym or a restaurant? Be that as it may, the House of Lords took the opportunity to define the doctrine. Lord Radcliffe said:[15]

> ... frustration occurs whenever the law recognises 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."

He continued:

> ... 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.

That passage is crucial to understanding the doctrine: it is not enough that the subsequent event makes the discharge of the outstanding obligations under the contract inconvenient, loss-making or causative of hardship: the very essence of the obligation to be performed must be *fundamentally* changed. This is a significant refinement of the more wooly approach taken by Lord Loreburn in *Tamplin*.

17. At House of Lords/Supreme Court level, the next case is *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, a case about whether a ten-year lease of a warehouse was frustrated by the compulsory closure of the only vehicular access to it by the highway authority for a period of twenty months.[16] Lord Simon described the doctrine as follows:

> 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**

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15 Both this and the following quotation are at [1956] AC 696, 726-7 (HL).

16 [1981] AC 675 (HL). The quotations from Lord Simon's speech are on pages 700 and 707. The other Members of the Judicial Committee either agreed with Lord Simon or made no statements of their own about the nature of frustration. The premises, in English Street, Kingston-Upon-Hull, now comprise a small business park of light industrial units.

> **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**.

The emphases are mine. Lord Simon added:

> **The *[tenants]* were undoubtedly put to considerable expense and inconvenience. But that is not enough**. Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative - what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) **would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution** that it would be unjust to insist on compliance with those literal terms?

The emphasis is, again, added. It is important to grasp that the evaluation of the reasonable contemplation of the parties is not an abstract exercise, but specifically directed to an identification of whether the future performance of the outstanding obligations is significantly or radically changed. What one is trying to identify is not a generic change in expectations,[17] but a change in the expectations which makes the future performance of those obligations something alien. The question is a focussed one: how is performance of this obligation changed by the supervening event?

18. The case arrived before the House as a summary judgment application by the landlord for non-payment of rent. The majority held that the tenant's defence that the lease was frustrated did not even raise a triable issue.[18] The reasons why were best articulated by Lord Wilberforce:[19]

18.1 First, the obligation to pay rent was unconditional, save in the case of fire, where the obligation was suspended pending reinstatement. The risk of being unable to use the premises therefore lay on the tenant.

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17 Here lies the ghost of Lord Loreburn LC in Tamplin Steamship: as we are about to see, his shade was put to rest by Lord Roskill and at rest is where it should remain.

18 Lord Russell dissented, holding that a lease could not be frustrated, save perhaps by physical destruction of the entire demise, including the underlying soil.

19 At page 697-8.

18.2 Secondly, although the warehouse would be unusable for two years out of a ten-year term, and there would be significant costs associated with acquiring alternative premises and moving the warehouse business to them, the facts did "not approach the gravity of a frustrating event".

Lord Simon agreed, adding that:[20]

> I do not think that the appellants have demonstrated a triable issue that the closure of the road so significantly changed the nature of the outstanding rights and obligations under the lease from what the parties could reasonably have contemplated at the time of its execution.

This sentence underlines that essential point: does the supervening event change the nature of the outstanding rights and obligations, rather than change the circumstances in which those obligations and rights are to be discharged?

19. At House of Lords / Supreme Court level, that is where the cases end, but for one coda. In the case of *The "Nema"*, the House of Lords, speaking through Lord Roskill, held that the doctrine of frustration was fully defined by Lord Radcliffe in *Davis Construction* and Lord Simon in *Panalpina* and that there should be no recourse to earlier authorities.[21]

20. In a review of the cases at Court of Appeal level, there is one important post-*Panalpina* case: *Edwinton Commercial Corpn v. Tsavliris Russ (Worldwide Salvage & Towage) Ltd. (The "Sea Angel")*.[22] Tsavliris chartered the *Sea Angel* for twenty days from Edwinton, on the basis that it would redeliver her to Edwinton at the end of that period, or to continue to pay an agreed sum, the "off-hire rate", for every day she was not returned. In shipping law, this is a standard form of "time-charter", but it does have a lease-like feel to it. After seventeen days, the harbour authority impounded the *Sea Angel* for a further 108 days,

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20 At 707.

21 *Pioneer Shipping Ltd. v. BTP Tioxide Ltd. (The "Nema")* [1982] AC 724, 751-2 *per* Lord Roskill (HL).

22 [2007] EWCA Civ 547.

wholly unreasonably.[23] Edwinton sued for the unpaid hire charges and Tsavliris defended on the basis that the charter was frustrated by the detention.

21. For our purposes, it is this passage in the judgment of Rix LJ that matters:

> [111] In my judgment, the application of the doctrine of frustration requires a multi-factorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as "the contemplation of the parties", the application of the doctrine can often be a difficult one. In such circumstances, the test of "radically different" is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.
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> [112] What the "radically different" test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. ...

22. The charter was not frustrated. Firstly, the supervening event was not unforeseen. The Court of Appeal accepted the finding of the trial Judge that unreasonable detention of salvage vessels by port authorities was a known and acknowledged risk within the salvage industry, although these parties had no reason to believe that the risk would materialise in this way on this charter.[24] Secondly, the clause providing for payment of the "off-hire rate" showed that the risk of a delay in returning the *Sea Angel* was allocated to the charterer, Tsavliris.

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[23] The Karachi Port Authority alleged that harbour dues were unpaid in respect of the vessel the *Sea Angel* had helped salvage, but not the *Sea Angel*. The High Court of Scind (Pakistan) found that to be baseless in fact, as well as no justification for impounding the *Sea Angel* and ordered her release. Magnificently, the Port Authority refused to comply with the judgment until it had been paid off. *Sea Angel* was eventually released after the Authority was paid US$1.6m in "fees" the High Court of Scind had found were *not* due from Tsavliris.

[24] This is a summary of Rix LJ's paragraphs [117]-[121].

23. Rix LJ's multi-factorial approach to identifying what was in the contemplation of the parties needs to be read in context. It is clear from *Davies Construction* and *Panalpina*, as endorsed in *The Nema*, that the ascertainment of the parties' reasonable expectations is *not* a general review of the "footings" on which the contract was made: that was Lord Loreburn's approach, as disavowed in those later House of Lords' cases. As Rix LJ was clear, the multi-factorial approach is still focussed on asking whether the performance of the outstanding obligations had become so radically different that there had been a break in the identity of the contract.

24. Rix LJ's approach also emphasises the need to identify whether a risk is actually foreseen and allocated under the contract. This point comes to the fore in the "Brexit" case of *Canary Wharf (BP4) T1 Ltd. v. European Medicines Agency*, in which the EMA argued that Brexit frustrated its 25-year lease of offices, intended to house its headquarters.[25] Much of the judgment is taken up with arguments on illegality, but once those points are stripped away, Marcus Smith J homed in on two points: whether the EMA could discharge its obligations under the lease and whether the lease catered for the possibility that the EMA might relocate during the term. He held that the answer to both questions was in the affirmative, the latter because the lease was capable of assignment and subletting. As the Judge noted:

> [240](4) I accept that the assignment and subletting provisions in the Lease are onerous. They were quite clearly directed to protecting the interests of CW. ... It is also quite clear, as a matter of construction, that the parties carefully considered not merely the EMA's need for more or less space, but also the fact that it might need no space at all. ... Or, to put the point another way: the EMA accepted the risk that it might be left holding Premises that it did not require for the balance of the term remaining, unless it could meet the subletting or assignment provisions.

Despite the excitement this case generated, on frustration anyway, it is nothing new. Marcus Smith J was not distracted by the seismic change in circumstances known as Brexit. Correctly, he identified the EMA's outstanding obligations under the lease -in essence, pay rent- and asked himself the two key questions:

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[25] [2019] EWHC 335 (Ch); [2019] L&TR 14 (Marcus Smith J).

24.1 whether Brexit had made the discharge of those obligations "radically different" (no); and

24.2 whether the risk of a change of that nature had been allocated under the lease (yes and on the EMA).

25. I mean no disrespect to Master Dagnall, but I am going to treat *Bank of New York Mellon* as an example of the principles being applied, not cases from which the principles can be derived.[26] He applied the *Panalpina* approach, noting the unexpired length of the various leases before him to gauge the severity of the closure of the premises due to Covid, taking into account that they were within the Landlord and Tenant Act 1954. He then had regard to the allocation of risks in the leases, whereby the tenants' obligations to pay rent were qualified only by the various clauses suspending payment if an insured risk occurred. Having regard to those factors, Master Dagnall concluded:

> [209](d)(vi) ... I do not see any real prospects of there being sufficient for any "radical difference" or to make it "unjust" for any the Leases to continue bearing in mind their terms and their actual allocations of risk.

Frustration in Focus:

26. I can now try to pull all those threads together. The frustration of any contract, including a lease, occurs when <u>all</u> of the following propositions are true:

26.1 A supervening event has occurred.[27]

26.2 That event occurred without the default of either party having a causative effect.[28]

26.3 Having regard to, *inter alia:*[29]

26.3.1 the terms of the contract itself,

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26 [2021] EWHC 1013 (QB) (Master Dagnall). His application of the principles is in [209]-[212].

27 *Davis Contractors*, *Panalpina*, *The "Nema"*.

28 *Davis Contractors*, *Panalpina*, *The "Nema"*.

29 *Davis Contractors*, *Panalpina*, *The "Nema"*.

26.3.2 its matrix or context,

26.3.3 the state of the parties' knowledge, expectations, assumptions and contemplations;[30]

the supervening event must be one which the parties to the contract:

26.3.4 did not reasonably foresee, or

26.3.5 did not otherwise provide for in their contract, explicitly or implicitly, by allocating the risk of the event occurring to one of them.[31]

26.4 The occurrence of the event must either:

26.4.1 render the as-yet unperformed obligations of the parties incapable of being performed;[32] or

26.4.2 cause performance of those obligations to become radically or significantly different from that which the parties must reasonably have anticipated when the contract was made.[33]

26.5 For the future performance of the contract to become radically or significantly different:

26.5.1 the change must be so profound that there is a break in identity between the contract as provided for and contemplated and its performance in the new circumstances,[34] so that the party with outstanding obligations can truly say: "this is not what I promised";[35] *and*

26.5.2 in assessing this change, it is immaterial that performance has become considerably more expensive, more time-consuming, more onerous and/or more inconvenient or significantly less profitable.[36]

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30 In particular, *The "Sea Angel"*.

31 *Davis Contractors*, *Panalpina*, *The "Nema"*, *The "Sea Angel"* and the *EMA* case.

32 *Davis Contractors*, *Panalpina*, *The "Nema"*.

33 "Radical" is from *Davis Contractors* and "significant" is from *Panalpina*. In light of *The Nema*, there is no difference between the two.

34 The *Sea Angel*.

35 *Davis Contractors*.

36 *Davis Contractors*, *Panalpina*, *The "Nema"* and *The "Sea Angel"*.

26.6 Even if all the above criteria are satisfied, treating the contract as discharged must also achieve justice between the parties, having the regard to the outstanding obligations to perform and the outstanding right to receive performance.[37]

Frustration of Leases - Whose Risk is It Anyway?

27. How about some conclusions? I started with two conveyancing cases, observing that the Court of Appeal took it as axiomatic that such contracts were to be analysed in such a way as made frustration close to impossible, because all the risks for the future, even the destruction of the premises, lay with the buyer. In *Panalpina*, Lord Wilberforce acknowledged this, but distinguished the position in respect of leases, because the terms of any given lease might either allocate the risks differently or not allocate some risks at all.[38]

28. As a statement of principle, that is undoubtably true. However, the logic of the doctrine, as derived from that analysis of the appellate cases, dictates that it is impossible for any lease drafted in common terms to be frustrated. If ever a lease is to be frustrated, it will have to have been drafted on exceptional and eccentric terms.

29. The reason I so conclude is evident in *Panalpina* itself, as well as actually obvious from the freehold conveyancing cases. Unless drafted on that exceptional and eccentric basis, the lease always allocated the risk of the unexpected on the tenant. Stripped to the basics, the landlord grants the tenant exclusive possession of the land for the term, in exchange for which the tenant pays the rent.[39]

30. At the irreducible minimum, the landlord's ongoing obligation is to continue to provide the premises demised to the tenant with quiet enjoyment. By the very definition of frustration,

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37 *Panalpina* and *The "Sea Angel".*

38 At page 692.

39 This analysis derives from the speech of Lord Templeman in *Street v. Mountford* [1985] 1 AC 800, 818 (HL).

the supervening event cannot be the consequence of a default by landlord in the performance of his obligations.

31. The landlord may have other obligations under the lease, but the risk of nonperformance is allocated to him by those covenants. Moreover, the risk of future performance of those other covenants, such as a covenant to repair, becoming more onerous, etc., lacks the profound gravity to be a frustrating event.

32. By contrast, at the irreducible minimum, the tenant's continuing obligation is to pay the rent. In any lease, competently drawn or otherwise, this obligation is either:

32.1 unqualified, as in the time-honoured "yielding and paying throughout the term"; or

32.2 is qualified only by reference to the occurrence of known and defined risks, as in the case of rent-cesser provisions following damage or destruction to the premises.

33. Thus, almost every conceivable lease, and perhaps others, will have been drafted on the basis that the tenant's right to quiet enjoyment during the term and the landlord's rights to receive the rent are independent of whether the tenant either can make use of the premises, or whether it chooses to. The only risk of interference allocated to the landlord is allocated by the covenants for quiet enjoyment and against derogation from grant. As frustration arises only without fault, any breach of these covenants is not a frustrating event. Accordingly, there is no reason to construe the lease as allocating to the landlord any share in the risk that something will stop the tenant from being able to use the premises for the permitted use. The bargain is the conferral of the right to exclusive possession for the term in exchange for the payment of the rent.

34. One might say that a lease with a turnover rent does spread the risk of the premises being capable of being put to economically beneficial use between the landlord and the tenant. Here there might be a little more room for discussion, but every turnover-rent provision I can remember obliged the tenant to pay a minimum rent and only pay the turnover element

if the premises generated sufficient income. Here is where Marcus Smith J's insight in the Brexit case about the effect of other covenants is useful: by providing for a minimum rent, the parties were contemplating the possibility that the tenant could not trade from the premises. The lease therefore allocates that risk to the tenant.

35. Further, turnover-rent leases usually have "keep-open" clauses as well, as do many leases in shopping-centres and arcades: such clauses also allocate the risk of not being able to open for trade on the tenant.

36. Going back to the generality of commercial leases, the very existence of the usual proviso for re-entry also shows that the risk of nonperformance of the covenant to pay rent lies with the tenant, as that proviso will inevitably be drafted so as to operate independently of the tenant's ability to make use of the premises. Even if the tenant finds it impossible to perform its obligation to pay the rent, it bears the risk of being sued for breach of covenant or, in most commercial leases, the lease being terminated at the landlord's election under the proviso for re-entry. Tenant impecuniousity, and even insolvency, is a thoroughly well-known risk in the property industry, it is *not* an unexpected supervening event.

37. Thus, as the House itself held in *Panalpina*, a rigorous analysis on how the doctrine of frustration operates shows that where the obligation to pay rent is unqualified, or qualified only by a rent-cesser clause which is not engaged, the risks of things happening in the future which make the premises incapable of use lies on the tenant. The tenant's obligation is to pay rent throughout the term, whether he makes use of the premises or not, irrespective of why not.

38. That is why, despite Lord Wilberforce's point of theoretical distinction, the result in leasehold cases is the same as in the sale and purchase contract cases. The buyer of the freehold and the tenant under the lease both bear the burden of even unforeseen future risks. In practical reality, a lease *cannot* be frustrated because the future risks are all allocated to the tenant.

39. All that remains is for me to leave you with this observation, made by Lord Hailsham LC in *Panalpina*:[40]

> I am struck by the fact that there appears to be no reported English case where a lease has ever been held to have been frustrated. I hope this fact will act as a suitable deterrent to the litigious, eager to make legal history by being first in this field.

Now that the pubs are open again, I'll drink to that.

NIC TAGGART[41]

25th May 2021

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40 At page 692.

41 Ah yes, about me. A senior-junior of 30 years' call, I have been inexplicably rated as a top-tier junior for real estate litigation by both *Chambers & Partners* and *Legal 500* for over fifteen years. I was *Chambers' and Partners* Real Estate Litigation Junior of the Year 2011. I deal with just about any aspects of real estate, apart from enfranchisement, but otherwise with an emphasis on valuation disputes, such as cases involving dilapidations, lease renewals under the Landlord and Tenant Act 1954 and rent reviews. I also specialise in advising on conveyancing issues, either before or after the transaction. Being at heart an anarchist, I have undertaken very many "Ground (f)" cases, although I am more comfortable with demolition than reconstruction. Despite loathing mobile phones, I am regularly involved in Electronic Communications Code cases, for either "operators" or "site providers". I also take on some recherché matters that no-one else in Chambers really wants to do, such as mines and minerals, manorial and customary rights, utility wayleaves, riparian rights and drainage. I am a qualified arbitrator but lack the disposition to be a mediator. For laughs, I am an editor of *Hill & Redman's Law of Landlord and Tenant*, a member of the editorial boards of both *The Conveyancer* and *The Journal of Building Survey, Appraisal & Valuation*, a member of The Law Society's Conveyancing and Land Law Committee, and was formerly a member of the RICS Dilapidations Steering Group. I appreciate that I need to get out more, now that I can. My CV and other potentially tall tales can be seen at: www.landmarkchambers.co.uk/people/nicholas-taggart/