

THE TERMINATION OF REAL PROPERTY INTERESTS BY FRUSTRATION UNDER ENGLISH LAW

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ABSTRACT

This article considers the extent to which the common law doctrine of frustration, which is grounded in the law of contract, is currently available as a means of terminating property rights in land which have as their foundation a contractual relationship (whether express or implied) between the parties. The writers' analysis reveals that a number of such rights falling within the *numerus clausus* principle, notably, leases, contracts for the sale of land, options to purchase land, easements, profits a prendre, mortgages and covenants affecting freehold land may, in principle, be discharged by a frustrating event under English law.

INTRODUCTION

The doctrine of frustration operates as a means by which a contract may be automatically discharged where an event occurs (without default of either party and for which the contract makes no sufficient provision) which either renders performance of contractual obligations impossible, or at least significantly different from what was intended.¹ In its current form, therefore, the doctrine arises primarily in the context of contract law. But to what extent may it operate outside purely contractual relationships so as to terminate property rights in land? Although there is little English authority on this question, and a number of thorny issues remain as to the application of the doctrine in relation to estates and interests in land, it is the thesis of this article that frustration is available, as a matter of law, as a means of terminating certain real property interests within the *numerus clausus* principle² where the right in question is supported by an ongoing (or "live") contractual relationship between the parties.

Before examining each of these property interests in turn, it may be helpful to give a brief overview of the doctrine as it applies to contracts generally.

BRIEF OVERVIEW OF THE DOCTRINE

(a) when does frustration occur?

Two well-known cases illustrate the circumstances when frustration will occur where the main purpose of the contract becomes impossible of performance by virtue of

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¹ See, generally, *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, (HL). The parties may, of course, include in their agreement a clause (for example, a force majeure clause) which expressly provides for unforeseen events, in which case the doctrine of frustration will have no application. The contract may also provide (expressly or impliedly) for which party should bear the risk of the events which have happened.

² The principle dictates that there is a closed list of accepted property rights in English law. See, S. Gardner, *An Introduction to Land Law*, (2nd ed., 2009), Hart Publishing, at pp. 9–13, who lists a number of rights in rem that can exist over land, including leases, estate contracts, options, easements, profits a prendre, mortgages and covenants. Each of these rights is discussed in this article.

supervening events. In *Taylor v Caldwell*,³ the defendants agreed to allow the claimants the use of a music hall on four specific days for the purpose of giving a series of concerts and fetes at a rate of £100 for each day. Before the concert was to be given, the premises were destroyed by fire without any fault on either party. The contract made no provision for this eventuality. The court held that the contract was subject to an implied condition that the premises were to continue to exist at all material times and that, because the fire destroyed the property, both parties were freed from their obligations under the agreement. Similarly, in *Krell v Henry*,⁴ Krell owned a flat which overlooked Pall Mall which was the intended route of the King's Coronation procession. Henry agreed to hire Krell's flat on the days of the procession. The King was taken seriously ill and the procession was cancelled. The Court of Appeal held that the contract had been frustrated and relieved Henry of the obligation to pay the balance of monies owing. The contemplated purpose of hiring the rooms was to view the coronation and that had been rendered impossible by subsequent events.⁵

Another possible cause of frustration is the prohibition of the contract for an indefinite duration or the unavailability of labour or materials necessary for performance of the parties' activities. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,⁶ for example, a contract to sell machinery to buyers in Poland was frustrated when Poland was occupied by Germany in the Second World War (it being illegal to trade with the enemy in times of war). However, whether the outbreak of war or an interference by government legislation discharges a contract will depend on the actual circumstances of each case. The answer often turns upon the probable duration of the interference and whether the interruption will render further performance of the contract radically different from that originally made. In *Tsakiroglou & Co Ltd v Noblee and Thorl GmbH*,⁷ for example, the sellers had agreed to sell to the buyers Sudanese groundnuts and to ship them during October/November 1956. In October, they booked space in one of four vessels scheduled to call at Port Sudan in these two months. In November, the Suez Canal was closed to traffic. The House of Lords held that shipment via the Cape of Good Hope would not constitute a fundamental alteration in the contractual obligations of the sellers. The extra expense of shipment did not justify a finding of frustration, nor the fact that the voyage would take four weeks longer than by the Canal. Similarly, in *Davis Contractors v Fareham Urban District Council*,⁸ a firm of building contractors submitted a tender to a local council in relation to a proposed building scheme. Attached to the tender was a letter which stated that the tender was subject to adequate supplies of labour being available as and when required. The tender was successful and the firm entered into a contract to build 78 houses within eight months for £94,425. Unfortunately, adequate supplies of labour were not available and the work took 22 months to complete at a cost to the firm of £115,233. The House of Lords held that the building contract had not been frustrated by the delay. The circumstances in which performance was called for would not render it a thing "radically different" from that which was undertaken by the contract.

³ (1863) 3 B & S 826.

⁴ [1903] 2 KB 740, (CA). See also, *Chandler v Webster* [1904] 1 KB 493.

⁵ The case may be contrasted with *Herne Bay Steam Boat Company v Hutton* [1903] 2 KB 683, (CA), where the contract involved the hiring of a steam boat to view a Royal Naval review and for one day's cruise around the naval fleet. Due to the King's illness, the naval review was cancelled. The hirer of the steam boat refused to pay the balance of monies owing under the contract, arguing that it had been frustrated. The Court of Appeal held that the contract was not frustrated, as the naval review was not the only purpose of the contract and the day's cruise around the fleet was still possible.

⁶ [1943] AC 32, (HL).

⁷ [1962] AC 93, (HL).

⁸ [1956] AC 696, (HL).

A contract may also become frustrated as a result of a party's incapacity to perform the contract either through death, illness or unavailability.⁹ However, this generally occurs only for the performance of personal services and not for generic commercial services such as building work, which can be performed by numerous individuals. Thus, in *Robinson v Davison*,¹⁰ the contract was frustrated where a piano player became ill prior to a concert she was contracted to play in on a particular date. The inability of an employee to perform his contractual duties due to serious illness may also frustrate his contract of employment.¹¹

(b) *underlying basis of the doctrine*

There have been a number of justifications put forward for the application of the doctrine including the notion that there is an implied term or condition in the contract that, if the frustrating event occurs, the contract would be at an end.¹² It has also been suggested that, on the occurrence of the frustrating event, there is a failure of consideration¹³ or that the doctrine is based on a special exception to the doctrine of absolute contracts as required by considerations of justice.¹⁴ The currently accepted view of frustration, however, is set out by Lord Reid in *Davis Contractors*¹⁵ who stated that frustration depends, in most cases, on the true construction of the terms of the contract read in light of the nature of the contract and the relevant surrounding circumstances when the contract was made. The doctrine, therefore, is essentially a risk allocation procedure¹⁶ in so far as the question is whether it is reasonable to place the risk of non-performance for the events which have happened on one party or the other, or neither. If it is not reasonably possible to place the risk on either party then the contract is frustrated. If, on the other hand, the risk is placed on a particular party (by contract or otherwise), then the doctrine does not apply. This, in turn, has been held¹⁷ to give rise to a "multi-factorial" approach involving an examination of (1) the terms of the contract (2) its matrix or context (3) the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract (4) the nature of the supervening event and (5) the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances. The consequences of the decision whether or not to apply the doctrine fall also to be measured against the demands of justice.¹⁸

LEASEHOLD ESTATES

There is little doubt that the foundation of the landlord and tenant relationship rests with contract law principles. Unlike simple contracts, however, what complicates the leasehold relationship is the fact that a legal estate is created by the lease, which, in turn, confers on the leaseholder exclusive possession of the demised property. Indeed,

⁹ See, *Stubbs v Holywell Railway Co* (1867) LR 2 Ex 311, (death).

¹⁰ (1870–71) LR 6 Ex 269. See also, *Condor v The Baron Knights* [1966] 1 WLR 87.

¹¹ See, for example, *Notcutt v Universal Equipment Co* [1986] 1 WLR 641, (heart attack).

¹² *Chandler v Webster* [1904] 1 KB 493, (CA).

¹³ This explanation is commonly used in the United States. Similarly, it has been opined that a frustrating event removes the foundation of the contract: *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, at 406, (HL) and *WJ Tatem Ltd v Gamboa* [1939] 1 KB 132, 138.

¹⁴ *Hirji Mulji Cheong Yue Steamship Co Ltd* [1926] AC 497, (PC).

¹⁵ [1956] AC 696, at 720–721, (HL).

¹⁶ See, D. Robertson, "Frustration of Leases: Who Bears the Risk?", (1982) Sydney Law Review 674, at 685–686.

¹⁷ See, *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, at [110], per Rix LJ. This view has been adopted by the Supreme Court of New Zealand: *Planet Kids Ltd v Auckland Council* [2013] NZSC 147.

¹⁸ [2007] EWCA Civ 547, at [112].

leases have always been viewed as a hybrid, namely a "chattel real",¹⁹ lying between real and personal property. In recent years, however, there has been a growing tendency to expose the law of landlord and tenant to a much more comprehensive application of ordinary contract principles.²⁰ As Laskin J observed in the Canadian case of *Highway Properties Ltd v Kelly Douglas & Co Ltd*,²¹ it is "no longer sensible to pretend that a commercial lease . . . is simply a conveyance and not also a contract".

(a) *Fixed term tenancies*

It was in the leading case of *National Carriers Ltd v Panalpina (Northern) Ltd*²² that the House of Lords was presented with the first real opportunity to consider whether the doctrine of frustration could apply so as to determine a lease. In this case, a warehouse was let to the tenant for a term of 10 years from January 1974. The tenant covenanted, *inter alia*, not to use the property otherwise than for the purpose of a warehouse. The only vehicular access to the property was by a street which the local authority closed in May 1979 because of the dangerous condition of a derelict Victorian warehouse which was situated nearby. The closure lasted for about 20 months, during which time the tenant's warehouse was rendered useless. In an action by the landlord for recovery of unpaid rent, the tenant claimed that the lease had been frustrated by the closure of the street. The House of Lords held, by a majority, that the doctrine of frustration was, in principle, applicable to leases²³ but, in view of the fact that the lease still had several years to run after the interruption had ceased, the lease was not frustrated. In reality, the tenants had lost less than two years of use of their warehouse and the lease would still have nearly three years left to run after the interruption had ceased. Essentially, the closure of the street was not serious enough as to go to the whole foundation of the lease rendering the leasehold estate worthless or useless. It is likely, therefore, that the outcome would have been different if the interruption of access had been lengthier.

More recently, the application of the doctrine has been considered in the context of a failure to pay rent caused by the tenant's inability to obtain housing benefit. In *Graves v Graves*,²⁴ an assured shorthold tenancy was executed in favour of a divorced wife (as tenant) on the basis that she would be entitled to housing benefit from the local housing authority. Unfortunately, she had been given wrong advice and she was not, in fact, entitled to benefit. The landlord (her ex-husband) sought possession and her defence, *inter alia*, was that the tenancy had been frustrated. At first instance, her

¹⁹ See, for example, the remarks of Nicholls VC in *Crago v Julian* [1992] 1 WLR 372, at 377.

²⁰ See, generally, S. Hicks, "The Contractual Nature of Real Property Leases", (1972) 24 *Baylor Law Review*, at 443-544; J. Effron, "The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities", (1988) 14 *Monash Law Review*, 83-113 and M. Pawlowski, "The Application of the Doctrine of Mitigation of Damages to Leases", [1995] 18 *Liverpool Law Review* 173. In Australia, the ground-breaking High Court of Australia decision in *Progressive Mailing House Property Ltd v Tabali Property Ltd* (1985) 57 ALR 609 applied the contractual doctrine of anticipatory breach in order to permit the landlord to accelerate its right to recover for future rent subject to its duty to mitigate damages. See, by contrast, the English position in *Reichman v Beveridge* [2006] EWCA Civ 1659.

²¹ (1971) 17 DLR (3d) 710, 721, (Supreme Court of Canada).

²² [1981] AC 675 (HL). In the earlier case of *Leighton's Investment Trust Ltd v Cricklewood Property and Investment Trust Ltd* [1943] KB 493, the Court of Appeal had held in principle that a lease could not be determined by frustration. This was then appealed to the House of Lords (see, [1945] AC 221), but the House was divided with two Law Lords stating that a lease could be frustrated (Viscount Simon LC and Lord Wright), two saying it could not (Lord Russell and Lord Goddard) with the fifth expressing no opinion.

²³ In *National Carriers*, the term of the lease was for a period of 10 years. It may, however, be artificial to regard the tenant's rights as governed by executory promises in cases where those rights are, as a matter of substance, more properly viewed by reference to their character as an estate in land with a root of title in the executed demise (i.e., a 99-year lease of land on payment of a premium and with no, or only a nominal, rent). Here, the lease takes on the character of a conveyance of land and, hence, purely a vehicle of estate ownership. In this situation, the contract is largely executed with minimal outstanding obligations on either party still to be performed. For this reason, an executed freehold conveyance may be beyond the scope of the doctrine.

²⁴ [2007] EWCA Civ 660. See further, J. Brown, "A New Way of Terminating Leases?" [2008] Conv. 70.

defence succeeded, the district judge applying the test laid down by Lord Radcliffe in *Davis Contractors*, namely, that frustration occurs “when, without fault of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken by the contract”. On appeal, however, the Court of Appeal preferred to decide the case in favour of the wife by relying on an implied condition that the contract would end if housing benefit was not available.

An American case, *Albert M. Greenfield & Co v Kolea*,²⁵ involving two lease agreements of adjoining premises, is also of interest. The first lease, executed in 1971, covered a one-storey garage, which was to be used for the repair and sale of second-hand motor vehicles. The lease was for a term of two years from May 1971. The second lease, also executed in 1971, covered several pieces of adjoining ground to be used by the tenant for the sale and storage of motor cars. This second lease was also for a two-year term commencing in May 1971. Neither lease contained any provision with respect to the tenant’s obligations in the event of the destruction of the premises by fire. After just one year of occupation, a fire completely destroyed the garage covered by the first lease. The day after the fire, barricades were placed around the perimeter of both premises and the tenant refused to pay the rents due under the leases. The court concluded that the underlying purpose of the lease had, clearly, been frustrated. As contemplated by the first lease, the building was to be used by the tenant for the repair and sale of used motor vehicles. Without a building, the tenant could no longer carry on that business and it also became impracticable for the tenant to continue using the adjoining pieces of land when his business office and repair stations were destroyed by the fire. Further, the barricading of the property prevented the tenant from entering onto the land. Significantly, the underlying policy arguments for discharging the parties from the leases were expressed in these terms:²⁶

“In this case, if we applied the general rule and ignored the realities of the situation, we would bind the appellant (tenant) to paying rent for barren ground when both parties to the lease contemplated that the building would be used for the commercial enterprise of repair and sale of used motor vehicles . . . The trial court’s decision to bind the lessee to the lease was simply an application of an outdated common law presumption. That presumption developed in a society very different from ours today; one where the land was always more valuable than buildings erected on it. Buildings are critical to the functioning of modern society. When the parties bargain for the use of a building the soil beneath is generally of little consequence. Our laws should develop to reflect these changes . . .”

It is also worth mentioning that, apart from the United States, the doctrine of frustration has been held to be applicable to leases in Canada,²⁷ Australia²⁸ and New Zealand.²⁹

²⁵ 1976, 475 Pa. 351.

²⁶ 1976, 475 Pa. 351, at 545.

²⁷ See generally, *Halsbury’s Laws of Canada*, (1st ed., 2017 Reissue), Contracts, LexisNexis, at p.413, n3 and cases therein cited.

²⁸ In Australia, there are conflicting authorities on whether the doctrine of frustration applies to executed leases. In several Australian cases, however, executed leases have been held to be frustrated: see further, *Halsbury’s Laws of Australia*, Vol. 6, Butterworths, at para. 110–9805 and notes thereto, where it is stated that the principle of frustration is capable of being applied to new situations such as leases, but that a lease would, in practice, rarely be frustrated.

²⁹ Although judicial opinion was previously divided, it is now generally accepted by the New Zealand courts that the doctrine of frustration is capable of applying to leases of land. Here again, it is acknowledged that the actual circumstances in which the doctrine may be successfully invoked to discharge a lease are likely to be very rare. It is well settled, applying the English cases, that a lease is not frustrated merely by the occurrence of an event which temporarily interrupts the tenant’s occupation of the property. See generally, *The Laws of New Zealand*, Vol. 8, Contract, Butterworths, at para. 369. In *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, the Supreme Court of New Zealand adopted a “contextual and flexible” approach to frustration which takes into account a number of factors including the terms of the contract itself, the parties’ expectations and the nature of the supervening event relying on the observations of Rix LJ in *Edwinton Commercial Corp v Tsavlis Russ Worldwide Salvage and Towage Ltd (The Sea Angel)* [2007] EWCA Civ 547.

(b) *What events will frustrate the lease?*

The actual circumstances in which a lease for a fixed term of years will become frustrated are likely to be rare.³⁰ Only if the event is so serious that it goes to the whole foundation of the lease, rendering the leasehold estate worthless or useless, will it amount to frustration.³¹ Generally speaking, therefore, long term leases will be less easily frustrated than short terms. On this reasoning, the doctrine will apply to a short-term lease of a building (or other structure) which is completely destroyed or burnt down.³² Similarly, frustration is more likely to succeed where the purpose of a short-term letting was to enable the tenant to view some particular event which was subsequently cancelled.³³ Clearly, the proportion of time the lease is affected by the frustrating event will be highly relevant in most cases.

It has been suggested that if "some vast convulsion of nature" swallowed up the demised property altogether (or buried it in the sea), this would give rise to a frustrating event.³⁴ This was also recognised by Lord Russell (in his dissenting speech in *National Carriers*) where he opined that a physical destruction of a flying leasehold and the total disappearance of the site comprised in the lease into the sea (so that it no longer existed in the form of a piece of land and could not be the subject of forfeiture) could amount to a frustrating event. In this latter circumstance, "the obligation to pay rent, which issues out of the land, could not survive its substitution by the waves of the North Sea."³⁵ On this reasoning, where the subject-matter of the lease comprises a structure only without land (for example, a lease of a flat or office in a block) and the structure is destroyed, it is submitted that the lease would be frustrated because the physical subject-matter of it would cease to be capable of definition. Viscount Simon LC in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*³⁶ also gave the example of a lease expressed to be for the specific purpose of building which is rendered impossible because of government legislation which permanently prohibits private building in the area in question.³⁷

It seems also that a lease would become frustrated if it provided for the use by the tenant of the demised premises for a single purpose which subsequently became illegal. However, a temporary restriction on building works merely suspending the tenant's ability to build in accordance with its obligations under a long lease would not amount to frustration.³⁸ That said, it has long been established that, although the whole lease may not be frustrated, it may be that a particular covenant in it may be temporarily

³⁰ This is because the events which are most likely to occur, such as fire, will normally be provided for in the lease and covered by insurance allowing for reinstatement of the premises. Alternatively, the incidence of the risk will normally be assumed by the tenant.

³¹ The tenant's personal incapacity which prevents him from using the premises will not be sufficient: see, *Youngmin v Heath* [1974] 1 WLR 135, (death of tenant did not discharge a weekly tenancy). But the position may be different where the tenancy contains a covenant on the part of the tenant to constantly reside at the premises: *Sunnall v Statt* (1985) 49 P & CR 367.

³² See, *Taylor v Caldwell* (1963) 3 B & S 826, (involving a licence to use a music hall).

³³ See, *Krell v Henry* [1903] 2 KB 740 and *Chandler v Webster* [1904] 1 KB 493, (coronation procession cancelled).

³⁴ See, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, at 229, per Viscount Simon LC.

³⁵ [1981] AC 675, at 709, per Lord Russell.

³⁶ [1945] AC 221, (HL).

³⁷ In *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 EG 427, an agreement for a lease was held to be frustrated by the refusal of planning permission for the proposed development of the property. In the Scottish case of *The Tay Salmon Fisheries Company Ltd v Speedie* [1929] SC 593, (Court of Session), a lease of 19 salmon fishing seasons was held to be abandoned by the tenant as a result of bye-laws which converted the greater part of the fishing area into a danger zone for the purposes of aerial gunnery and bombing practice. The decision, however, is not based on frustration but on the principle that the bye-laws caused a total eviction of the tenant from the fishing areas. Government expropriation has also been held to frustrate a lease: see, *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, (HL).

³⁸ See the facts in *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, (HL).

suspended until it becomes possible to perform it.³⁹ But it has been held that a covenantor will not escape liability for damages for breach of covenant merely because the covenant cannot be performed due to an absence of planning permission or building consent.⁴⁰

(c) *Periodic tenancies*

A periodic tenancy, as we know, continues indefinitely until determined by either party by the service of a valid notice to quit. From a retrospective viewpoint, a weekly tenancy is seen as comprising a single unbroken term which, until determined, grows by the regular aggregation of a new period (or unit) of occupation from week to week.⁴¹ On this reasoning, there is only one single tenancy originating from the original grant.⁴² The notion that the term of a periodic tenancy simply "rolls over" from period to period has been judicially identified in several cases. In *Hammersmith and Fulham London Borough Council v Monk*,⁴³ Lord Bridge observed:⁴⁴

"... the substance of the matter was that ... by his omission to give notice of termination ... each party signifies the necessary positive assent to the extension of the term for a further period."

In the Australian case of *Commonwealth Life (Amalgamated) Assurance Ltd v Anderson*,⁴⁵ Jordan CJ said:⁴⁶

"Whether the tenancy be from year to year, quarter to quarter, month to month, or week to week, it is a tenancy for a definite term of a year, a quarter, a month, or a week, as the case may be, with a superadded provision that it is to continue for another definite term of the same period, unless, by proper notice to quit, it is terminated ..."

In *Prudential Assurance Co Ltd v London Residuary Body*,⁴⁷ Lord Templeman concluded⁴⁸ that a yearly tenancy is saved from uncertainty:

"... because each party has power by notice to determine at the end of any year. The term continues until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year."

Looking, therefore, at a weekly tenancy as no more than an amalgam of individual occupational units of time which together comprise the periodic tenancy, it may be argued that such a tenancy is capable of frustration (in the same way as a fixed term) provided the frustrating event is sufficiently serious to render the relevant period of occupation useless or worthless. The only English case directly in point is *Prince v Robinson*,⁴⁹ in which a flat (the subject of a weekly tenancy) had been damaged by a serious fire caused by squatters living in the building at the time. Although not reaching any definite conclusion on the frustration point, the Court of Appeal reiterated the view

³⁹ See, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1955] AC 221, at 233-234, per Lord Russell; *John Lewis Properties plc v Viscount Chelsea* [1993] 34 EG 116 and *Baily v De Crespigny* (1869) LR 4 QB 180.

⁴⁰ See, *Sturcke v SW Edwards* (1971) 23 P & CR 185 and *Eyre v Johnson* [1946] KB 481.

⁴¹ *Hammersmith and Fulham London Borough Council v. Monk* [1992] 1 AC 478, at 490.

⁴² *In Re Midland Railway Co.'s Agreement* [1971] Ch 725, at 732.

⁴³ [1992] 1 AC 478.

⁴⁴ [1992] 1 AC 478, at 490-491.

⁴⁵ (1946) 46 SR (NSW) 47.

⁴⁶ (1946) 46 SR (NSW) 47, at 50.

⁴⁷ [1992] 2 AC 386, (HL).

⁴⁸ [1992] 2 AC 386, (HL), at 394.

⁴⁹ (1999) 31 HLR 89.

held in *National Carriers* that the doctrine would discharge a tenancy only in wholly exceptional circumstances. In particular, it was seriously doubted whether frustration could apply to a weekly (or other periodic) tenancy in circumstances where fire damage could be repaired within a matter of weeks or months. In *Prince* itself, there was little detailed information about the fire damage, but Walker LJ was able to conclude that the flat could have been restored more or less to its original condition fairly quickly.

The point, however, that a periodic tenancy forms a number of individual periods or units of occupation together comprising the leasehold estate, was not addressed by the Court of Appeal in *Prince* leaving open the intriguing question whether a frustrating event can discharge the tenancy by simply rendering *the relevant unit of occupation* (i.e., the week, month, quarter or year, as the case may be) worthless or useless, as opposed to the "open-ended" term (which, as we have seen, may extend indefinitely in the absence of a notice to quit). On this reasoning, despite the view in *Prince*, extensive fire damage to the demised premises could be characterised as sufficiently serious in so far as it prevented the tenant's occupation of the property during the current (weekly) occupational unit of time under the tenancy. As against this, however, it could be argued, consistently with the authorities referred to above, that a periodic tenancy should not be viewed as giving rise to a termination of one tenancy at the end of each period, followed by the start of a distinctly new letting.⁵⁰ In this connection, it is significant that the continuation of a periodic tenancy does not depend on the exercise of some kind of option to renew the letting after each unit of time. Because the tenancy continues as an integral term (until determined by notice to quit), the true analysis may be that a periodic tenancy should not be viewed as a series of distinct units of occupation, but as a single estate comprising just one grant which is continually extended over time. On this basis, fire damage to the demised property may not be treated as sufficiently extensive so as to frustrate the "estate" if the damage can be repaired within a matter of several months.

(d) Unresolved issues

Despite judicial recognition that a lease may, in principle, be discharged by a frustrating event, a number of thorny issues yet remain to be resolved by the courts in relation to the applicability of the doctrine to leases. For example, privity of contract only exists as between the original parties to the lease. Is, therefore, frustration limited to the original landlord and tenant? Or does it apply also as between say, original landlord and assignee of the lease? In the absence of any contractual relationship between these latter parties, the answer appears to be negative.⁵¹ This, however, may be too restrictive given that the Landlord and Tenant (Covenants) Act 1995 allows for the running of the benefit and burden of covenants on the assignment of lease or reversion.⁵² Where the term (or the reversion) have been transferred, the relationship between the landlord and tenant is undoubtedly based on privity of estate, but the rights and obligations as between the landlord and tenant remain entirely rooted in the terms of the contract agreed between the original lessor and lessee. There is no reason, therefore, why the application of the doctrine of frustration should not similarly be relied on by the parties' successors in title. In this connection, it is important to emphasise that, when the term and/or reversion are transferred, the contract still survives, although only as between the original lessor

⁵⁰ *Jones v Chappell* (1875) LR 20 Eq 539, at 544.

⁵¹ In *Jones v Cleanthi* [2005] EWHC 2646 (QB), at [49], Bell J concluded that assignees of a lease are not protected by the principles of frustration to the same extent as the parties to the original contract. The point was not addressed on appeal: [2007] 1 WLR 1604.

⁵² See, *Gumland Property Holdings Ltd Property Ltd v Duffy Bros Fruit Market (CampbellTown) Property Ltd* (2008) 234 CLR 337, (High Court of Australia), where the assignee of a leasehold reversion was held entitled to terminate a lease and recover loss of bargain damages, notwithstanding the absence of privity of contract between the assignee and lessee.

and lessee. The idea, therefore, that the lease can be determined by frustration when the lease and reversion have been transferred, thereby putting an end to the original contract, is entirely consistent with established principles of leasehold law.

Another unresolved difficulty relates to the consequences of frustration.⁵³ Does the doctrine automatically discharge the lease? The tenor of the judgments in *National Carriers* suggests that frustration operates automatically. If not, what is the interrelation of the doctrine and the provisions for termination of say, a business tenancy under Part 2 of the Landlord and Tenant Act 1954? The problem here is that both commercial and residential tenancies⁵⁴ are regulated by statute which may, depending on the wording of the statute, limit or impede the ability of either the landlord or tenant to apply contractual doctrines and remedies. Unfortunately, the decision in *National Carriers* contains no discussion of this interaction. The writers would venture to suggest that frustration automatically terminates the lease, but if that is not correct, it may be possible to reconcile the doctrine with the relevant statutory regime. Take, for example, a business tenancy. A frustrating event, although incapable *per se* of effecting a termination of a business tenancy,⁵⁵ would nevertheless have the effect of accelerating the landlord's right to terminate the tenancy in accordance with the 1954 Act.⁵⁶ In other words, if the lease is frustrated, this would permit the landlord to serve a statutory (s.25) notice of termination on the tenant anytime thereafter. Given, however, that the tenant may no longer be in occupation of the premises for the purposes of its business (for example, where the premises have burnt down with no possibility of reinstatement during the remainder of the term), the tenancy may simply cease to be one to which Part 2 applies. If this occurs at the expiry of a fixed term, there will be no continuance under s.24(1).⁵⁷ If, however, the tenant is forced out after the expiry of a fixed term, the tenancy will not end for that reason alone, but the landlord will be entitled to terminate giving written notice under s.24(3)(a). So far as the tenant is concerned, it may serve notice to quit on the landlord thereby ending the tenancy under s.24(2), which preserves the right of a periodic tenant to give a common law notice to quit in the normal way. If, on the other hand, the tenant holds a fixed term tenancy continuing under Part 2, then presumably it may give written notice to terminate under s.27(2).

CONTRACTS FOR THE SALE OF LAND

(a) *The English caselaw*

The effect of a contract for the sale of land, pending completion of the sale, is to pass the equitable interest to the purchaser. The vendor becomes a constructive trustee for

⁵³ Interestingly, Lord Wilberforce in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, at 697, opined that, "if the frustrating event occurs during the currency of a lease, it would be appropriate to consider the Law Reform (Frustrated Contracts) Act 1943." Thus, for example, in the event of a lease being frustrated, the obligation to pay rent ceases with it in so far as rent is said to issue out of and be derived from the land. If the frustrating event occurs during the course of a rental period, some part of the rent already paid may be recoverable by the tenant from the landlord: see, s.1(2) of the 1943 Act. The consequences of frustration, however, for third parties with derivative interests (for example, subtenants and mortgagees) remain to be decided by the courts. It is unlikely that such interests will be preserved by s.139 of the Law of Property Act 1925 as the section refers only to extinguishment by surrender or merger. In any event, it is likely that such interests will be of little value if the lease is frustrated.

⁵⁴ So far as residential tenancies are concerned, the decision in *Hussein v Mehman* [1992] 32 EG 59 suggests that frustration would discharge the tenancy automatically without recourse to any statutory provisions affecting security of tenure. In that case, Mr Stephen Sedley QC (sitting as an assistant recorder at the Wood Green Trial Centre) held that a three-year assured shorthold tenancy had been terminated by the tenants' acceptance of their landlord's repudiatory breach involving a serious and continuing failure to repair the premises. See also, *Prince v Robinson* (1999) 31 HLR 89, involving a weekly Rent Act tenancy.

⁵⁵ Section 24(2) of the Landlord and Tenant Act 1954, whilst preserving several common law methods of termination of a business tenancy, makes no mention of the discharge of the tenancy by a frustrating event.

⁵⁶ See, *Weinbergs Weatherproofs Ltd v Radcliffe Paper Mill Co Ltd* [1958] Ch 437.

⁵⁷ See, *Esselte AB v Pearl Assurance plc* [1997] 02 EG 124.

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the purchaser so that the contract becomes specifically enforceable by either party. Prior to the decision in *National Carriers*, the primary objection to extending the doctrine of frustration to leases was that a lease created not merely a contract but also an estate in land.⁵⁸ The estate fell to be treated as the subject-matter of the contract and survived even though the tenant derived no benefit from it. This objection, which was said to apply to an executed lease under which the legal estate had passed to the tenant before the occurrence of the frustrating event, would presumably have also applied equally to the equitable interest that vests in a tenant under an enforceable contract for the grant of a lease even though no lease had been executed.

Similar reasoning would, no doubt, have applied to a purchaser under a contract for the sale of land pending the transfer of the legal estate. In both instances, equity, applying the maxim that what ought to be done is to be regarded as already done, allows either party to seek specific performance in order to enforce the transfer of the legal estate in accordance with the contract. In both cases, the purchaser (and the tenant) would be treated as being in the same position *as if* the estate (or lease) had been executed in their favour. On this analysis, although both purchaser (and tenant) are entitled to only an equitable interest, neither can rely on the doctrine of frustration. Such, indeed, appears to be the reasoning adopted in *Hillingdon Estates Co v Stonefield Estates Ltd*,⁵⁹ where the vendors agreed to sell certain land to the purchasers which was to be used for building development. Ten years later, a compulsory purchase order was made affecting the land. No conveyance of the legal estate had yet been executed. The purchasers brought an action claiming that the foundation of the contract was the development of the land which had been frustrated by the compulsory purchase order and that, therefore, the contract was extinguished. The vendors, on the other hand, sought specific performance of the contract. Vaisey J held that the contract had not been frustrated and should be carried out. In his Lordship's words:⁶⁰

"I cannot see that there is in this case any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served . . ."

The decision, however, is unsatisfactory for a number of reasons. First, it appears that Vaisey J was influenced heavily by the long delay that had occurred between the contract and the action brought by the purchasers. Secondly, his Lordship's conclusion that the doctrine "does not operate normally in the case of contracts for the sale of land"⁶¹ appears to have been premised largely on the "complete absence of authority" in point. Thirdly, the decision is hard to reconcile with earlier cases⁶² where the land was sold but requisitioned before completion. The vendor, in each case, was not permitted to enforce the contract as he could not perform his obligation to give vacant possession. Finally, the decision might well have gone the other way had it involved some catastrophic event which precluded the remedy of specific performance so that the purchasers could not acquire even an equitable interest in the land. The point here is that the remedy of

⁵⁸ See, for example, *London and Northern Estates Co. v Schlesinger* [1916] 1 KB 20, (lease of a flat not terminated by the fact that the tenant had become an alien enemy and was, therefore, prohibited from residing on the premises). See also, *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680, at 686-687; *Redmond v Dainton* [1920] 2 KB 256; *Matthey v Curling* [1922] 2 AC 180, at 237, (HL); *Swift v Macbean* [1942] 1 KB 375, at 381-382 and *Simper v Coombs* [1948] 1 All ER 306.

⁵⁹ [1952] Ch 627. See also, *Paine v Meller* (1801) 6 Ves 349.

⁶⁰ [1952] Ch 627, at 634.

⁶¹ [1952] Ch 627, at 631.

⁶² See, *Cook v Taylor* [1942] Ch 349 and *James Macara Ltd v Barclays Bank* [1945] KB 148.

specific performance, upon which the equitable interest depends, cannot be applied if the land itself does not exist. The remedy, as we know, is discretionary, and it would be absurd to suppose that equity would compel performance of the contract where the subject-matter of the contract has effectively disappeared.

There is also, of course, the broader point that, since *National Carriers*, objections to the application of the doctrine to leases based on the parties' relationship as giving rise to not only a contract but also an estate in land have been rejected in favour of the modern view that the parties' rights under the lease are governed by executory promises with their origins firmly grounded in the law of contract. That being the case, it is, in the writers' view, a small step to concede that the doctrine should apply equally to contracts for the sale of land notwithstanding that the foundation of the agreement is the transfer of an estate in land.⁶³ Although there is no clear authority in point, several dicta in the English case law support the notion that frustration applies to sales of land. In *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd*,⁶⁴ where a listing of property as of architectural or historical interest precluded the purchaser's planned development, Buckley LJ stated:⁶⁵

"I am prepared to assume for the purposes of this judgment that the law relating to frustration of contracts is capable of being applied in the case of a contract for sale of land, though that is one of the matters which has been debated before us. But, making that assumption, I have reached the conclusion that there are not here the necessary factual bases for holding that this contract has been frustrated."

In this case, the purchasers had entered into the contract without any stipulation that it was subject to their obtaining planning permission for redevelopment. That being so, they had accepted the risk that the property could be listed as of architectural or historical interest and the loss fell on them. The same reasoning was applied in *E. Johnson & Co (Barbados) Ltd v NSR Ltd*,⁶⁶ where a notice of intended compulsory purchase was issued by the Crown in respect of the land being sold. The Privy Council, on appeal from the Court of Appeal of Barbados, held that this did not frustrate the contract since it was to be presumed, in the absence of contrary provision, that the purchaser had agreed to accept the normal risks incidental to land ownership arising after the date of the contract, including the risk of interference with land rights by the Crown. Significantly, however, in *Universal Corporation v Five Ways Properties Ltd*,⁶⁷ concerning a change in the Nigerian exchange control regulations which left the purchaser without funds, Walton J observed:⁶⁸

"Whether or not the doctrine of frustration can ever apply to a contract for the sale of land in circumstances, at any rate, where the land is still there may well be open to doubt, but I do not pause to enquire; I assume for present purposes that it is. But quite emphatically

⁶³ It should be noted, however, that contracts for the sale of land invariably fix on one party (usually the purchaser) the risk of the property being destroyed by fire. Purchasers, therefore, normally insure on this basis.

⁶⁴ [1977] 1 WLR 164. If the vendor has insured, the purchaser, as a person interested, can require the insurance company to lay out the insurance money towards rebuilding or reinstating the building if it has been destroyed or damaged by fire: see, s.83 of the Fires Prevention (Metropolis) Act 1774. Alternatively, he may recover from the vendor any money coming to him under an insurance policy in respect of any damage to or destruction of the property: see, s.47(1) of the Law of Property Act 1925.

⁶⁵ *Ibid*, at 173. See also, at 176-177, per Sir John Pennycuik.

⁶⁶ [1997] AC 400, (HL).

⁶⁷ [1978] 3 All ER 1131.

⁶⁸ [1978] 3 All ER 1131, at 1135. The statement was referred to with approval on appeal: see, [1979] 1 All ER 552, at 554, where Buckley LJ stated: Certainly the purchasers were unable, by reason of matters beyond their control, to complete the contract when they should have done so, but this is something quite different from the contract having become incapable of performance; nor, in my view, can it be suggested that anything had happened to make the performance of the contract, in the circumstances existing at the date for completion, significantly different from what was contracted for . . ."

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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.”

Again, in *Hasham v Zenab*,⁶⁹ the Privy Council expressly envisaged an event frustrating an order for specific performance before the completion date. Lord Tucker stated:⁷⁰

“The court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order [of specific performance] in the event of an intervening circumstance frustrating the contract.”

In summary, it can be said that the English courts are prepared to admit the doctrine of frustration as applying to contracts for the sale of land, but the actual circumstances in which the doctrine will be held to frustrate the contract will be rare⁷¹ amounting, in line with the analysis in *Davis Contractors*, to some catastrophic event which renders performance of the contract either impossible or radically different from that envisaged under the contract.

A Commonwealth perspective

The Canadian caselaw recognises that the court's dispensing power under the doctrine of frustration may be necessary where the sales contract does not expressly allocate the risk arising from the change of circumstances in the contract and there is no implied allocation of risk in the background or context of the contract that governs the situation. In *Capital Quality Homes Ltd v Colwyn Construction Ltd*,⁷² for example, a purchaser agreed to buy a specified number of building lots, but the imposition of planning controls made it impossible to subdivide the land into the required number of lots before completion of the sale. The Ontario Court of Appeal concluded that the contract had been frustrated. Evans JA, after accepting that frustration applies to leases, stated:⁷³

“I am unable to distinguish any difference between leases of land and agreements for the sale of land, so far as, the application of the doctrine is concerned. Each is more than a simple contract. In the former, an estate in land is created while in the latter an equitable interest arises. There does not appear to be any logical reason or binding legal authority which would prohibit the extension of the doctrine to contracts involving land.”

Similarly, in *KBK No 138 Ventures Ltd v Canada Safeway Ltd*,⁷⁴ a sale contract for the development of land was held to be frustrated because the zoning for the land was changed and the permitted density drastically reduced which significantly altered the costs of the venture and made the purchaser's intended development uneconomic. The British Columbia Court of Appeal concluded that there was nothing in the contract that allocated the risk to the purchaser and the change in circumstances had transformed the contract into something radically different from what the parties had intended. By contrast, in *Dinicola v Huang & Danczkay Propertie*,⁷⁵ a proposed condominium development could not proceed because of the refusal of the city council to grant site plan approval and the eventual downsizing of the property. The Ontario Court of Appeal held that, since the contract dealt with this risk, it was not frustrated.

⁶⁹ [1960] AC 316, (HL). See also, *Rom Securities Ltd v Rogers (Holdings)* (1967) 205 EG 427, (planning permission refused).

⁷⁰ [1960] AC 316, (HL), at 330.

⁷¹ As the cases indicate, the risk that the premises may be destroyed or damaged, for example, by fire, will normally be borne by the purchaser and in respect of which it is usual to insure.

⁷² (1976) 61 DLR (3d) 385.

⁷³ (1976) 61 DLR (3d) 385, at 397.

⁷⁴ (2000) 185 DLR (4th), 650.

⁷⁵ (1998) 163 DLR (4th) 286. See also, *Victoria Wood Development Corporation Inc v Ondrey* (1978) 22 OR (2d) 1, (Ontario Court of Appeal), (no frustration where land purchased for building to knowledge of vendor and, after conveyance, legislation prohibited such development).

In Australia too, despite the obvious distinction between property and contract, the doctrine of frustration has been extended to contracts involving land, although here again, the outcome of the cases is largely dependent on the incidence of risk between the parties.⁷⁶ For this reason, the application of the doctrine has only rarely resulted in the frustration of the contract.⁷⁷ That said, it is recognised that frustration applies to an executory contract for the sale of land (and an agreement for a lease)⁷⁸ notwithstanding that the contract confers an equitable interest on the purchaser.⁷⁹

In New Zealand, the courts have followed the English caselaw and held that contracts for the sale of land are capable in law of being frustrated. Here again, however, in practice, the application of the doctrine will be rare given that such contracts normally provide for either vendor or purchaser to bear the risk of the events which have happened.⁸⁰ In *Steele v Serepisos*,⁸¹ however, the measures which the vendors of property needed to take in order to deposit a plan to achieve subdivision of the land proved (due to an inability to obtain an easement of drainage) to be of a substantially different character from what had been contemplated by the parties. The Supreme Court of New Zealand held that the vendors had taken all reasonable steps to try and complete the subdivision and, therefore, they were not in breach of contract. Moreover, although the doctrine of frustration was not invoked *per se*, the vendors were entitled to treat the contract as at an end (without the need for a prior warning notice served on the purchaser) because they could not fulfil the necessary drainage requirements as envisaged by the parties.

OPTIONS TO PURCHASE LAND

An option to purchase is a contractual agreement relating to a piece of land that allows the purchaser the exclusive right to purchase the land by the exercise of the option. The option usually contains an agreed purchase price and is expressed to be valid for a specified period. The purchaser does not have to buy the property, but the vendor is obligated to sell to the purchaser at the purchaser's election within the terms of the option agreement. Such an option (sometimes referred to as a "call" option) is an estate contract and creates an equitable interest in the land.⁸²

There is English authority for the application of the doctrine to options to purchase land. In *Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd*,⁸³ an agreement entered into between saw millers and timber importers stated that the former should

⁷⁶ In most cases, in the absence of specific provision, the purchaser is taken to have assumed the risk of not being able to use or develop the land in a particular way: see, for example, *British Traders' Insurance Co Ltd v Monson* (1964) 111 CLR 86, (ris22 OR (2d) 1, (risk of destruction by fire assumed by purchaser) and *Meriton Apartments Property Ltd v McLaurin & Tait (Development) Property Ltd* (1976) 133 CLR 671, (event preventing development of land in the way anticipated not frustration).

⁷⁷ See, for example, *Fletcher v Manton* (1940) 64 CLR 37, (demolition pursuant to government order did not frustrate contract) and *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, at 229, (no frustration where land requisitioned prior to completion).

⁷⁸ See, *Re Dennis Commercial Properties Ltd v Westmount Life Insurance Co* [1969] 2 OR 850; affmd. without reasons, [1970] 1 OR 698n, (Ontario Court of Appeal). See also, *Lobb v Vasey Housing Auxiliary (War Widows Guild)* [1963] VR 239, (agreement for a lease or licence frustrated) and *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, at 228, (frustration of agreement only excluded by the tenant taking possession).

⁷⁹ See, for example, *Wong Lai Ying v Chinachem Investment Co Ltd* [1980] HKLR 1, (PC), (landslip prevented completion within time stipulated in building permit). See also, *Silva v Tarval Property Ltd* (1986) 4 BPR 9101 and *Austin v Sheldon* [1974] 2 NSWLR 661.

⁸⁰ See, for example, *Carly v Farrelly* [1975] NZLR 356, (destruction of house by fire did not, in the absence of any express provision in the contract, discharge the purchaser). Where, however, the vendor is insured, the position of the purchaser is ameliorated by statute: see, s.13 of the Insurance Law Reform Act 1985.

⁸¹ [2007] 1 NZLR 1, (Supreme Court of New Zealand).

⁸² See, *London & South Western Railway v Gomm* (1882) 20 Ch D 562.

⁸³ [1944] AC 265, (HL).

purchase all their supplies of certain wood from the latter and should let them a certain timber yard with an option to purchase it (or take it on a long lease) on certain terms. As a result of war time regulations, further transactions between the parties became illegal for an indefinite period. The Privy Council, on appeal from the Scottish Court of Session, held that the regulations operated to frustrate the whole agreement⁸⁴ and that, therefore, the option to purchase lapsed since it only arose in the event of the agreement being terminated by a notice in accordance with the terms agreed between the parties. To this extent, the option to purchase was held to be entirely dependent on the main part of the agreement relating to the trade in timber. In the words of Lord Macmillan:⁸⁵

"It cannot be suggested with any reason in the present case that the respondents would have conferred on the appellants an option to purchase . . . independently of the trading arrangements into which they had agreed to enter. The consideration for the option was the fulfilment of those arrangements and there was no severable consideration."

There is no reason to suppose that the doctrine would not also apply to a so-called "put" option, where the agreement between the parties gives the vendor the right, but not the obligation, to sell the land at an agreed price within a specified time to the purchaser. Unlike the call option, until the put option is exercised, the potential purchaser has no right over or interest in the land. It is not uncommon to find an option and put option (i.e., a "put and call" option)⁸⁶ in one agreement. Under such an agreement, if the purchaser does not exercise the option to purchase, the vendor can compel the purchaser to proceed under the put option. In such a situation, applying *Denny*, a frustrating event would (presumably) discharge both options in so far as they formed part of one composite agreement.

EASEMENTS

An easement, as we know, is a right which attaches to a piece of land. It is not possible, therefore, to be the owner of an easement without being the owner of an estate in land to which the easement is attached. Does this, therefore, necessarily preclude an easement from being discharged as a result of a frustrating event? It is certainly possible for an easement to be impliedly released if it can be shown to be permanently unexercisable, or to have been abandoned by the dominant owner.⁸⁷ It is also apparent that an easement which has become impossible to use will be treated as impliedly extinguished. However, if there is any likelihood that it might again become useable, extinguishment will not be presumed.

In *Jones v Cleanthi*,⁸⁸ a tenant of a flat was granted an easement to use communal refuse bins in an area at the rear of the building. The landlord was required to carry out certain works to the building in order to comply with a fire safety notice under the Housing Act 1985. These works involved, *inter alia*, the building of a wall on the ground floor blocking off the hallway which gave access to the bin area. The Court of Appeal

⁸⁴ Interestingly, part of the contract was an agreement for a lease, but no argument was raised on the application of the doctrine to agreements for leases.

⁸⁵ [1944] AC 265, (HL), at 273.

⁸⁶ In such an agreement, the option holder's notice of exercise operates as a mechanism to trigger the obligation to sell or buy the land. Whilst there is no obligation on the option holder to exercise his right, if he does so then the other party is bound to perform his part of the bargain.

⁸⁷ See, for example, *Benn v Hardinge* (1993) 66 P & CR 246, where, on the facts, a right of way was held not to have been abandoned despite it not being used for 175 years. See also, *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, where fencing and earthworks that rendered a right of way less easy to use were held not enough to show abandonment.

⁸⁸ [2007] 1 WLR 1604.

held that the statutory obligation relieved the landlord from any liability in respect of rendering the easement unexercisable (and the tenant was not entitled to any damages), but the easement itself had not been extinguished and was only suspended. The Court concluded that it was possible that, at some future time, fire safety regulations (or the use of the property) might change so that the easement could be used again.

Despite the ruling in favour of the landlord, the case is significant in so far as it recognises the possibility of an easement being extinguished by a frustrating event. Indeed, the argument presented on behalf of the tenant is characterised by references to the likely discharge of a lessor's contractual obligations to his lessee "in circumstances where the statute frustrates the performance of the obligation".⁸⁹ Moreover, the tenant placed much reliance on the earlier case of *Yarmouth Corporation v Simmons*,⁹⁰ where the relevant statute had authorised the erection of a substantial structure which was intended to be permanent and the existence of which was physically inconsistent with a public right of way in that it prevented access onto a beach. Fry J held, not surprisingly, that by necessary implication, the existence of the statutory power extinguished the public right of way. In his Lordship's words, "there was a physical impossibility in the persons who had exercised the alleged right continuing to exercise it in the manner in which they had previously done."⁹¹ By contrast, in *Jones*, the lease had another 72 years to run which, in the Court of Appeal's view, gave ample time for the circumstances to change so far as the requirements for fire safety were concerned.

Reference may also be made to *Huckvale v Aegean Hotels Ltd*,⁹² where the Court of Appeal considered whether an easement could be extinguished by its ceasing to accommodate the dominant tenement. The claimants owned premises where they carried on a bakery business. They sold a plot of land (the red land) at the rear of the bakery to the predecessors in title of the defendants for use as a car park for their adjacent hotel. The conveyance contained a reservation of two rights of way over the red land to enable the claimants to gain access to the rear of their property. The contract of sale also provided for the grant of two complimentary rights of way over the adjacent hotel land, the effect of which would have been to give the claimants access through to the main street running in front of the hotel. These complimentary rights of way, however, were void as against the defendants for non-registration of the agreement under the Land Charges Act 1972. The defendants proposed to erect new buildings on the red land which would prevent the claimants from enjoying their rights of way over that land. The defendants argued that those rights had become extinguished as they no longer accommodated the dominant tenement in view of the unenforceability of the complimentary rights of way. In the course of his judgment, Slade LJ stated:

"... in the absence of evidence of proof of abandonment, the court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change of circumstances since the date of the original grant there is no practical possibility of its ever again benefitting the dominant tenement in the manner contemplated by the grant."

The Court of Appeal concluded that there was a triable issue as to whether, on the true construction of the reservation contained in the conveyance, the conditions necessary to establish frustration were satisfied.

⁸⁹ [2007] 1 WLR 1604, at 1620.

⁹⁰ (1878) 10 Ch D 518.

⁹¹ (1878) 10 Ch D 518, at 526.

⁹² (1989) 58 P & CR 163. See, G. Kodilinye, "Easements Ceasing to Accommodate the Dominant Tenement", [1990] Conv. 292.