LEGAL RESPONSE TO NATURAL DISASTERS

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PREFACE

This book could not have happened without the generous support and assistance provided by many people and institutions. The principal funder of the research, the New Zealand Law Foundation, allowed us to commence our research even before the earthquake sequence finished and has been tolerant of revisions to our schedule and work plans. We greatly appreciate the level of support we received. The Centre for Commercial and Corporate Law Inc provided further funding, as well as an opportunity for us to test some of our early work at a conference the Centre organised. The Law School at the University of Canterbury has provided an extraordinary level of administrative support (particular thanks to Fiona Saunders!) and a number of targeted research grants which have allowed us to explore areas at and outside the periphery of our work. Without this generous level of support the project could never have been undertaken or completed. Nor could it have been undertaken successfully without the strong support given to us by the Canterbury-Westland branch of the New Zealand Law Society. We are very grateful to all these organisations and their staff.

Our collection of research data was made possible by the contributions of hundreds of individuals who answered our survey, took part in interviews in New Zealand and the United States, provided us with copies of relevant documents and material or assisted us to make connections with other researchers within the University of Canterbury, elsewhere in New Zealand and across the world. We particularly would like to thank those who readily made time for interviews in their very busy schedules. We will not mention names here as some prefer to remain anonymous, but you know who you are and we really appreciate your help. We are, of course, are solely responsible for our interpretation of the information with which we were provided.

Specialist knowledge was necessary for some of the issues raised by the disasters described in this work. We were able to draw on a number of other writers to contribute their expertise in diverse fields: Alison Chamberlain, Ursula Cheer, Toni Collins, Andrew Maples, Sarah Rosanowski and Adrian Sawyer. Their contributions have been invaluable. We want also to thank colleagues within the University and elsewhere who have provided us with advice, support and encouragement, particularly John Caldwell, Steve Glassey, Lucy Johnston, Robert Kipp and Debra Wilson. We were blessed with an extraordinarily capable and energetic researcher in Rose Roberts, and have benefited greatly from research done by a number of research assistants including Greg Belton-Brown, Shane Campbell, Sarah Down, John Goddard, Sarah Mills, Elizabeth Somerfield and

Rachel Walsh. Karen Grant and Rachel Souness ensured that our text had a consistency of style and format. A number of colleagues and practitioners reviewed and commented on these drafts to our great benefit. Without these contributions the book would not be what it is. The editors alone are responsible for any remaining errors. The law is stated as at 1 November 2014, although a few significant cases from November and early December 2014 have been incorporated.

We are very grateful to Thomson Reuters Ltd, and Anna Gray and Ian McIntosh in particular, for taking on the book project, for their enthusiasm and backing of the project and their willingness to ensure that it appeared quickly. Special thanks also to Hellena Briasco for her superb editing.

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Frustration of Contract and Dealing with Disasters

Jeremy Finn

8.1 Introduction

The doctrine of frustration is a judge-made rule, which holds that contracting parties should not be held to a bargain which has been rendered impossible of performance or radically transformed to the disadvantage of one party by the occurrence of some event which arose independently of any fault by the parties.[1] In such cases, frustration requires something which can be said to change performance into something radically different from what was in the parties' mutual expectations. It is not enough that the contract had become more burdensome or performance more expensive than had been expected at the time of the contract.[2] Frustration may also be established where an external circumstance or event transforms any benefit one party was to receive under the contract to something different from that which was *mutually* expected to be conferred[3] or if performance of the contract becomes illegal.[4]

1 *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL) at 728–729.
2 *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 (CA).
3 *Krell v Henry* [1903] 2 KB 740 (CA).
4 *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119 (HL).

8.2 Consequences of frustration

Where the doctrine of frustration applies, it is often said that the occurrence of a frustrating event "brings the contract to an end forthwith, without more and automatically".[5] Thus, if a contract is frustrated, neither party need do any acts to further perform the contract. In effect frustration "freezes" the position. However, some cases have qualified the immediate and automatic frustration rule. There may be cases where frustration occurs not at the time of the critical event but rather the point at which prolonged impossibility of performance (rather than a temporary interruption) is to be expected.[6] A party may wait a short time to assess the consequences of an arguably frustrating event before claiming frustration has occurred.[7]

Problems will arise if the event is later not found to have been sufficient for frustration. A party who, considering the contract to be frustrated, does not perform, or does not continue to perform, obligations under the contract will be liable in damages for repudiating the contract or for breaches in performance if a court later holds the contract was not frustrated. This, of course, places a premium on being able to predict accurately whether a particular event will give rise to frustration. Sometimes this is possible, as where the subject matter of the contract has been destroyed, or where there has been a cancellation of an event which, in the mutual contemplation of both parties, was the sole underlying basis for the contract, or on the death or incapacity of a person whose personal involvement is central to the contract or in cases of supervening illegality.

8.3 Post-facto adjustments: discretionary relief under the Frustrated Contracts Act 1944

If the contract is frustrated, the whole contract is discharged, so neither party has any further obligations. That rule may operate unfairly if one of the parties has commenced performance, or has expended money or resources in preparing for performance. In such cases the disadvantaged party may seek to have the Court exercise its limited powers to grant relief under the Frustrated Contracts Act 1944. Under s 3(2) of the Act a party may recover money paid before the frustrating event discharged the contract. However, where this occurs, and the other party had incurred expenses before the time of discharge in performing or for the purpose of performing of the contract, that other party may be permitted by the Court to retain or recover the whole or part of those expenses. There is no presumption of total reimbursement, and it is up to the defendant to establish the claim to expenses.[8] More generally under s 3(3) the Court may order that such sum as it

5 *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497 (PC) at 505 per Lord Sumner.
6 *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 2 All ER 658 (QB).
7 *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 (HL) at 752.
8 *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226 (QB).

considers just be paid by one party to the other in return for a valuable benefit received by that party as a result of the other's performance of the contract at the time of frustration. The Court's general discretion to achieve a fairer outcome in these cases must be exercised without taking into account any payments received by either party under a contract of insurance as a consequence of the frustrating event unless the contract of insurance was required by a term of the contract between the parties.[9] This is clearly intended to prevent the courts from allocating loss to the insured party when it would not otherwise fall there.

8.4 Frustration and the Canterbury earthquakes

Our research specifically investigated the extent to which Canterbury lawyers had considered the doctrine of frustration and how far it had been considered applicable. Some respondents referred to it as a matter which was considered, but it appears few, if any, considered it could resolve issues faced by clients.[10] A major issue was that the law as it stood in 2010/2011 was seen as uncertain. The key problem was how far, if at all, the doctrine applied to allegedly frustrating events which had been foreseen by the parties, or were reasonably foreseeable, at the time of making the contract. The leading New Zealand authority was *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australasia) Ltd*,[11] where Blair J held that a contract for the supply and purchase of electricity over a five-year period was not frustrated when the defendant's works were devastated by the Napier earthquake of 1931, on the basis that earthquakes were not uncommon in New Zealand, and the risk of one was foreseeable, preventing the doctrine of frustration from applying. However, not all judges[12] or commentators[13] have taken the same view, arguing that frustration could apply even if the frustrating event was foreseeable.

It was certainly possible to argue the foreseeability issue both ways after the September 2010 earthquake. On the one hand, an earthquake was foreseeable on Blair J's argument that New Zealand generally is prone to earthquakes; further, seismologists had pointed out there were a number of faults underlying the Canterbury Plains and Christchurch. On the other hand, the earthquake occurred on a previously unknown fault line, and it was not predictable in terms of either location or scale. However, once that major earthquake had occurred, there were very clear public warnings that further large aftershocks were to be expected. While

9 Frustrated Contracts Act 1944, s 3(5).

10 It is perhaps illustrative that in one case involving a building damaged by the February earthquake, a claim that a contract had been frustrated was replaced with an argument based on total failure of consideration: see *Awly Investments Ltd v McPhail* [2012] NZHC 3599 at [12].

11 *Hawkes Bay Electric Power Board v Thomas Borthwick & Sons (Australasia) Ltd* [1933] NZLR 813 (SC).

12 See the views of Lord Denning in *Ocean Tramp Tankers Corporation v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226 (CA) at 239.

13 See, for example, John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [20.2.3].

the scale of the February 2011 earthquake was at the upper end of such predictions, its occurrence was highly foreseeable. Certainly once it occurred the probability of still more substantial aftershocks was overwhelming. A Canterbury academic, writing after the September 2010 earthquake but before the February event, noted: "Certainly after the big Canterbury earthquake New Zealand businesspersons would be well aware of the risk … ."[14]

On that basis frustration was potentially available for contracts entered into before the September 2010 quake, but unlikely to be available for contracts formed later.

It is, therefore, not surprising that it seems few lawyers were ready to advise clients that contracts had been frustrated or to rely on a frustration defence if sued. There have been only a few cases arising from the Canterbury earthquakes in which frustration has been argued. In *GP 96 Ltd v FM Custodians Ltd*[15] Chisholm J held, on an application for an interim injunction, that a lease should not be regarded as frustrated where the building was slightly damaged but access had been prevented by the government-imposed cordon for a few weeks (as at the time of the application).[16]

An even less satisfactory approach was taken in the High Court decision in *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd*,[17] where it was held that a contract of insurance had been frustrated by the occurrence of two aftershocks, which each damaged a building partly repaired after the September 2010 earthquake. Dobson J's reasoning is suspect not least because of a finding that these aftershocks were not foreseeable (something not apparently arising from the evidence and certainly contrary to the public statements by a number of geologists and seismologists at the time). The case went to the Court of Appeal where the judgment was upheld on the basis of the construction of the contractual wording, but the Court of Appeal expressly stated that it would not have supported the frustration analysis applied by the Judge.[18] The frustration issue was not argued when the case went on further appeal to the Supreme Court, but the Supreme Court indicated clearly that it considered Dobson J's view to be unsustainable.[19]

8.5 The law reconsidered

The Supreme Court revisited the doctrine of frustration in *Planet Kids Ltd v Auckland Council*.[20] While the case did not involve earthquake or natural disaster issues, the view taken of the operation of the frustration doctrine will be likely to have

14 Maree Chetwin "Frustration and earthquakes" [2010] NZLJ 419 at 420.
15 *GP 96 Ltd v FM Custodians Ltd* (2011) 12 NZCPR 489 (HC).
16 See ch 13 at [13.2.1] for further analysis of this case.
17 *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd* [2012] NZHC 2954, (2012) 17 ANZ Insurance Cases 61-957.
18 *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd* [2013] NZCA 291, [2013] 3 NZLR 618.
19 *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 129, [2015] 1 NZLR 40 at [18].
20 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149.

significant implications for such disaster cases. In the *Planet Kids* case the Supreme Court held, overruling the courts below, that an agreement between the Council, as lessor, and the appellant, as lessee, in settlement of issues arising from the Council's intention to acquire the leasehold land interest under the Public Works Act 1981 so as to use the land for roading, was not frustrated by the automatic termination of the lease on destruction of the buildings on it by arson. While the Court was unanimous in holding that the contract was not frustrated, there was some difference between the views of the majority (McGrath, Glazebrook and Gault JJ) and Elias CJ and William Young J who wrote separate judgments.[21] The majority judgment identified three salient features of the doctrine of frustration:[22]

> "(a) For fundamental policy reasons related to the sanctity of contract, the threshold for frustration is high.
>
> "(b) It does not depend on application or election by the parties but occurs automatically by operation of law to discharge the contract 'forthwith, without more and automatically.'
>
> "(c) The doctrine of frustration operates to bring the contract to an end at the time of the frustrating event. The contract is not deemed invalid from the outset and so at common law there was usually no relief for part performance occurring prior to the supervening event … ."

Predictably, all of these features have been recognised in many previous cases.

The majority went on,[23] as had Elias CJ,[24] to hold that because the circumstances in which the doctrine of frustration might apply are extremely varied, the courts should adopt the lead of the English Court of Appeal in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)*,[25] and adopt a "multi-factorial" approach taking into account the following factors:[26]

> "(a) the terms of the contract;

21 Elias CJ took a somewhat different view on the issue of the effect of a contractual provision allocating risk (see *Planet Kids* at [15]–[16]), although otherwise generally agreed with the majority on other aspects of the doctrine of frustration. As noted later, William Young J focused primarily on a different approach to the issues raised.

22 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [48] (footnotes omitted). As the majority noted, the Frustrated Contracts Act 1944 now allows some restitutionary relief. See [8.3].

23 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [60].

24 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [8].

25 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517.

26 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [60], citing *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517 at [111] per Rix LJ.

> "(b) its matrix or context;
>
> "(c) the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of the contract, at least to the extent that these can be ascribed mutually and objectively; and
>
> "(d) the nature of the supervening event, and
>
> "(e) the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."

The Court must also consider the overall justice of the case; that is the consequences of applying or not applying the doctrine in the particular circumstances, although this does not create a broad power to override the other factors.[27]

The majority then proceeded to hold that partial performance of the contract does not prevent the doctrine of frustration applying. The question is whether completion of performance has become impossible and has frustrated the main common purpose underlying the contract.[28]

In later passages the majority expressly addressed the issue of foresight of, and foreseeability of, the supervening event alleged to have made performance impossible or very substantially different from that which was mutually intended. As noted earlier, some previous cases had treated this as decisive. Instead the majority held:[29]

> "[158] A foreseen event will generally exclude the operation of the doctrine, but the inference that a foreseen event is not a frustrating event can be excluded by evidence of contrary intention. When an event is foreseeable but not foreseen by the parties, it is less likely that the doctrine of frustration will be held to be inapplicable. The degree of foreseeability required to exclude frustration is high. The supervening event must be one which any person of ordinary intelligence would regard as likely to occur. Further, not only must the supervening event be foreseeable but its consequences or effects on the contract must also be foreseeable. The inference that an event that is foreseeable may exclude frustration can also be displaced by evidence of contrary intention."

This pronouncement clearly means that the application of the doctrine of frustration can be treated as inevitably barred by the foreseeability of the allegedly frustrating event. Rather it will depend on what is meant by the event which would

27 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [61].
28 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [78].
29 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 (footnote omitted).

be foreseen as "likely" – a word with a wide range of meanings in different contexts. The application of the doctrine may, therefore, be considered to be less, rather than more, certain.

8.5.1 Risk allocation

The majority in *Planet Kids* held that there was no room for application of the doctrine of frustration flowing from the occurrence of a particular event where the contract expressly or implicitly allocated to one or the other party the risk of that event occurring.[30] Clearly where the parties had contemplated the risk, or are taken to have contemplated it, and have not provided for the event to terminate the contract, the underlying purpose of the contract must have been intended to survive the event.

However, the majority then went on to say:[31]

> "[140] This does not mean that the doctrine of frustration cannot be brought into operation by other events affecting the performance of such contracts, like impossibility in the method of performance, delay or illegality.
>
> "[141] Despite a clause apparently allocating risk in a contract, there have been instances, as pointed out by the Council, where the courts have held that frustration has occurred. This is because the clause in question has been interpreted as being only wide enough to apply to events of a less seriously disruptive kind."

The majority held that the doctrine of frustration could also be excluded by rules of law which operated to allocate risk to one party or the other.[32] The judges went on to illustrate this principle by referring to contracts for the sale of land:[33]

> "[143] In a contract for the sale of land, risk passes to a purchaser when the contract is entered into. This is because, under the trust that arises from a specifically enforceable contract, the property belongs to the purchaser in equity. The risk of damage or destruction to the property therefore also passes to the purchaser. Risk passes to the purchaser even with regard to conditional contracts but passes back if the condition is not fulfilled. This means that there is no room for the doctrine of frustration when buildings or structures on the land are destroyed prior to settlement (although of course contractual remedies may apply, including under the Contractual Remedies Act)."

30 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [139].
31 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 (footnotes omitted).
32 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [142].
33 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 (footnotes omitted).

The majority noted, but did not discuss, the Privy Council decision in *Wong Lai-ying v Chinachem Investments Co Ltd*.[34] In that case contracts for the purchase of apartments in buildings to be constructed within a fixed time frame were held to have been frustrated by the occurrence of an unforeseeable landslip which both prevented the vendors from accessing the site to continue building operations and required very substantial and expensive changes to the design and construction of the subsurface elements of the buildings.

Express allocation of risk should a disaster occur is not uncommon in some kinds of contracts, usually through "force majeure" clauses, which state that full performance of a contractual obligation is to be excused if performance or further performance is rendered impossible by unavoidable causes, such as Act of God, the Queen's enemies, or force majeure ("superior force"). For these purposes "Act of God" includes earthquakes, even though events which have a probability of recurring are not normally considered Acts of God.[35]

8.5.2 Hardship

A more minor matter, and one not likely to be in issue in a post-disaster context, was whether it was necessary to show that hardship would have followed from the contract remaining in force. Here the majority held that while extreme hardship could itself amount to a frustrating event,[36] it was not necessary that the consequences of the supervening event cause hardship to either party.[37] However, a lack of hardship is a matter to be taken into account in determining whether the contract was frustrated.[38]

8.6 Some particular problems for the doctrine of frustration in earthquake events

The Canterbury earthquake sequence and the disaster management responses to it reveal some particular difficulties with the application of the doctrine of frustration even allowing for the multifactorial analysis adopted by the Supreme Court in *Planet Kids*. These can be analysed under three different headings as follows.

8.6.1 The multiple event problem

In almost all cases where frustration has been in issue, the parties are agreed that there was a single critical event which should be regarded as frustrating the contract. The only significant exception to this principle is where it is alleged that frustration arose from extreme delay, as clearly in such cases there may be no single event. As

34 *Wong Lai-ying v Chinachem Investments Co Ltd* [1980] HKLR 1 (PC).

35 *Wright, Stephenson & Co Ltd v Holmes* [1932] NZLR 815 (CA) at 823.

36 Applying a dictum of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 (HL) at 729.

37 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [118].

38 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [121].

the judgment of Rix LJ in *The Sea Angel*[39] shows, settling the point at which delay has had sufficient impact to frustrate a contract may be difficult in the extreme.

The Canterbury problem is slightly different in that there were a series of earthquakes, with several very large shocks doing the bulk of the damage. In some areas it is relatively easy to identify which of the various seismic events caused particular damage, but in many parts of Christchurch city and some surrounding areas there was a process of cumulative damage. This raises an obvious difficulty in determining whether there was any one single frustrating event. If a building was damaged in one seismic event but could readily have been repaired and brought back into use had it not been for the later seismic events, which caused further damage and disruption, was any contract of lease frustrated at the time of the first seismic event, or at one of the later events? If so, which of them?

The difficulties are increased by the need to take into account the degree to which these further risks were foreseen or foreseeable. A court utilising the multifactorial approach to frustration will need to determine in each and every case the event or events that allegedly frustrated the particular contract, the degree to which that element of the seismic cycle was either foreseeable or, quite possibly, foreseen and then go on to determine in the light of those conclusions and the impact of other factors whether frustration occurred. There may well be a substantial chance that disparate findings as to frustration will be made for litigants in essentially similar positions.

8.6.2 Possible frustration by governmental actions in disaster management

In many cases the issue of frustration will arise not from the direct impact of the earthquakes and physical damage to premises or other property, but rather from the inability of a contracting party to gain access to particular premises or to ensure that members of the public have access to those premises. After both the September 2010 and February 2011 events, significant parts of the centre of Christchurch were "red-zoned" – that is placed under a regime where general public access was either very significantly restricted or completely forbidden. Large areas of the centre city remained closed to public access for more than two years. Yet many of the buildings within the cordons were perfectly sound and could have been used by the owners or tenants had access been possible. The issues are most simply illustrated by the example of a building in the city centre which had been in use as a cafe or restaurant, which survived the series of earthquakes undamaged or with only minor and easily-repairable damage, but could not be accessed either by the occupier, the occupier's employees or by potential customers because of the closure of the inner-city area. What was the frustrating event? Was it the earthquakes (which led to government

39 *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage and Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517.

action to cordon off the centre city)? Or was it the imposition of the cordons and access restrictions to the premises? Or was it at some later point when it became clear that access could not be quickly restored? It is hard to see that a temporary and brief restriction of access would have been sufficient to amount to a frustrating event. Indeed, after the September 2010 earthquake most of the areas to which access had been restricted were reopened for public access within a matter of days or weeks. Thus, it seems likely that the frustrating event, if one can be identified at all, came when it became obvious that the restriction on access would be very lengthy.

8.6.3 The overarching retrospectivity problem

In a post emergency context the greatest single weakness of the doctrine of frustration as it has evolved in recent years, particularly with the adoption of the multifactorial analysis, is that the doctrine of frustration has become increasingly a matter to be determined retrospectively. Because there are no clear bright-line rules, the parties to a contract affected significantly by some major change in circumstances as a result of a disaster are often unsure whether their contract is frustrated or remains operative.

In a significant number of cases, parties to a contract affected by a major event may be able to make a "first-cut" analysis by considering whether one or other would have had grounds to terminate the contract because of the consequences of the event. In the *Planet Kids* case William Young J advanced this novel approach to the issue of frustration. He argued that the Court should consider the way in which the consequences of the alleged frustrating event would be dealt with under the Contractual Remedies Act 1979 were the contract held not to be frustrated.[40] The Court should consider whether the inability of a party to complete its obligations under the contract would have entitled the other party to cancel the contract, something to be determined by deciding whether non-performance involved a breach of a term which the parties had impliedly or expressly agreed was essential, had substantially reduced the benefit to the other party, had substantially increased the burden to that party or had substantially altered the benefit or burden of the contract.[41] The other judges considered this would be a useful "practical cross-check".[42]

8.7 Reform

It is clear from the discussion above that the doctrine of frustration provides at best an uncertain and inefficient remedy for dealing with contracts affected by major disaster events. We suggest that some change in the law is needed. One possibility is to largely replace the doctrine by a specific frustration of contract Act

40 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [175].
41 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [178].
42 *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [66]. See also at [12].

on the lines of other contractual legislation, such as the Illegal Contracts Act 1970 and the Contractual Mistakes Act 1977. Such a statute would need to include a clearer definition of frustration which could readily be applied by the parties and the courts. The approach advocated by William Young J in the *Planet Kids* case would provide a suitable starting point for drafting a statutory definition. The courts would then be given a wide discretionary power to grant relief to the parties to the frustrated contract, for example by varying the terms of the contract to allow it to be performed on terms which are reasonably fair to either party, to award compensation or to order restitution. The relief provisions of the Illegal Contracts Act 1970, which have been used with some modification in other contractual statutes, will provide a starting point for appropriate powers to be conferred on the courts.

If this is seen as too drastic a change, we suggest there should be a statute along these same lines, which would be designed to apply only in the aftermath of a natural disaster or other state of emergency. Indeed, it would be possible to provide that it only came into operation when a state of emergency had been declared. Any party to a contract affected by the event, which triggered the declaration of a state of emergency, would be able to apply to a court for a determination of whether the contract should be regarded as frustrated or not. If the contract is found to have been frustrated, the relief powers suggested above would apply, and the Court could make such relief orders as seemed necessary in the circumstances. Inevitably, difficult issues would arise and in some cases decisions would need to be revisited, for example where inability to access a building was expected to be relatively brief the decision would need to be revisited if that inability was prolonged.

The final design of reform along these lines could be settled by the Law Commission after its usual process of consultation. It would be most unfortunate if the law was left unaltered.