APPROVED NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL APPEAL No. 2022/26

Neutral Citation Number [2024] IECA 65

BARNIVILLE P.

HAUGHTON J.

PILKINGTON J.

BETWEEN/

FOOT LOCKER RETAIL IRELAND LIMITED

PLAINTIFF/APPELLANT

AND

PERCY NOMINEES LIMITED

DEFENDANT/RESPONDENT

JUDGMENT of Mr. Justice David Barniville, President of the High Court, delivered on the 22nd day of March, 2024

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1. Introduction & Overview

1. This appeal raises an interesting but very net issue as to whether a commercial lease of a retail store on Grafton Street in Dublin was, ultimately, frustrated, on a partial or temporary basis, as a consequence of the closure requirements introduced by ministerial regulations following the arrival of the Covid-19 pandemic in Ireland in 2020, such that the tenant could be excused from the obligation to pay the rent reserved under the lease for the period for which the unit was required to be closed. The High Court, applying clear and established authority, decided that issue against the tenant. The tenant has now appealed and, in support of its appeal, has asked this Court to apply a concept ("*partial"* or "*temporary"* frustration) which has not been expressly recognised by the common law, and to "*make new law*" in, what are said to be, the exceptional circumstances which have given rise to these proceedings.

2. This is an appeal by the plaintiff/appellant, Foot Locker Retail Ireland Limited ("Foot Locker"), from the judgment of the High Court (O'Moore J.) delivered on 30th November, 2021, (*Foot Locker Retail Ireland Ltd. v. Percy Nominees Ltd.* [2021] IEHC 749), and from the Order made by the High Court on foot of that judgment on 2nd December, 2021. The High Court dismissed Foot Locker's claim against the defendant/respondent, Percy Nominees Limited ("Percy"), that the lease to which Foot Locker and Percy are parties was frustrated or "*partially*" frustrated due to the fact that the retail store the subject of the lease was forced to close for a period of time, on foot of ministerial regulations introduced in 2020 and 2021to deal with the arrival of Covid-19 in Ireland. Foot Locker has appealed against the decision dismissing its claim and against the order that it pay the costs of the proceedings.

3. The High Court judge delivered a comprehensive judgment in which he considered and assessed all the arguments advanced by Foot Locker in support of its claim. The trial judge set out clearly, and in some detail, the relevant legal principles applicable to the frustration of

contracts (including leases) and to a claim of *"partial"* or "*temporary"* frustration. For reasons set out in this judgment, I am satisfied that the judge identified and applied the correct legal principles and reached the correct conclusion that there was no basis for the claim of "*partial"* or "*temporary"* frustration which was (ultimately) advanced by Foot Locker at the trial.

4. I am satisfied that Foot Locker has not advanced any good reason to interfere with the decision of the trial judge or to "*make new law*", as Foot Locker asked this Court to do, for any of the reasons advanced on its behalf. The approach taken by the trial judge and the conclusions he reached were, in my view, completely consistent with clear and established Irish case law, as well as case law from other jurisdictions, and with the well-established legal principles governing the frustration of contracts (including leases). I have not been persuaded by Foot Locker's efforts, made in its written and oral submissions, to distinguish the previous cases from this case on the basis of certain provisions of the lease at issue. The trial judge was, in my view, absolutely correct to dismiss the claim ultimately advanced by Foot Locker at the trial, which was that the lease had been partially frustrated for the periods during which the retail unit had to remain closed due to the ministerial regulations in force at the time. For these reasons, and for the further reasons set out in detail in the judgment below, I have concluded that Foot Locker's appeal should be dismissed.

2. Factual Background

5. Foot Locker, a well-known retailer of sporting and fashion footwear and apparel, operated, as of March 2020, seven retail stores in Ireland. One of those stores is located at 44 Grafton Street, Dublin 2 (the "Grafton Street Store"). Foot Locker is the holder of the tenant's interest under the lease in respect of the Grafton Street Store. The lease dates back to March 1990. On 14th March, 1990, a lease was entered into between AIIM Nominees Limited (as landlord) and Xtra-Vision plc. (as tenant) in respect of 44 and the rear of 45 Grafton Street, Dublin 2, for a term of 35 years from 20th March, 1990 (the "lease"). The initial annual rent

reserved under the lease was IR£170,000. The rent was increased, on a number of occasions, on foot of rent-review provisions under the lease. As of March 2020, the annual rent was €750,000. Foot Locker became entitled to the tenant's interest under the lease and Percy became entitled to the landlord's interest. The lease is due to expire in March 2025. Foot Locker was also granted a licence to underlet a portion of the premises and entered into a sublease in August 2019 with a company called Crawley Limited (which trades as the well-known restaurant "Captain Americas") in respect of a part of the ground floor and the entire first floor of the premises. That sublease is also due to expire in March 2025 and provides for an annual rent of €93,000 payable to Foot Locker.

6. On 29th February, 2020, the first confirmed case of Covid-19 was reported in Ireland. On 12th March, 2020, the Government announced the closure of schools, third-level educational institutions and childcare facilities as part of a series of urgent public health emergency measures designed to suppress the spread of Covid-19 in Ireland. On 16th March, 2020, the Government required all bars and public houses to close and advised against non-essential travel.

7. On 17th March, 2020, Foot Locker decided to close all seven of its stores in the State, including the Grafton Street Store. A week later, on 24th March, 2020, the Government announced emergency measures in response to the public health emergency, including the required closure of all non-essential retail premises. There followed a series of ministerial regulations made under s. 31A of the Health Act 1947 (as amended) which required the closure of non-essential retail stores, including the Grafton Street Store, with effect from 24th March, 2020 and which imposed strict restrictions on the ability of members of the public to leave their homes. There was some easing of restrictions, with effect from 8th June, 2020, which permitted the opening of non-essential retail outlets, with physical distancing between persons, and allowed members of the public to leave their homes and move between counties. Restrictions

were reintroduced and lifted from time to time throughout 2020 and 2021, in an effort to combat the growing number of Covid-19 cases in certain parts of the country, including Dublin. It is unnecessary to outline the precise details of these various restrictions as it has been agreed between the parties that Foot Locker was required, by virtue of these restrictions, to close the Grafton Street Store for a total of 253 days between March 2020 and May 2021.

8. Between late March 2020 and early June 2020, Percy was seeking payment of the rent for the second quarter of 2020 (1st April – 30th June) and Foot Locker was seeking Percy's agreement that it would not have to pay rent or service charges until such time as non-essential retail outlets were permitted to reopen. Percy was not agreeable to that suggestion and continued to press for payment of the rent then due. On 8th June, 2020, Foot Locker's solicitors set out their client's position as regards its obligations under the lease. In essence, Foot Locker's position was that it was not required to pay rent in circumstances where it was obliged, by law, to close the Grafton Street Store from 17th March, 2020, with limited opportunity to reopen with effect from 8th June, 2020. Reference was made in the letter to certain covenants contained in the lease which required the tenant to:

(a) comply with enactments *"for the time being in force"* (Clause 3.4.1);

(b) not to use or permit the demised premises or any part of them to be used for any purpose (at ground floor) other than as a *"high quality retail shop"* (Clause 3.19); and

(c) to keep the premises open *"at all reasonable times during the usual business hours of the locality"* (Clause 3.19.2).

9. It was maintained by Foot Locker in that letter that: (a) it was not liable for the rent reserved under the lease for the period during which the premises were closed in compliance with the Covid-19 regulations; and (b) it was clear that Foot Locker was not in a position to discharge rent for a premises which could not be operated or used for the purpose envisaged in the lease.

10. The letter concluded:

> *"*[Foot Locker] *considers that the lease is in effect now entirely frustrated both by the COVID-19 restrictions which have been put in place to date and those which are now to be put in place by the authorities going forward.*
>
> *Our client will not have any opportunity to obtain or operate anything like the type of retail unit which was the subject of this lease and which has been operating since its commencement date.*
>
> *In the circumstances our client will, entirely without prejudice to this position, operate this unit for a limited period of time and expressly reserve the right to treat this lease as entirely frustrated and should be extinguished on that basis*."

11. Percy's response to that letter was, in the words of the trial judge, *"unmistakeably direct"*. On 21st July, 2020, Percy's solicitors served a 21-day notice seeking payment of all rent arrears, failing which a petition would be brought to wind up Foot Locker. On 28th July, 2020, Foot Locker's solicitors replied stating that the 21-day notice and threatened application to wind up Foot Locker were inappropriate in circumstances where, as Foot Locker contended, the lease was frustrated and, where, without prejudice to that position, Foot Locker had discharged 50% of the rent owing for the third quarter of 2020 (1st July – 30th September, 2020).

12. Ultimately, the parties were unable to reach any compromise on the arrears of rent claimed by Percy and, in light of Percy's threat to present a petition to wind up Foot Locker, Foot Locker commenced the proceedings in the High Court on 11th September, 2020.

3. The High Court Proceedings

13. In the plenary summons issued on 11th September, 2020, Foot Locker sought a declaration that:

> *"by reason of the unprecedented national emergency caused by the Covid-19 pandemic and Government Regulation issued pursuant to s. 31A of the Health Act 1947 (as*

amended…). [Foot Locker] *has been unable to trade from the premises as contemplated by Clause 3.19.2 of the Lease…to which* [Foot Locker] *is the successor to the tenant's interest and* [Percy] *is the successor to the landlord's interest and that in consequence the common intention of the parties has been frustrated"*.

14. Foot Locker sought a further declaration that *"by reason of the said frustration,* [Foot Locker] *has no liability for rental payments under the lease as and from 24 March 2020"*. As noted by the trial judge, somewhat different reliefs were sought in the statement of claim delivered on 19th October, 2020. Having set out the terms of the lease, the impact of the arrival in Ireland of the Covid-19 pandemic, and the restrictions imposed by the Government to combat its spread, including the restrictions on non-essential trading from retail-outlets, such as the Grafton Street Store, and having noted that such restrictions and measures would continue *"for the foreseeable future"*, Foot Locker pleaded that those measures caused interference with the contractual arrangements between the parties in that they:

> *"(a) fundamentally undermined the common intention of the parties that the Demised Premises would remain open during normal business hours throughout the term of the lease as contemplated by Clause 3.19.2 of the lease;*
>
> *(b) frustrate the common purpose of the parties that the Demised Premises would operate as a high-quality retail shop;*
>
> *(c) radically alter the pattern of public behaviour in the Grafton Street area, such that the bargain which the parties had struck and the nature of the contractual relationship is significantly undermined in a completely unforeseen way from that which the parties had contemplated;*

(d) render commercially impossible the operation of the demised premises at the rental level agreed due to the officially induced reduction in trading capacity as envisaged between the parties." (para. 21 of the statement of claim)

15. Foot Locker then pleaded that the lease between the parties *"has been frustrated or partially frustrated"* (para. 23 of the statement of claim). The inclusion of a claim that the lease had been "*frustrated or partially frustrated"* led to a change in the declarations sought by Foot Locker in the statement of claim. The first declaration sought was to the effect that, by reason of the matters set out, *"the common intention of the parties has been frustrated in whole or in part"*. The second declaration was to the effect that, by reason of the alleged frustration, Foot Locker had no liability for rental payments under the lease as, and from, 24th March, 2020 *"or a proportionate part thereof"*.

16. Percy delivered a full defence denying Foot Locker's entitlement to those declarations and making a counterclaim for payment of the arrears of rent which, as of November 2020, amounted to €375,000, as well as for the various other sums allegedly due under the lease, including insurance and reinstatement as well as interest. The amount claimed in respect of arrears of rent reflected the fact that Foot Locker had chosen to discharge 50% of the rent payable under the lease in respect of the third and fourth quarters of 2020, pending the determination of the High Court proceedings.

17. In its answers to interrogatories raised by Percy, Foot Locker confirmed that it was not unable to pay the full rent owing since January 2020, when the last payment of the full rent due was received, and that it had the financial means to pay the full rent in respect of the remaining quarters of 2020 and the first two quarters of 2021.

18. As the trial judge noted in his judgment, when the case opened before him on 19th October, 2021, Foot Locker's claim had *"radically altered"* from being that the common intention of the parties had been frustrated (and that the lease was at an end) to a claim that there

was *"a partial frustration of the terms of the lease such that the tenant should not be obliged to pay the rent for the periods it was closed"* (para. 7 of the judgment; transcript Day 1, pp. 4 – 5).

19. Having confirmed that Foot Locker's case was that it was entitled to continue to occupy the premises, and to refuse to allow access to the premises for an alternative permitted use and to pay the rent reserved, Foot Locker informed the judge that it was not advancing a claim of frustration (as that would bring contractual relations between the parties to an end), but one of *"partial frustration"* or *"temporary frustration"*, the effect of which was summarised by Foot Locker's counsel at the trial as being:

> *"...[F]or the period during which I couldn't use the property for the purpose which was expressly agreed in the terms of lease, that I shouldn't have to pay the rent for that period."* (Transcript, Day 1, pp. 9 – 10)

20. Foot Locker later clarified that what it was seeking was *"the discharge of the performance to pay the rent for the period during which the property cannot be used"* (Transcript, Day 1, p. 64). When asked by the trial judge whether its claim of "*temporary frustration"* was a *"one-way street"* in that Foot Locker would be relieved of its obligation to pay rent but Percy would not be relieved of any of its obligations, Foot Locker's counsel confirmed *"it is a one-way street. I have to accept that."* (Transcript, Day 1, p. 64).

21. Having referred to some of the Irish and English caselaw on frustration, which will be discussed later in this judgment, Foot Locker's counsel conveniently summarised its argument as follows:

> *"In the cases, it is stated that a temporary frustration, a frustration which doesn't go to the end of the contract, can nevertheless have the effect of discharging the entire contract. If it can discharge the entire contract, we can see, and we have seen no reason in principle why it should not discharge it for the period of the frustration.*

> *Despite what Mr. Justice Kelly says in relation to Donatex.*[1] *In the case of a lease, if there is a frustration, there is no reason why the lease should not resume after the frustration. …"* (Transcript, Day 1, p. 72) (Footnote added)

22. The case which Foot Locker ran in the High Court was, therefore, that there was a "*partial frustration"* or a "*temporary frustration*" of the lease such that its obligation to pay the rent reserved under the lease would be lifted, for the period in which it was not possible for Foot Locker to trade from the Grafton Street Store, and would resume when it was possible for the Grafton Street Store to trade again in the manner envisaged under the lease. Foot Locker's counsel confirmed to the trial judge that the case which it was making was that there had been a *"partial frustration, a temporary frustration of the obligation* [to pay rent] *and I have to accept that the perceived law is that it* [i.e., frustration] *is an all or nothing concept".* (Transcript, Day 1, p. 68)

23. Although it was indicated by Foot Locker at the end of its case (on Day 1 of the hearing in the High Court) that an application would be made to amend its pleadings to make a case of unjust enrichment, it was decided, overnight, not to make those amendments or to pursue that claim. The entire basis for Foot Locker's claim was that there had purportedly been a *"partial frustration"* or a *"temporary frustration"* of the lease, which relieved it of its obligation to pay the rent reserved under the lease while the premises were required by law to remain closed. That contention was hotly disputed by Percy on the facts and on the law.

4. Relevant Provisions of the Lease

24. Before outlining the way in which the trial judge determined the issues in his judgment, it is appropriate here to set out the relevant provisions of the lease. As mentioned earlier, and as provided for in the "*habendum"* clause, the lease was for a term of 35 years from March 1990 and will come to an end in March 2025.

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[1] *Ringsend Property Limited v. Donatex Limited & Bernard McNamara* [2009] IEHC 565.

25. As of the date of the commencement of the proceedings in the High Court, the annual rent had increased to €750,000, on foot of the rent-review provisions under the lease. That rent was to be paid in equal quarterly instalments, in advance, on the first day of January, April, July and October of each year.

26. The *"reddendum"* clause of the lease provided that the rent was to be paid *"without any deduction"*. That obligation is repeated in the tenant's covenants in the lease. Under Clause 3.1.1 which bears the heading *"Pay Rent"*, Foot Locker covenanted:

> *"To pay the rent or increased rent hereby reserved or any sums payable hereunder on the days and in manner herein prescribed without any deductions"*.

27. Clause 3.1.2 contains a covenant of Foot Locker to pay certain amounts expended by Percy for the insurance in respect of the premises. The covenant at Clause 3.4.1 of the lease is entitled *"Comply with Enactments"*. Under that provision, Foot Locker covenanted:

> *"At all times during the said term to observe and comply in all respects with the provisions and requirements of any and every enactment for the time being in force or any orders or regulations thereunder for the time being in force and to do and execute or cause to be done and executed all such works as under or by virtue of any such enactment or any orders or regulations thereunder for the time being in force are or shall be properly directed or necessary to be done or executed upon or in respect of the demised premises or any part thereof whether by the owner, landlord, lessee, tenant or occupier and at all times to keep the landlord indemnified against all claims, demands and liability in respect thereof and without derogating from the generality of the foregoing to comply with the requirements of any local or other statutory authority and the order or orders of any court of competent jurisdiction."*

28. There is a covenant relating to the permitted user of the premises at Clause 3.19. Under that clause, Foot Locker covenanted:

"Not to use or permit the demised premises or any part thereof to be used for any purpose other than at ground floor as a high quality retail shop and at upper floor levels as such a retail shop or as a fully licensed public bar and restaurant with ancillary offices[2] *AND for no other purpose save with the landlord's written consent…."* (Footnote added)

29. While Clause 3.19 provides for the permitted user of the premises, it should be noted that Clause 5.5 provides that no warranty is given in relation to that user by Percy. Clause 5.5 states:

"Nothing in this lease contained shall be deemed to constitute any warranty by the Landlord that the demised premises or any part thereof are authorised under the Planning Acts or otherwise for use for any specific purpose."

30. Foot Locker places considerable reliance on another covenant, the *"keep open"* covenant contained in Clause 3.19.2. Under that provision, Foot Locker covenanted:

"At all reasonable times during the usual business hours of the locality to keep the demised premises open for carrying on the tenant's business and at all times comply with all requirements of the Dublin Corporation or the relevant local authority in connection with the user of the demised premises for the purpose of the tenant's business."

31. It was an essential part of Foot Locker's case in the High Court, and on its appeal to this Court, that it could not, by reason of the Covid-19 restrictions introduced by ministerial regulations, use the Grafton Street Store as permitted under Clause 3.19 (i.e. as a *"high quality retail shop"*) or keep the premises open *"at all reasonable times during the usual business hours of the locality"* for carrying on Foot Locker's business, as provided for in Clause 3.19.2. Those

[2] The upper floors being subject of the sublease to the company operating *"Captain Americas restaurant"*.

covenants are central to Foot Locker's contention that there was a "*partial"* or "*temporary"* frustration of the lease.

32. Clause 5.2 provides for certain circumstances in which Foot Locker's obligation to pay the rent may be suspended. Those circumstances arise where all or part of the premises are destroyed or damaged by one of the "*insured risks*". The term "*insured risks*" is defined in very broad terms in Clause 4.1. Those risks include occurrences like fire, explosion, lightning, earthquake, floods, storms and so on as well as "*such other risks as the landlord may from time to time consider prudent and desirable"*. The relevant parts of Clause 5.2 read as follows:

> *"If during the said term the demised premises or any part thereof shall be destroyed or damaged by any of the insured risks so as to be unfit for occupation or use or the policy or policies of insurance effected by the landlord shall not have been vitiated or payment of the policy monies withheld or refused in whole or in part in consequence of any act, neglect or default of the tenant, its servants, agents or licensees, the rent hereby reserved and the obligations of the tenant as to maintenance and repair of the demised premises of a fair proportion thereof according to the nature and extent of the damage sustained shall be suspended until the demised premises shall have again been rendered fit for occupation or use by the tenant or become accessible again or for three years whichever is the shorter…"*

33. Finally, Clause 5.3 provides for a waiver by Foot Locker of any right to surrender the lease under s. 40 of the Landlord and Tenant Law Amendment Act Ireland 1860 ("Deasy's Act" or the "1860 Act"). It states:

> *"In case the demised premises or any part thereof shall be destroyed or become ruinous and uninhabitable or incapable of beneficial occupation or enjoyment by, for or from any of the insured risks the tenant hereby absolutely waives and abandons its*

rights (if any) to surrender this lease under the provisions of s. 40 of the Landlord and Tenant Law Amendment Act Ireland 1860 or otherwise."

34. This is a fairly common clause in leases providing for the purported waiver by a tenant of a right which it may have under s. 40 of Deasy's Act to surrender the tenancy in circumstances where the demised premises are destroyed as a result and accidental fire or other inevitable accidents.

5. The High Court Judgment

35. O'Moore J. delivered a very comprehensive judgment in the High Court dismissing Foot Locker's claim for a declaration that the lease had been *"partially"* or "*temporarily"* frustrated by reason of the Covid-19 restrictions. He identified the two issues to be determined as being:

(i) whether there is such a thing as partial frustration of a lease; and

(ii) if the answer to (i) is in the affirmative, whether Foot Locker had established an entitlement to a declaration that the lease in respect of the Grafton Street Store had been partially frustrated.

36. The judge considered the various terms of the lease, including the covenant to comply with enactment in Clause 3.4.1, the "*user*" covenant in Clause 3.19 and the *"keep open"* covenant in Clause 3.19.2.

37. The judge rejected the submission that the combination of the "*user*" covenant and the "*keep open"* covenant could justify a claim of "*partial frustration*" of the lease. He stated that those provisions, which impose obligations on Foot Locker, might well reflect an understanding on the part of the parties, at the time of entering the lease, that the premises would be *"kept open, in ordinary trading hours, for the purpose of high class retail"* (para. 15). However, he noted that what constituted *"normal trading hours"*[3] could change over time and that such hours

[3] The precise term used in Clause 3.19.2 is *"usual business hours"*.

in 1990 might be very different to what they would be in 2020 before the Covid-19 pandemic intervened. The judge stated that he did not think that Clause 3.19.2 (the "*keep open*" covenant) required Foot Locker to trade out of the Grafton Street Store throughout the pandemic during the hours which would apply under more normal circumstances. There was not, in his view, any reasonable or proper interpretation of Clause 3.19.2 which could result in Foot Locker being found to be in breach of that covenant because it did not open the Grafton Street Store for business when it was illegal to do so, and when members of the public were subject to strict requirements to stay at home, or in close proximity to home, except in very limited circumstances. The position was put beyond doubt, in the judge's view, when one also considered the covenant in Clause 3.4.1 to *"comply with enactments."*

38. The judge noted that a *"key part"* of Foot Locker's case was that it was the combination of the requirements contained in Clause 3.19 and Clause 3.19.2 which distinguished this case from every other case in which the concept of a *"partial frustration"* of a contract and, in particular, of a lease was rejected or, in the words of the trial judge, *"found to be a legal mirage"* (para. 17). The judge rejected that submission and stated that, if anything, those provisions, taken alone or in combination, would be relevant to the issue as to whether Foot Locker had established a *"supervening event frustrating the common intention of the parties (rather than whether or not partial frustration has any legal reality)."* He felt that the two clauses did not assist Foot Locker in establishing *"that there is such a thing as partial frustration of a contract."*

39. The trial judge then reviewed the evidence in the case and noted that there was only one witness called by Foot Locker (John Lowry, Real Estate Director of Foot Locker and of Foot Locker Europe BV) and one witness called by Percy (David Goddard, a Director of Percy, and Chief Executive of Davy Real Estate. He found the evidence of both witnesses to be of *"limited use."* The judge did note that Mr. Lowry's evidence was that Foot Locker was of the

view that *"the landlord should share some of the pain"* and that he accepted that Foot Locker was financially capable of paying the rent but felt that a *"fair resolution of the issues created by the pandemic would be that half of the rent would be paid"* (para. 20). That compromise, however, was not acceptable to Percy. In his evidence on behalf of Percy, Mr. Goddard stated that Foot Locker had *"unilaterally given themselves a discount of half the rent"*. Ultimately, however, the trial judge did not derive great assistance from the evidence of the two witnesses in light of the two issues which he had to decide.

40. The judge then considered the submissions advanced by the parties. He noted that Foot Locker's submission was that it was entitled to continue to occupy the Grafton Street Store but was under no obligation to pay rent for the period during which it could not trade from the store in the normal way. In support of that submission, Foot Locker relied on a combination of the "*user*" and "*keep open*" covenants. It was, however, accepted by Foot Locker that there is no Irish authority supporting the concept of *"partial frustration"* of a lease or, indeed, of a contract. Foot Locker submitted that two of the relevant Irish cases, *Ringsend Property Limited v. Donatex Limited & Anor* [2009] IEHC 568 ("*Donatex*"), and *Oysters Shuckers Limited t/a Klaw v. Architecture Manufacturer Support (EU) Limited* [2020] IEHC 527 ("*Oysters Shuckers"*), could be distinguished from this case because of the existence of those two covenants, the "*user*" and "*keep open*" covenants, in the lease. The judge noted that Foot Locker was relying on Supreme Court authority in *Law Society of Ireland v. MIBI* [2017] IESC 31 and *Merck Sharp & Dohme Corporation v. Clonmel Healthcare Limited* [2019] IESC 65, [2020] 2 IR 1 *("Clonmel Healthcare*"), as permitting the court to depart from established legal principles in the exceptional circumstances of this case. Foot Locker also submitted that if a lease could, in principle, be frustrated, then there was no reason why, in principle, the doctrine of partial or temporary frustration could not apply to a lease (reference was made to the decision of Master Dagnall in *Bank of New York Mellon (International) Limited v. CineUK Limited* [2021] EWHC

1013 (QB) ("*Cine-UK*")). Foot Locker also initially relied on another English case, *London Trocadero (2015) LLP v. Picturehouse Cinemas Limited & Ors* [2021] EWHC 2591 (Ch) (*"London Trocadero*"), concerning unjust enrichment, though it conceded that it had not pursued such a claim, despite having indicated an intention, and having been given an opportunity, to apply to amend its pleadings to include a claim for unjust enrichment. The issue of unjust enrichment was not, therefore, part of the case in the High Court (or indeed in this Court).

41. In summarising the submissions made by Percy, the judge observed that its position was *"simpler to summarise"*. Its case was that the concept of partial frustration was unknown in law, and that Foot Locker's claim should be dismissed on that basis. Its second submission was that the lease had not, in the particular circumstances of the case, been frustrated in any way.

42. The judge then carefully analysed the parties' submissions and the relevant legal principles in this area. He noted that the "*essence*" of the doctrine of frustration is that where a contract is frustrated, it is treated as being at an end, and both parties are freed from their mutual obligations under the contract. Neither party would, thereafter, have an entitlement to receive any benefit from the other under the contract. Notwithstanding those *"elementary propositions"* (as the judge put it), it was Foot Locker's case that it was free from any obligation to pay rent but was nonetheless entitled to continue to occupy the Grafton Street Store. The judge described that as a *"form of frustration which does violence to the fundamentals of the doctrine"* (para. 31). It would result in what Foot Locker accepted was a *"one way street"* with *"benefits flowing to the tenant without any balancing release of liabilities in favour of the landlord"* (para. 31). Even if the premises were proposed for a different use, Foot Locker claimed that it would be entitled to remain in occupation and to refuse to allow Percy to use the premises for any such alternative purpose. The judge noted that Foot Locker's case was, therefore, that the doctrine of partial frustration allowed it *"to pay no rent, to remain in occupation of the premises*

to the exclusion of any alternative letting by the landlord, and to resume trading out of the premises (and the payment of rent) when and for as long as the Covid-19 rules permit" (para. 31). The judge noted that, unsurprisingly, Foot Locker was unable to point to any case law that would support such an "*extraordinary conclusion."* On the contrary, he stated that the authorities were *"uniformly against the case made by Foot Locker"* and that the concept of partial frustration, as relied on by Foot Locker, was unsupportable at the level of principle and contrary to precedent (para. 32).

43. The judge referred to the description of the doctrine of frustration of contracts (including leases) in the speeches of Lord Simon and Lord Roskill in *National Carriers Limited v. Panalpina Limited* [1981] A.C. 675 ("*National Carriers*"), and to the approval of the relevant parts of those speeches by Blayney J. in the Supreme Court in *Neville & Sons Limited v. Guardian Builders Limited* [1994] IESC 4, [1995] 1 ILRM 1 ("*Neville"*). The judge noted that in *National Carriers*, the House of Lords confirmed that the doctrine of frustration did apply to leases. In *Neville*, the Supreme Court confirmed that the test for establishing frustration of a contract (including a lease) was that set out in the passages from the speeches of Lord Simon and Lord Roskill in *National Carriers*. While noting that Blayney J. had approved an observation made by Lord Wilberforce in *National Carriers* to the effect that the doctrine of frustration ought to be *"flexible and capable of new applications"*, the judge observed that the new application of the doctrine of frustration in *National Carriers* was its application to leases. That was, he said, *"a positively timid extension of the doctrine of frustration compared with what is contended for here, namely that a lease can be suspended temporarily but indefinitely in the one-sided way proposed by Foot Locker"* (para. 38). He described what Foot Locker's claim required as involving a *"radical reshaping"* of the doctrine and noted that *"the concept of a lease which is frustrated but which continues in existence in some form is quite inconsistent with the foundations of the doctrine as it has originated and evolved"* (para. 38). He further noted

that the Supreme Court in *Neville* had endorsed the fundamental principle that contract which is frustrated is at an end (para. 39).

44. The judge then referred to the judgments of Kelly J. in *Donatex* and of Sanfey J. in *Oysters Shuckers*. In *Donatex*, Kelly J. had rejected the concept of "*partial frustration*" of a contract by reference to established case law and academic authority. While accepting that it might be possible for there to be a partial discharge of severable contractual obligations, no such obligations were present in *Donatex*. Nor, the trial judge concluded, were there severable obligations in the present case. The judge stated that the obligation to pay rent, which he correctly described as the *"basic requirement placed on the tenant by any lease"*, is not a severable obligation (para. 42). He stated that:

> *"Relieving the tenant of this obligation, while permitting it to occupy the premises to the exclusion of the landlord or any alternative tenant, is not what Kelly J. contemplated when referring to the concept of partial discharge."* (para. 42)

45. The judge concluded that the obligation to pay rent was not a severable obligation but was an *"integral part of the contract"* (para. 43). The judge noted that Sanfey J. in *Oysters Shuckers* agreed with Kelly J's conclusions in *Donatex* as to the availability of *"partial frustration"*. Sanfey J. held that the plaintiff (the tenant under a lease) could not argue that its obligation to pay rent was frustrated while, at the same time, arguing that the lease remained valid.

46. The judge concluded that all of the relevant Irish authorities were all to the effect that *"partial frustration*" was not a legal concept recognised in this jurisdiction and that the doctrine of frustration, if successfully invoked, would result in the termination of the contract or lease (para. 45). While noting that Foot Locker did not submit that those cases were wrongly decided, the trial judge rejected Foot Locker's contention that the combination of the *"user"* and *"keep open"* covenants meant that this case could be distinguished from those previous cases. The

judge also declined Foot Locker's invitation to push out the boundaries of the doctrine of frustration. He did not agree that the doctrine of frustration could, as a matter of principle, be *"torn from its moorings"* in the manner suggested by Foot Locker (para. 45).

47. The judge then referred to a number of English authorities and noted that none of those cases assisted Foot Locker. Those cases included: *Cine-UK, London Trocadero* and *John Lewis Properties plc v. Viscount Chelsea* [1993] 2 EGLR 77 *("John Lewis")*. The judge concluded that all of those cases were against Foot Locker and noted that they put the Covid-19 restrictions *"in their proper place"* that is to say that they *"may provide a reason for not meeting a contractual obligation"* but *"do not however necessarily cause a contract to be frustrated"* (para. 50).

48. The judge concluded, therefore, that the concept of partial frustration as advanced by Foot Locker, was not one which exists in Irish law (para. 51). While concluding that it was unnecessary to decide the second issue, he explained that he would also have found in favour of Percy on that point (i.e., that even if partial frustration was a legally recognised concept, Foot Locker had failed to establish an entitlement to a declaration of partial frustration) (para. 52). He noted that the lease had provided for compliance by the tenant with all legal requirements governing the operation of the Grafton Street Store and that the obligation on Foot Locker to keep the store open was one which is *"caveated by reference to normal trading hours and reasonable times"* (para. 52). In his view, the parties must be taken to have contemplated the possibility that the store would be closed in emergency situations, and that the lease, nonetheless, made no provision for a suspension of rent in such circumstances as had been made in the event the premises were destroyed or damaged as a result of the insured risks (provided for in Clause 5.2). He further concluded that there was no fair reading of the lease which would require the tenant to keep the store open for business when (a) it was illegal to do so, or (b) it would constitute a danger to public health to do so (para. 52). The judge concluded, therefore,

on the basis of the evidence before him, that the forced closure of the Grafton Street Store did not amount to frustration of the lease. For these reasons, therefore, the judge dismissed Foot Locker's claims.

6. Foot Locker's Appeal

49. In its notice of appeal, Foot Locker advanced a number of grounds of appeal which may be summarised as follows:

(i) the judge failed to give proper weight to the *"truly exceptional, unprecedented and wholly unanticipated nature of the impact"* of Covid-19 and the consequent emergency health measures on the performance and operation of commercial retail leases and, in particular, the lease between the parties;

(ii) the judge failed to give proper weight to the significance of the *"user"* and *"keep open"* covenants in construing the *"fundamental bargain"* made between the parties to the lease and how the closure of the Grafton Street Store, on foot of the public health restrictions, was *"wholly at odds"* with the terms of the agreement between the parties as set out in the lease and could not reasonably have been contemplated as part of the agreement at the time it was made;

(iii) the judge erred in restricting his consideration of the *"keep open"* covenant to a consideration as to whether Foot Locker might be in breach of that covenant, and he ought to have considered the nature of the bargain between the parties at the time of the execution of the lease;

(iv) the judge failed to give proper weight to the consideration that a lease is a *"rolling contract day by day with periodic payments of rent"* and that *"factually"* its operation can be subject to *"temporary frustration"*;

(v) the judge erred in recalibrating the expression *"normal trading hours"* as expressed in the *"keep open"* covenant from that which might have been originally contemplated by the parties to the lease;[4]

(vi) the judge erred in failing to give due weight to the dicta of the Supreme Court in *Neville* that the doctrine of frustration is, and ought to be, *"flexible and capable of new applications"* and in failing to give due weight to the *"interplay between concepts of temporary impossibility of performance and the frustration doctrine"* and the *"inherent flexibility"* of the frustration doctrine as it had evolved from *"common foundational principles in other common law jurisdictions such as the United State";*[5]

(vii) the judge erred in determining that the consequence of frustration of a contract must either be the full discharge of the parties from obligations under the contract or no contractual relief, at all, from the consequence of unexpected supervening events which radically change the nature of the bargain between the parties and, therefore, failed to give full effect to the flexibility of the doctrine identified in *Neville*;

(viii) the judge erred in failing to distinguish the cases of *Donatex* and *Oysters Shuckers* from the present case.

(ix) the judge erred in holding that a finding of partial frustration would require, as a corollary, that the court deny Percy occupancy or other rights to the property during the period of partial frustration, and that it was open to the judge to determine the consequences for the parties' contractual rights during any period

[4] As mentioned previously, the term in Clause 3.19.2 of the lease is *"usual business hours"* and not *"normal trading hours"*.

[5] While reference is made in the notice of appeal to principles applied in the United States and while Foot Locker's submissions contain reference to case law from some Federal and State Courts in the US, there was no evidence of the relevant law in those States and cases were not discussed in any detail at all in the oral submissions at the hearing of the appeal.

of partial frustration in that context. Foot Locker pleaded that the initial position adopted by it in correspondence contemplated the full discharge of the contract and delivery of possession of the premises to Percy, but Percy had rejected the contention that the lease had been frustrated and had not sought possession of the premises.

50. Percy comprehensively responded to the notice of appeal by means of a detailed respondent's notice in which it denied each of the grounds of appeal advanced by Foot Locker and made a number of additional points which it developed in its written and oral submissions including the following:

(i) The lease expressly allocated the risk of closure of the premises in such a way that Foot Locker bore the risk of closure in the particular circumstances which came to pass.

(ii) The *"keep open"* covenant is a covenant by Foot Locker which imposes an obligation, and does not confer an entitlement, upon it.

(iii) A doctrine of "*temporary*" or "*partial frustration*" is not known to exist in Irish law.

(iv) The lease is not a rolling contract day-by-day with periodic payments of rent but rather a fixed term lease albeit providing for periodic payments of rent.

(v) Foot Locker argued its case in the High Court solely on the basis of "*partial frustration"* and should be precluded from pursuing an appeal based on, or by reference to, a concept of *"temporary impossibility"* which is separate and distinct from partial frustration. Without prejudice to that, however, Percy pleaded that having accepted in evidence that it was in a position to discharge the entirety of the rent reserved under the lease, Foot Locker cannot seek to pray in aid the doctrine of temporary impossibility.

(vi) Foot Locker did not open any case law from the United States before the High Court.

(vii) Foot Locker conceded in the High Court that the form of partial frustration for which it contended was a *"one way street"*, entitling Foot Locker to withhold payment of the rent reserved under the lease but not relieving Percy of any of its obligations under that lease.

(viii) It would not have been open to the judge to rewrite the terms of the lease to account for any period of alleged partial frustration.

(ix) The position was that Foot Locker remained in occupation of the Grafton Street Store to the exclusion of Percy and refused to pay rent. That was not an evolving situation but remained constant for the relevant period.

(x) Foot Locker's obligation to pay rent under the lease is absolute and not subject to any qualification or condition, as is clear from the terms of the *reddendum* clause and the covenant to pay rent in Clause 3.1.1.

(xi) Foot Locker was in a position to pay rent throughout 2020 and 2021, but unilaterally chose not to do so.

(xii) Clauses 3.19 and 3.19.2 do not vest any rights in Foot Locker but impose obligations on it. Neither clause has been compromised or rendered impossible to perform by reason of the Covid-19 restrictions.

(xiii) At the time the proceedings were commenced, the lease was not frustrated but continued to be performed by Foot Locker which (a) continued to enjoy possession of the premises, and (b) traded from the premises. Foot Locker did not treat the lease as having been frustrated, at any point in time.

(xiv) The lease expressly contemplated the suspension of Foot Locker's obligation to pay rent in the case of a forced closure only in the particular circumstances set out in the lease.

(xv) The supervening event relied on by Foot Locker (the forced closure of the Grafton Street Store during the period of the Covid-19 restrictions) did not *"radically alter"* the bargain between Foot Locker and Percy from that originally contemplated by the parties.

(xvi) Without prejudice to its contention that it was not open to Foot Locker to pursue a claim of temporary impossibility (as it had not pleaded or made any such claim in the High Court), temporary impossibility would only excuse the particular obligation which was said to be rendered impossible to perform (such as the obligation to keep the store open) and not any other obligations (such as the obligation to pay rent).

7. Submissions on the Appeal

(1) Foot Locker's Submissions

51. Foot Locker delivered very comprehensive written submissions in support of its appeal. I will set out here a summary of those submissions together with the submissions made at the hearing. It is, however, important at the outset to note that Foot Locker has expressly based its appeal on the contention that there has been a *"partial"* or "*temporary*" frustration of the lease (those terms being used interchangeably by Foot Locker) and has frankly acknowledged that such a concept has not previously been recognised at common law (although a passing reference is made to some US case law). It is expressly acknowledged that Foot Locker is asking the Court of Appeal to make *"new law"*. From Foot Locker's perspective, the essential issue which it asks the court to determine is whether the common law can *"ameliorate the*

rigid burden" of Foot Locker's contractual obligations in light of the unprecedented and exceptional measures and regulations introduced to combat Covid-19.

52. In urging the court to find that the lease has been "*partially frustrated"*, Foot Locker asks the court to consider the bargain made by the parties, which it says was that Foot Locker would lease and operate a retail premises and would be obliged to keep the premises open during normal business hours which, it contends, was frustrated by the unprecedented emergency measures and regulations that compelled the closure of the premises for prolonged periods of time (253 days in total).

53. Foot Locker asks the court to bear in mind a number of key factors, namely (i) the periodic nature of leasehold relationships, (ii) the significance of (a) the "*user"* covenant (Clause 3.19), and (b) the "*keep open"* covenant (Clause 3.19.2), and (iii) the response of the common law to a radical change in circumstances from those contemplated by the parties when this bargain was originally struck.

54. While accepting that there is a "*superficial attraction*" to, and precedential support for, the notion that the law does not recognise the concept of *"partial frustration"* given that frustration discharges all obligations or none at all, Foot Locker asserts that the following considerations support a departure from the "*orthodox*" approach followed by the High Court namely (i) the concept of temporary impossibility of performance which it says is well-recognised in the common law; (ii) the notion that frustration is intended to temper the absolute nature of contractual obligations in specific exceptional circumstances where justice so demands; (iii) the touchstone of the doctrine of frustration is that it ought to be flexible and capable of new applications (as per Blayney J. in *Neville*); and (iv) the fact that there has been no enduring societal phenomenon in the modern era comparable to the Covid-19 pandemic.

55. Foot Locker submits that frustration is a judicially devised doctrine which evolved to mitigate the harshness of contractual obligations in the face of extraordinary circumstances and

suggests that justice requires that the court should not exclude the possibility of a partial application of the doctrine of frustration in extreme circumstances for contracts which have a *"fundamentally periodic quality"*, as Foot Locker contends the lease in the present case has.

56. In determining the essential issue raised on the appeal as to whether there can be and whether there has been a "*partial frustration*" of the lease in this case, Foot Locker asks the court to consider (i) the essential nature of the lease and the specific purpose and intention of the parties in entering into the lease; (ii) the proper basis for the doctrine of frustration and its inherent flexibility; (iii) the concept of temporary impossibility in suspending contractual obligations which has been recognised by common law courts; and (iv) the scope for applying principles of frustration or of temporary impossibility to the obligations of the parties to the lease in this case.

57. Foot Locker submits that there is no reason, in principle, why the doctrine of frustration could not be applied with *"temporary effect"* to a lease during a specific period so as to alleviate the rigours of absolute contractual obligations in the face of radically different circumstances to those which existed at the time the contract or lease was entered into. It submits that the required use of the store for *"high quality retail"* and the *"keep open"* obligation became impossible to perform for the period of time the premises were mandated by law to remain closed. It submits that such temporary supervening impediments to performance (including legislative and health-related impediments) have, in the past, provided a basis for the application of both the doctrines of frustration and the temporary suspension of contractual obligations. It contends that, in the particular circumstances of this case, and in light of the scale of the Covid-19 pandemic and the extent of the regulatory restrictions, the court would be justified in holding that the lease has been *"partially frustrated"*.

58. In considering the nature of the relationship between Foot Locker and Percy under the lease, Foot Locker stresses the fact that, under s. 3 of Deasy's Act, the relationship of landlord

and tenant is deemed to be founded on contract and that the essence of the contract is the holding of land for a period of time from another in return for periodic payments of rent. It draws attention to the provisions of the lease governing its term and the manner in which the rent reserved under the lease is required to be paid. It seeks to stress what it calls the *"quintessentially periodic quality"* of the lease, which it contends contains obligations which are several and distinct. In considering the bargain made between the parties to the lease, Foot Locker stresses the *"user"* covenant, the *"keep open"* covenant and the *"quintessentially periodic nature of a commercial lease"*. It relies on the unprecedented, though temporary, duration of the mandated closure of the store which, it maintains, could not have been foreseen. While noting the covenant to comply with enactments in Clause 3.4.1, Foot Locker contends that it could not reasonably have been contemplated that it would be necessary to close the store over a period of many months, and that that was not part of the bargain struck between the parties.

59. While noting that the position of Foot Locker in June 2020, was that the lease had been entirely frustrated (and not merely "*partially*" frustrated), such that there would be a full discharge of both parties from any future obligations under the lease, that claim was rejected by Percy and was met with a threat of a petition to wind up Foot Locker. Foot Locker maintains that it took a commercially sensible approach by mitigating its losses and continuing to trade when permitted to do so by law, while, at the same time, maintaining that the lease was "*partially*" or "*temporarily*" frustrated for the periods during which the store could not open. Foot Locker submits that since the "*keep open*" obligation under the lease was required to be modified, on a temporary basis, in light of the emergency provisions, the same approach could be taken in relation to the obligation to pay rent. Foot Locker submits that neither *Donatex* nor *Oysters Shuckers* is binding on this Court and ought not to be applied. It submits that the doctrine of frustration has greater flexibility than suggested by those cases or by the judgment

under appeal in this case. It seeks to rely in this respect on academic authority including *Treitel, Frustration and Force Majeure* (3rd Ed., Sweetman and Maxwell, London 2014). Foot Locker refers to the fact that the doctrine of frustration has developed over time and notes the extension of the doctrine to leases by the House of Lords in *National Carriers* (and the subsequent endorsement of some of the observations in the speeches in that case by the Supreme Court in *Neville*). Foot Locker relies on what it refers to as the "*inherent flexibility"* of the doctrine of frustration, and, while acknowledging that the orthodox application of that doctrine is that it gives rise to a total future discharge of obligations under the relevant contract and that certain cases emphasise a limited and narrow application of the doctrine, it contends that that does not mean that it is not capable of evolving in the context of contracts of a periodic character.

60. It further contends that the parameters of the doctrine should not be regarded as fully settled and refers to its extension to leases in *National Carriers*. While accepting that the doctrine of frustration is not to be lightly or frequently invoked, it is not a rigid doctrine.

61. Foot Locker contends that the application of the doctrine of frustration (or rather its version of *"partial"* or *"temporary"* frustration) to this case would be consistent with the decision of the Supreme Court in *Neville* which it accepts represents the leading statement of the doctrine in Ireland. It also suggests that its application in this case would be consistent with the views of the authors of *McDermott and McDermott Contract Law* (2nd Ed., Bloomsbury Professional 2017) who, in turn, approved the description of the modern test for frustration given by Rix L.J. in the Court of Appeal of England and Wales in *The Sea Angel* [2007] EWCA Civ. 547, [2007] 2 All E.R. (Comm) 634 (*"The Sea Angel"),* in which it was described as a *"multifactorial"* test and the court stressed the fact that "*the purpose of doctrine is to do justice"* (para. 112 of the judgment of Rix L.J.).

62. Foot Locker also drew attention to some academic commentary (*Treitel* at para. 8-029) and case law (*Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* [1944] A.C. 265

("*Denny*")) to the effect that a supervening prohibition which renders performance in some respect unlawful, but which does not discharge the particular contract, may, nonetheless, excuse performance of the particular obligation which can no longer lawfully be performed. It submits that, in some instances, an obligation which has been rendered illegal by some supervening legislation may be severed from the balance of the contract. It maintains that, while the occupation of the property and the payment of rent did not become illegal (under the various Covid-19 emergency measures) in this case, the intended contractual use of the premises did. By way of example, Foot Locker referred to two cases of temporary illegality suspending performance obligations, *Andrew Millar v. Taylor* [1916] 1 K.B. 402, and *Fibrosa v. Fairbairn* [1943] A.C. 32. Foot Locker submits that these authorities show that temporary illegality may, on some occasions, suspend contractual obligations and, on others, frustrate contracts in their entirety.

63. Foot Locker rejected the statement of principle that frustration is an *"all or nothing"* concept and that there is no such thing as *"partial frustration"*. While accepting that this approach has a *"commercial purity"*, it maintains that a rigid approach would be inconsistent with the role of frustration as a judicially made solution for extreme or extraordinary circumstances and would also be contrary to the inherent flexibility adopted by the courts in the application of legal tests and it relies, in this respect, on the judgment of the Supreme Court in *Clonmel Healthcare*. Foot Locker submits that it would be contrary to principle to limit the effect of a judicial remedy designed for temporary supervening events which discharge contractual obligations absolutely without the possibility of temporary relief where the contract is of a fundamentally periodic character. As I explain below, this appears to me to be an overly simplistic approach which completely overlooks the well-established consequence of the successful invocation of frustration of a contract which is to fully discharge the contract.

64. Foot Locker suggested that *Donatex* and *Oysters Shuckers*, which held that there is no such concept as *"partial"* or *"temporary"* frustration on account of partial or temporary impossibility, are not sound cases on which the development of the concept of frustration should be considered or tested. Foot Locker also suggested that in the decision in *Cine-UK*, which also rejected the concept of *"temporary frustration"*, should be rejected as not being consistent with the wider case law and the underlying rationale for the doctrine of frustration. Foot Locker also noted that a series of cases demonstrate that the common law courts have repeatedly upheld the temporary suspension of contractual obligations in certain circumstances (it cites, for example, *Minnevitch v. Café de Paris* [1936] 1 All E.R. 884 *("Minnevitch"))* and that several English authorities demonstrate temporary impossibility (in the context of a particular venture) can, in exceptional circumstances, excuse non-performance (and it relies on a number of the cases to that effect, including *HR & S Sainsbury Limited v. Street* [1972] 1 WLR 834 and *John Lewis*).

65. While much of its written submission addresses the concept of temporary impossibility excusing non-performance, it must be said that that was not the fundamental basis on which Foot Locker ran its case at the hearing of the appeal. Its approach at the hearing was that this is a case of *"partial"* or *"temporary"* frustration and not a case of temporary impossibility which might excuse non-performance of certain obligations. A number of the cases relied on by Foot Locker, including *Minnevitch* and *John Lewis*, are cases involving an excuse for non-performance in the case of supervening events and not frustration.

66. Foot Locker sought, in its written submissions to rely on what it refers to as the *"evolution"* of the common law in the United States and refers, for example, to section 269 of the Restatement (Second) of Contracts definition of *"temporary impracticability or frustration"*. It referred to a number of cases. However, those cases are decisions of state trial courts (*Bush v. ProTravel International Inc.*, 746 N.Y.S. 2d 790 (N.Y. Civ. Ct. 2002) or state appellate courts (*Gregg School Township v. Hinshaw* 76 In App. 503, 132 N.E. 586 (1921), a decision of the

Indiana Court of Appeal). These cases were not opened before the High Court. Nor were they opened at the hearing of the appeal and no indication was provided as to the basis on which an Irish Court should consider decisions of state trial or appellate courts in the United States. Without relevant context and, potentially, evidence of foreign law, it seems to me that the Court can place little or no reliance on those cases.

67. Foot Locker contends that upholding a principle of "*temporary*" frustration would not be as radical as the High Court held and suggested that there were compelling reasons why the court should uphold a temporary frustration or suspension of Foot Locker's rental payment obligations in light of the far-reaching Covid-19 restrictions. It again stresses the bargain made by the parties which had a particular quality which was frustrated by the intervention of the Covid-19 pandemic and relies again on the *"user"* and *"keep open"* covenants and the impact of the Covid measures on its ability to trade, which, it maintains, is a fundamental part of the bargain made with Percy.

68. Foot Locker submits that the bargain reached by the parties, as represented by the *"user"* and *"keep open"* covenants of the lease, was frustrated by the introduction of the Covid-19 regulations and measures. It concedes that those measures did not interfere with its right of possession in respect of the Grafton Street Store, which, it acknowledges, continued uninterrupted, but submits that the contractual business venture represented by the lease, and subtending its obligation to pay rent, contemplated significantly more than mere possession namely the use of the store as a "*high quality retail shop*". Consequently, it is submitted that, for the period during which the store was closed, that bargain was frustrated, and the basis for the payment of rent, removed.

69. In conclusion, Foot Locker submits that there is no reason, in principle, why a concept of temporary frustration should not be given legal recognition and that it would be consistent with the common law's varying rationales for the doctrines of frustration and the temporary

suspension of obligations. It submits, therefore, that it should be possible for the Court to sanction the temporary suspension or discharge of obligations under a contract rather than the discharge of that contract, in its entirety, and that, in this case, there are compelling grounds to suspend its obligation to pay rent while the Covid-19 measures and regulations prevented or frustrated the very essence of the user contemplated by the lease.

70. In its oral submissions at the hearing, Foot Locker's counsel urged the court to start by looking at the terms of the lease and the entirety of the agreement between the parties before considering whether there exists a concept of *"partial"* or *"temporary"* frustration in Irish law and its potential application to the lease. While Foot Locker submits that the trial judge failed to take this preliminary step, I observe here, however, that that is precisely what the trial judge did. He carefully looked at the terms of the lease at the very outset of his judgment. Counsel made clear that the case being made in the High Court, and on the appeal, was that the Covid-19 measures and consequent closure of the premises gave rise to a temporary frustration of the lease, not because those measures made it impossible for Foot Locker to meet its rental obligations but because they affected the fundamental nature of the bargain for the period during which the store was required to be closed. Counsel asked the Court to focus on the central issue which is the nature of the bargain made between the parties which is that is the lease provided for the letting of the store in a premier retail area in return for the payment of a high rent. Counsel submitted that what distinguishes this case from ordinary landlord and tenant cases are the two significant covenants in the lease namely, the *"user"* covenant requiring the premises to be used only as a *"high quality retail shop"* (Clause 3.19) and the *"keep open"* covenant requiring the store to be kept open *"at all reasonable times during the usual business hours of the locality"* (Clause 3.19.2). Those clauses, it was submitted, inform the entire purpose of the letting to Foot Locker and were frustrated during the periods of lockdown. Counsel also stressed (as was done in the written submissions) the periodic nature of the rental obligation

under the lease. He submitted that the court should consider (i) whether the effect on Foot Locker's business as a result of the Covid-19 measures was reasonably foreseeable, and (ii) whether the parties had made provision in the lease for the eventuality that the store might have to be closed in such circumstances. Both questions had to be answered in the negative, he submitted. It was contended that the appropriate way to allocate the risk by reason of what had occurred was by providing for a reduction in the rent. The intention of the parties as expressed in the lease was, he submitted, frustrated by an unfortunate event which was not provided for in the lease and which existed for a temporary period.

71. Counsel stressed the flexible nature of the doctrine of frustration and referred to the developments in the law including its application to leases which was confirmed by the House of Lords in *National Carriers*. Counsel sought to distinguish the lease at issue in this case from other leases by reason of the existence of the two covenants, the "*user*" and "*keep open"* covenants. Counsel argued that since the doctrine of temporary impossibility might relieve Foot Locker of the obligation to keep the premises open and to use it in the manner provided for, during the period of the restrictions imposed under the Covid-19 regulations and measures, those same circumstances should provide a basis for holding that the lease was temporarily frustrated so as to give Foot Locker a defence to Percy's claim for the full rent for that period. While the lease does envisage circumstances in which the tenant's obligation to pay rent can be suspended (Clause 5.2), Foot Locker submitted that this should not preclude the suspension of rent in circumstances which were not foreseen or contemplated when the lease was entered into, such as the outbreak of a global pandemic. Foot Locker's unequivocal stance on the appeal was that the Court should conclude that there has been frustration of the lease for the period during which the Grafton Street Store could not open (a total of 253 days).

72. Counsel relied on *Minnevitch* as being an example of a case of "*partial"* or *"temporary"* frustration (although, as I explain below, I do not accept that the *Minnevitch* case

provides such an example, rather it provides an example of circumstances where temporary impossibility provided an excuse for the temporary non-performance of certain contractual obligations under a contract). Counsel also sought to rely on certain passages from the speeches in *National Carriers* including the speech of Lord Hailsham. However, counsel did, very appropriately, acknowledge that that the fact that Foot Locker continued to retain possession of the premises, posed a *"considerable hurdle"* for the case which it was seeking to make on the appeal. He did, however, submit that Foot Locker was entitled to occupy the premises for the purposes set out in the lease and that mere possession without an entitlement to trade from the premises in the manner envisaged under the lease was not the bargain made by the parties.

73. Counsel submitted that an extension of the doctrine of frustration to provide for temporary frustration of the lease in this case would not be such a major leap forward. While the concept of temporary impossibility was argued by Foot Locker, it was confirmed that the outcome it was seeking was the temporary frustration of the lease in the event that it could establish the temporary impossibility of using the premises in the manner for which it had contracted.

(2) Percy's Submissions

74. Percy also delivered a set of very comprehensive written submissions in response to the appeal. I propose now to summarise those submissions drawing particular attention to the submissions highlighted by counsel, on behalf of Percy, at the hearing of the appeal.

75. Percy fully contests Foot Locker's appeal and supports the judgment of the High Court. In its written submissions it outlined several *"fundamental transformations"* which Foot Locker's case has undergone (and which were referred to in the judgment of the trial judge). It noted that the appeal, now presented by Foot Locker, is solely premised on an argument for "*partial"* or *"temporary"* frustration although the argument is, in reality, made on the basis of alleged temporary impossibility. The case presented to the High Court was, ultimately, one of

"*partial frustration*". In asking the court to *"make new law"*, Percy suggested that Foot Locker's claim requires that the Court revisit and overturn decades of well-established precedent which is grounded on unimpeachable principle which would amount to a radical departure from established principle. It notes that while the common law is capable of evolution, such evolution is incremental and subtle and generally not in *"violent contrast"* to that which preceded it (reference is made, for example, to *University College Cork v. Electricity Supply Board* [2020] IESC 38, and *Law Society of Ireland v. Motor Insurers Bureau of Ireland* [2017] IESC 31). Percy urged the court not to take up the challenge of making *"new law"* and maintained that the existing law can fully address the issue which has arisen.

76. Percy submitted that Foot Locker's written submissions appeared to be premised on a claim of temporary possibility and not "*partial"* frustration (although the position was clarified by Foot Locker at the hearing of the appeal). The crux of Foot Locker's submission, according to Percy, is that because it was temporarily impossible to keep the Grafton Street Store open for trade for certain periods of time, Foot Locker ought to be excused from the obligation to pay rent for those periods (a total of 253 days). Percy noted, however, that Foot Locker's ability to comply with its obligation to pay rent was not rendered impossible for any of that period and that Foot Locker admitted that it was able to pay rent throughout the relevant period. The obligation, therefore, which Foot Locker seeks to avoid is not one which was rendered impossible to perform, either temporarily or at all. It was unsustainable, therefore, Percy contended, for Foot Locker to rely on temporary impossibility to make *"new law"* such as would provide a basis for the court to find that the lease had been frustrated on a partial or temporary basis. If, as Foot Locker has contended, the lease had been frustrated (whether wholly or partially or on a temporary basis), it would have had to have rendered Foot Locker's continued possession of the premises impossible and that did not occur. Foot Locker remained in possession throughout the period of the restrictions and traded from the premises when

permitted, depending on the prevailing restrictions. In that sense, Percy submits, the lease was performing in all respects except one, Foot Locker's obligation to pay, in full, the rent reserved under the lease. Percy submitted that the continued payment of rent by Foot Locker in return for possession of the premises was not rendered impossible by reason of the Covid-19 regulations and measures, even on its own case.

77. Percy disputed the relevance of the two covenants (the *"user"* and *"keep open"* covenants) to the frustration case made by Foot Locker. It also disputed the contention that the lease is of a *"periodic nature"*: It is for a fixed term of 35 years, albeit that rent is paid on a periodic basis. Percy noted that while the doctrine of frustration can, in principle, apply to a lease, there is no reported decision in Ireland or in England where a lease has been found to have been frustrated. Percy agreed with Foot Locker that the essence of a lease is the holding of land from another in return for the payment of rent.

78. With respect to the two covenants relied on (the *"user"* and *"keep open"* covenants), Percy noted that those covenants impose obligations on Foot Locker and do not confer rights or entitlements on it. They are intended to be for the benefit of the lessor, Percy, and not the lessee, Foot Locker. In other words, Percy submitted Clause 3.19 (the "*user"* covenant) precludes Foot Locker from using the premises for any purpose other than a *"high quality retail shop"* but does not confer any entitlement to use it for that purpose. Clause 3.19.2 (the "*keep open*" covenant) imposes an obligation on Foot Locker to keep the premises open *"at all reasonable times during the usual business hours of the locality"* but does not confer any right on Foot Locker to keep the premises open. On the contrary, non-performance of that obligation would entitle Percy to take action against Foot Locker should it elect to do so. Neither of these covenants, Percy submitted, affords any support for Foot Locker's claim that the lease has been frustrated on a partial or temporary basis. Percy also pointed to the wording of Clause 3.19.2 and to the inherent qualifications on the "*keep open"* covenant by the reference to *"reasonable times"* and

"usual business hours in the locality". It also refers to Clause 3.4.1 and the obligation to comply with all enactments which demonstrate that this obligation formed an important part of the bargain between the parties. Foot Locker's performance of its obligations under the lease was not, Percy submitted, rendered impossible by the Covid-19 restrictions. In fact, Foot Locker performed its obligations under the relevant clauses (in particular, Clauses 3.19.2 and 3.4.1). Further, it submits that performance by Foot Locker of those covenants bears no relation to Foot Locker's obligation to pay the rent *"without any deduction"* (in the *reddendum* clause and in Clause 3.1.1).

79. Percy also relied on the description of the doctrine of frustration by the Supreme Court in *Neville* which, in turn, approved passages from the speeches of two Law Lords in *National Carriers*. It noted that the authorities demonstrate that the doctrine of frustration is not actually a flexible concept and is rarely successfully invoked. That is particularly so in the case of leases. Percy relied on what was said in that respect by the Law Lords in *National Carriers* and, before that, in *Cricklewood Property and Investment Limited v. Leighton's Investment Trust Limited* [1945] A.C. 221 *("Cricklewood")*. Percy also relied on a number of recent English cases including *Cine-UK* in which claims that a lease was totally, "*partially*" or "*temporarily*" frustrated or rendered impossible to perform by reason of the Covid-19 restrictions in the United Kingdom, were rejected. Reliance was also placed on similar decisions in other jurisdictions including Hong Kong (*The Centre (76) v. Victory Serviced Office (HK)* [2020] HKCFI 2881).

80. Percy maintained that under Irish law (and English law) there is no such concept as "*partial frustration*" and that the trial judge correctly so found. It relied in that respect on the judgments of Kelly J. in *Donatex* and of Sanfey J. in *Oysters Shuckers*. It noted that the conclusion that there is no such concept derives from the very nature of frustration itself which, if successfully invoked, automatically brings the contract to an end forthwith (and it relied, in that respect, on *Cricklewood* and *Constantine Line v. Imperial Smelting Corp* [1941] 2 All E.R.

165). Percy observed that while Foot Locker asked the court to reconsider *Donatex* and *Oysters Shuckers*, it failed to acknowledge that those cases are premised on earlier authorities and on the decision of the Supreme Court in *Neville*. Percy further observed that once discharged under the doctrine of frustration, a contract cannot be resurrected.

81. Insofar as Foot Locker seeks to rely on aspects of the doctrine of temporary impossibility in support of its plea to the court to find that the lease was "*partially*" or "*temporarily frustrated"*, Percy submitted that (i) "*partial frustration"* does not exist as a concept known to Irish law as demonstrated by the judgments in *Donatex* and *Oysters Shuckers* and (ii) Foot Locker has completely misunderstood what is meant by the doctrine of temporary impossibility. The doctrine of temporary impossibility could not excuse Foot Locker from its obligation to pay the rent under the lease, while, at the same time, retaining the benefit of the lease and remaining in possession of the premises as the payment of rent was not impossible for all, or any, of the period affected by the restrictions. It noted that the *John Lewis* case on which Foot Locker relies is, in fact, against the proposition being advanced by Foot Locker. Percy relied on that case and on *Cricklewood* to demonstrate that the doctrine of temporary impossibility does not excuse non-performance of contractual obligations which have not, in fact, been rendered impossible to perform. That doctrine might assist Foot Locker if Percy sought to enforce the "*keep open*" covenant in Clause 3.19.2 of the lease or took steps to forfeit the lease. In those circumstances, Foot Locker could potentially rely on the doctrine of temporary impossibility as a defence to such action if taken by Percy. However, it could not do so in response to a claim for rent where the payment of rent is neither impossible nor conditional on the store being kept open. In that respect, Percy urged the court to adopt a similar position to that taken by the English Court in *Cine-UK*.

82. Percy noted that Foot Locker has, at no stage, treated the lease as having been frustrated, in that, notwithstanding its initial claim in correspondence and in the proceedings that

the lease had been frustrated, it remained in possession of, and traded from, the premises. Foot Locker, therefore, benefitted from the lease even during the period of the Covid-19 restrictions. If the lease had actually been frustrated, contractual relations between Percy and Foot Locker would have come to an end, freeing Foot Locker from its obligation to pay rent in full and ending its entitlement to remain in possession of the premises.

83. Percy further submitted that the forced closure of the premises was not an unforeseeable event in that the parties did contemplate circumstances in which it would not be possible to trade from the premises. That situation is dealt with in Clause 5.2 where the parties provided for what was to happen if the premises became unfit for occupation or use and addressed the allocation of risk in such a situation. In the situations envisaged under Clause 5.2, the risk fell to be borne by Percy, as the landlord. However, Percy submitted that in all other circumstances, the risk would fall to be borne by the tenant, as its obligation to pay rent is absolute. Therefore, such an outcome would reflect the bargain struck between the parties. Percy relied on *London Trocadero* as an example of where the court refused to imply a term into a rent suspension clause in a lease so as to enable it to operate in the context of Covid-19 restrictions on the basis that the express rent suspension clause constituted the bargain struck between the parties. A similar conclusion was reached in the English case of *Commerz Real Investmentgesellschaft GmbH v. TFS Stores Limited* [2021] EWHC 863 (Ch) *("Commerz Real")*.

84. Percy further submitted that, in any event, the supervening event relied upon by Foot Locker (i.e., the Covid-19 restrictions) was not so fundamental so as to frustrate the lease (being a disruption totalling 253 days in the context of a 35-year lease which, when at an end, left the lease with around four years to run). Percy submitted that the authorities make clear that temporary interruption of the use of a premises is not sufficient to frustrate a lease and relied on authorities from, *inter alia*, the UK (*Cricklewood* and *National Carriers*) and Hong Kong. It

submitted that, while the authorities suggest that the unexpired term of a lease is a relevant factor in considering a temporary interruption in the user of a premises, the period of disruption also must be examined against the overall term of the lease. Reliance was placed, in that respect, on *Drocarne Limited v. Seamus Murphy Properties and Developments Limited* [2008] IEHC 99 *("Drocarne*"), and on *Cine-UK*.

85. While Percy emphasised certain aspects of these submissions at the hearing, it is unnecessary to summarise those submissions at any length. Percy's counsel stressed that the conditions precedent for frustration to apply are not satisfied in this case (and Foot Locker does not claim that they are). Counsel further stressed, again, that the concept of "*partial"* or "*temporary"* frustration does not exist as a matter of Irish (or English) law. While temporary impossibility might provide a defence to a particular breach of a term of a contract where performance of that term has become temporarily impossible by virtue of some supervening illegality or for some other reason, that does not mean that the contract is frustrated on a temporary or partial basis or at all. Counsel was critical of Foot Locker's attempt to elide the unrecognised concept of "*temporary frustration"* with the concept of temporary impossibility. He submitted that there was no requirement for the Court to develop the law in the radical way sought by Foot Locker, and that the law was clearly set out in the existing English and Irish authorities which had been brought to the Court's attention.

86. Counsel stressed the nature of the fundamental bargain between the parties and the fact that, while some obligations might have become impossible to perform, payment of the rent in this case was not (and was not claimed to be by Foot Locker) impossible to perform. In his submission, the obligation to pay rent is an integral and fundamental part of the contract. While it might be suspended in certain circumstances provided for under the lease (Clause 5.2) those circumstances do not apply here. Further, he maintained that it was not open to Foot Locker to

argue that the obligation to pay rent was frustrated during the period of the restrictions while the lease otherwise remained valid.

87. Counsel urged the court to adopt the approach taken by the trial judge and to follow the approach adopted in *Donatex* and in the recent English cases such as *Cine-UK*. There is no necessity to create a new concept of "*partial"* or "*temporary*" frustration as there are adequate remedies available in the case of temporary impossibility under the existing law. Foot Locker could have relied on the doctrine of temporary impossibility (had it sought to do so) in order to resist any claim by Percy for breach of covenant for not using the premises as required under the "*user"* covenant or keeping it open within the terms of the *"keep open"* covenant during the Covid-19 restrictions. But that is not the scenario which has arisen here.

88. Percy's counsel rejected the suggestion that the case should be treated any differently because of the existence of those two covenants and noted that similar covenants were contained in the lease at issue in the *London Trocadero* case. On the basis of existing authority, therefore, counsel submitted that there was no need to change the law or to "*make new law*" as sought by Foot Locker in this case.

8. Analysis and Decision on Appeal

89. I have carefully considered the submissions advanced on behalf of Foot Locker in support of its appeal, and the points which it has advanced in arguing that the trial judge was incorrect in concluding that (a) the concept of *"partial"* or *"temporary"* frustration of a lease is not one which exists in Irish law, and (b) Foot Locker has not established an entitlement to a declaration that the lease in respect of the Grafton Street Store has been *"partially"* or *"temporarily"* frustrated. I am satisfied, however, that the trial judge was correct in reaching both of those conclusions and Foot Locker has not managed to persuade me that his conclusions on these issues should be disturbed. In my view, the judge correctly identified and applied the applicable legal principles and reached the correct and appropriate conclusion, on the facts and

on the law, that there is no basis for Foot Locker's claim of *"partial"* or *"temporary"* frustration of the lease in respect of the Grafton Street Store. Foot Locker has not persuaded me that there are any grounds for this Court to interfere with the decision of the trial judge in that respect.

90. I agree with Foot Locker's counsel that the court should start by considering the relevant terms of the lease. That is precisely what the trial judge did. I have identified earlier (in section 4 of this judgment) what appeared to me to be the relevant provisions of the lease. Of critical importance are the provisions of the *reddendum* clause and of Clause 3.1.1, "*Pay Rent"*, which provide, respectively that the rent reserved under the lease was to be paid *"without any deduction"* and that Foot Locker was covenanting to pay the rent (and any increased rent) *"without any deductions"*.

91. The only circumstances in which the parties expressly provided in the lease that the payment of rent would be suspended are those provided for in Clause 5.2. In that clause, the parties provided for the suspension of the obligation to pay rent where all or part of the premises are destroyed or damaged by one of the *"insured risks"* (those risks are defined in very broad terms in Clause 4.1). That provision reflects the manner in which the parties decided to allocate the risk of a change in circumstances over the duration of the lease. In other words, those provisions of the lease would strongly suggest that it was the intention of the parties that, apart from the circumstances covered by Clause 5.2, the risk of a change in circumstances over the duration of the lease would be borne by Foot Locker, as the successor to the original tenant's interests under the lease (see, for example, the discussion in *Peel, Frustration and Force Majeure* (4th Ed., Sweet & Maxwell 2022) at paras. 11.013–11.014, pp. 407– 409).[6]

92. The fundamental issue which arises on this appeal is whether supervening events, in the form of the Covid-19 restrictions, change the express allocation of risk by the parties to the lease

[6] Prof. Peel succeeded Prof Treitel as the author of *Frustration and Force Majeure* in its 4th Ed. which was published in 2022.

to the extent that the lease is "*partially"* or "*temporarily"* frustrated (to the extent that such a concept exists in Irish law). Almost uniquely under Irish law, the relationship of landlord and tenant is deemed to be founded on contract and is deemed to subsist where there is an agreement by one party to hold land from, or under, another for a period of time in return for the payment of rent. That much is agreed between Foot Locker and Percy. However, Foot Locker contends that the lease in this case has a *"quintessentially periodic"* quality, so as to undermine the force of the parties' presumed allocation of risk in the case of changed circumstances during the course of the lease. While leases can be of a periodic nature and can roll over at will from-time-to-time, that is not the nature of the lease in this case which is for a 35-year term. Foot Locker, having become entitled to the tenant's interest under the lease, holds the premises for the balance of the term of the lease *"subject to and with the benefit of the lease"* (as is clear from the *habendum* clause in the lease). In return for that entitlement, it is obliged to pay the rent reserved (and any increased rent) under the lease (as provided for in the *reddendum* clause and in Clause 3.1.1). While it is true that the rent is paid on certain dates in respect of certain periods, as opposed to being paid in lump sum, that does not, as contended by Foot Locker, change the essential character of the lease as being one for a fixed term to a periodic lease. I, accordingly, reject the submission advanced by Foot Locker based on the supposed periodic nature of the agreement between the parties. The lease is not a periodic agreement but one for a fixed term, being 35 years from March 1990.

93. Foot Locker places great reliance on the *"user"* and *"keep open"* covenants (Clauses 3.19 and 3.19.2). It contends that, for the periods when it was not possible to use or keep open the Grafton Street Store in accordance with those covenants, the fundamental bargain between the parties was destroyed. However, in order to understand how that might be so, leaving aside the critically important issue as to whether the concept of *"partial"* or *"temporary"* frustration

exists in Irish law, at all, it is necessary to consider what those two covenants relied on by Foot Locker actually entail.

94. The "*user*" covenant in Clause 3.19 is a covenant which imposes an obligation on Foot Locker not to use the relevant part of the premises (namely, the Grafton Street Store) other than as a *"high quality retail shop"*. It is also clear from Clause 5.5 of the lease that Percy was providing no warranty that the premises are authorised for that use or for any specific purpose. The terms of the "*user*" covenant make clear that it is intended to benefit Percy and to impose an obligation on Foot Locker, rather than to confer any legal entitlement on Foot Locker, to use the relevant part of the premises for its stated purpose. It is common for landlords to seek to control the user of premises by means of the user clause such as found in Clause 3.19. It is not suggested by Percy that Foot Locker was not permitted to use the Grafton Street Store for the stated purpose. I agree with Percy that Clause 3.19 would become relevant only if Foot Locker attempted to use the relevant part of the premises for a purpose other than as a *"high quality retail shop"* without seeking Percy's prior consent. That has not happened here. On the contrary, Foot Locker, at all times, wanted to use the premises for that purpose but was unable to do so during the currency of the Covid-19 restrictions.

95. The position is somewhat similar with the "*keep open*" covenant in Clause 3.19.2. Again, this provision imposes an obligation on Foot Locker and does not confer any entitlement upon it. It is, in my view, clearly intended to be for Percy's benefit, insofar as it imposes an obligation on Foot Locker. The obligation to "*keep open*" is also heavily qualified: The obligation is not to keep the premises open all the time. It is to keep the premises open *"at all reasonable times"* and *"during the usual business hours of the locality"*. The use of the words *"reasonable"*, *"usual"* and *"locality"* provides powerful support for the qualified, flexible and fluid nature of the obligation imposed on Foot Locker under the "*keep open*" covenant. That covenant appears to me to be directed at protecting Percy's interests as landlord in a situation

where Foot Locker does not open the Grafton Street Store at a time when other businesses in the locality are open. But whatever else it does, Clause 3.19.2 cannot be construed as imposing an obligation upon Foot Locker to open the store where it is not legally permitted to do so, as was the case during the currency of the Covid-19 restrictions.

96. I completely agree with the trial judge where he stated (at para. 15 of his judgment) that he could not see how any reasonable or proper interpretation of Clause 3.19.2 that could result in Foot Locker being found to be in breach of that provision because it did not open the Grafton Street Store for business at a time when it was illegal to do so and at a time when people were legally obliged to stay at home and to travel no more than 2km from their homes, except in very limited circumstances.

97. I also agree with the trial judge where he said (at para. 16 of his judgment) that the position is put beyond doubt by Clause 3.4.1 of the lease under which Foot Locker is obliged to comply with "*every enactment for the time being in force or any orders or regulations thereunder for the time being in force"*. I fail to see how it could be suggested that Foot Locker would be in breach of either Clause 3.19 or Clause 3.19.2 in circumstances where it did not open, and trade from, the Grafton Street Store during the currency of the Covid-19 restrictions.

98. I agree, therefore, with the trial judge that the combination of the *"user"* and "*keep open"* covenants do not assist Foot Locker in its attempts to establish the existence of "*partial frustration"* or to distinguish this case from all other cases in which a claim that a lease has been "*partially"* or "*temporarily"* frustrated has been rejected or, as the trial judge put it, found to be a *"legal mirage"* (at para. 17 of his judgment). In my view, those provisions of the lease, when properly construed as conferring no legal rights or entitlements but imposing only obligations, provide no support for Foot Locker's contention that they represent the fundamental bargain between the parties which was frustrated, on a partial or temporary basis, during the period of the Covid-19 restrictions. The fundamental bargain between the parties was, in my

view, the holding of the premises for the duration of the lease in return for the payment of rent "*without any deductions*".

99. As acknowledged by the trial judge (at para. 50 of his judgment), the Covid-19 restrictions may well provide a reason for not meeting a particular contractual obligation in circumstances, for example, where the enactment of a legislative measure has rendered compliance with the particular obligation illegal: as acknowledged and discussed in, for example, *Minnevitch, Cricklewood, John Lewis, Commerz Real* (at para. 51) and *Cine-UK* (at para. 218). I will, however, return to this issue later as much of the case made by Foot Locker on the appeal, while failing to make out its claim for *"partial"* frustration, might well have persuaded a court that there was valid excuse for non-compliance with the "*user"* and "*keep open"* covenants during the period of the Covid-19 restrictions, should Percy have sought to enforce those covenants at the time, which it did not.

100. Foot Locker does not claim that the lease was completely frustrated but rather that it was "*partially"* or "*temporarily*" frustrated for the periods during which it was not permitted to open by reason of the Covid-19 restrictions. However, to consider its claim of "*partial"* or "*temporary*" frustration, it is necessary, first, to consider the concept of frustration, itself, as without an understanding of what that concept means, it is impossible properly to assess what might be meant by "*partial*" or "*temporary*" frustration.

101. The legal principles applicable to frustration are not in dispute between the parties. The doctrine was addressed by the trial judge in section D, "*Analysis*", (paras. 31 onwards) of his judgment. He noted that the "*essence*" of the doctrine of frustration is that, where the conditions for its application are met, the contract is treated as being at an end, with both parties being freed from their obligations to each other and neither party having an entitlement to receive any further benefits, under the contract, from the other. The judge noted that, notwithstanding, what he described as *"these elementary propositions"*, the case made by Foot Locker is that "*partial"*

or "*temporary"* frustration of the lease, would free it from its obligation to pay rent for the relevant period but it would, nonetheless, be entitled to continue to occupy the premises. The judge noted that this form of frustration resulted in a "*one way street"*, (as was accepted by Foot Locker's counsel) which he felt did *"violence to the fundamentals of the doctrine"*.

102. A full discussion of the doctrine of frustration is unnecessary for present purposes. It is appropriate, however, to provide a brief summary of the relevant legal principles. As noted by *McDermott and McDermott*, the doctrine of frustration was developed by the courts to mitigate the strictness of the doctrine of *"absolute contracts"* which was applied in the 17th century case of *Paradine v. Jane* (1867) Aleyn 26, 82 ER 897 (*McDermott and McDermott*, para. 21.06, p. 281), the authors refer to *Taylor v. Caldwell* (1863) 3 B&S 826, 122 ER 309, as being the case which is generally considered to have established the doctrine of discharge by supervening events which has become known as the doctrine of frustration (see also *Peel* at para. 2-001, p. 17).

103. The general rule is that where the test is met, frustration discharges a relevant contract, by operation of law, and not at the option of any of the parties. It operates not only automatically but totally, in that the obligations of both parties which had not yet fallen due are totally discharged: see, for example, *Peel* at paras. 11-020, 15-002 and 15-013.

104. The classic statement regarding the effect of frustration on a contract is provided by Lord Sumner in *Hirji Mulji v. Cheong Yue SS Co. Ltd* [1926] A.C. 497, where he said that frustration discharges the relevant contract *"forthwith, without more and automatically"* (p. 505). This effect of the doctrine of frustration can also be seen in some of the Irish cases, including in the case of *Neville* where the Supreme Court approved various passages from the speeches of the House of Lords in *National Carriers*.

105. The absolute and peremptory description of the effect of frustration given by Lord Sumner is cited by *McDermott and McDermott*. They state at para. 21.83 that: *"At common law*

if a contract is frustrated the courts declare that all future obligations are thereby discharged." They refer to Irish authority for that aspect of the doctrine of frustration including *Byrne v. Limerick Steamship Co.* [1946] I.R. 138, where Overend J. noted that: *"…frustration operates automatically to determine the entire contract and does not depend on the volition or even the knowledge of the parties…"* (p. 150) and *Kearney v. Continental Shipping* (1943) Ir. Jur. Rep. 8.

106. Clark in his leading text *Contract Law in Ireland* (9th Ed., Round Hall Press 2022) notes (at p. 788, para. 18-116) that the effect at common law, if the test for frustration is met, is that all future obligations of the parties are discharged (he too cites *Kearney*). It is clear, therefore, that frustration of a contract differs significantly from termination of a contract for breach which depends on the innocent party electing to treat the contract as at an end. Lord Wright observed in *Denny* that: *"where there is frustration a dissolution of a contract occurs automatically. It does not depend, as does rescission … on the choice or election of either party."* (p. 274: cited by *Peel* at para. 15-006, p. 521).

107. Termination of a contract for breach involves, by definition, one of the parties being in breach of the contract and the other being an innocent party who elects to terminate the contract on that basis. In the case of frustration, however, each of the parties is equally innocent and both are victims of an event for which, by definition, neither is responsible.

108. It is fair to say that an examination of the authorities demonstrates that, notwithstanding what some judges have referred to as the *"flexible"* nature of frustration, the scope of the doctrine of frustration is quite narrow. That is particularly so in its application to leases and, even more so, in its application to leases of long duration where the parties can, and often do, make provision for what is to happen, or who should bear the risk, in the case of a supervening event.

109. Clearly were the lease to have been frustrated by the enactment of the Covid-19 restrictions, that would have provided no benefit, whatsoever, to Foot Locker as the lease would

automatically have come to an end, and both it and Percy would have been discharged from all future obligations under the lease. It would not have entitled Foot Locker to remain in occupation without paying rent.

110. The test for frustration was considered by the Supreme Court in *Neville* which approved the test as described in the speeches of Lords Simon, Roskill and Wilberforce in *National Carriers*. Before *Neville*, McWilliam J., in the High Court, summarised the principles applicable to frustration of a contract in *McGuill v. Aer Lingus* (Unreported, High Court, 3rd October, 1983). He summarised those principles as follows:

> *"1. A party may bind himself by an absolute contract to perform something which subsequently becomes impossible.*
>
> *2. Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed.*
>
> *3. The circumstances alleged to occasion frustration should be strictly scrutinised and the doctrine is not to be lightly applied.*
>
> *4. Where the circumstances alleged to cause the frustration have arisen from the act or default of one of the parties, that party cannot rely on the doctrine.*
>
> *5. All the circumstances of the contract should also be strictly scrutinised.*
>
> *6. The event must be an unexpected event.*
>
> *7. If one party anticipated or should have anticipated the possibility of the event which is alleged to cause the frustration and did not incorporated* [sic] *a clause in the contract to deal with it, he should not be permitted to rely on the happening of the event as causing frustration."*

111. Those do appear, to me, to be relevant principles. They do not, however, describe the significance of the event which is alleged to have caused frustration of the relevant contract. That issue was considered by the Supreme Court in *Neville*. In his judgment for the Supreme

Court in that case, Blayney J. cited with approval a number of the passages from the speeches in *National Carriers*. He referred first to that of Lord Simon, where he said:

> *"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case the law declares both parties to be discharged from further performance."* (per Lord Simon at p. 700, cited by Blayney J. at p. 13).

112. Blayney J. then quoted from Lord Roskill's speech (and he described the circumstances in which frustration occurs as being *"virtually identical in their effect"* to those stated by Lord Simon). Lord Roskill stated:

> *There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the Court to say, 'This was not the bargain which these parties made and their bargain must be treated as at an end', a view which Lord Radcliffe himself* [in *Davis Contractors Limited v. Fareham Urban District Council* [1956] A.C. 696] *tersely summarised in a quotation of five words from the Aeneid: 'non haec in foedera veni.'"* (per Lord Roskill at p. 717 cited with approval by Blayney J. at p. 14)

113. Blayney J. stated that those two passages represent a correct statement of the principles of the law applicable to frustration in Irish law. He then referred to an extract from the speech of Lord Wilberforce in *National Carriers* as also being a correct statement of the principles of Irish law on this issue. In that passage, Lord Wilberforce, after referring to various possible theories justifying the doctrine of frustration, stated:

> *"In any event, the doctrine can now be stated generally as part of the law of contract; as all judicially evolved doctrines it is, and ought to be, flexible and capable of new applications."* (per Lord Wilberforce at p. 694, cited by Blayney J. at pp. 7 – 8)

114. What was significant about *National Carriers* is that the House of Lords accepted, for the first time, that the doctrine of frustration could apply to a lease. In an earlier decision, *Cricklewood*, the House of Lords was divided on that issue of principle. The two Law Lords who were prepared to accept, as a matter of principle, that frustration could apply to a lease (Viscount Simon L.C. and Lord Wright) were, nonetheless, of the view that the circumstances in which the doctrine would, in fact, apply would be very rare indeed.

115. In his speech in *National Carriers*, Lord Hailsham, after noting the difference in opinion expressed in *Cricklewood*, put it as follows:

> *"It is the difference immortalised in H.M.S. Pinfore*[7] *between 'never' and 'hardly ever' since both Viscount Simon and Lord Wright clearly conceded that, though they thought the doctrine applicable in principle to leases, the cases in which it could properly be applied must be extremely rare"* (per Lord Hailsham at pp. 688 – 689) (Footnote added)

116. In the present appeal, Foot Locker understandably places heavy reliance on the statement of Lord Wilberforce in *National Carriers*, as endorsed by Blayney J. in *Neville*, that the doctrine of frustration "*is, and ought to be, flexible and capable of new applications"*. That flexibility, however, has not been borne out in its application to leases due, in large part, to the inherent nature of the relationship between the parties to a lease, particularly one of a lengthy duration. This is so given that the parties must necessarily envisage the possibility that circumstances might change over the term of the lease and where the length of that term provides a reasonable basis for the assumption that the parties took on the risk of changes in

[7] Gilbert & Sullivan's comic opera which was first performed in May 1878.

circumstances, and where such changes may only be temporary and, ultimately, do not amount to a serious interference with the intended user of the premises in the context of the duration of the lease, as a whole (see the discussion in *Peel*, para. 11-013, pp. 407 – 408). It is, also, notable that, notwithstanding the description of the doctrine being a flexible one, *Peel* points out that there is no decision in England in which a lease was held to have been frustrated (*Peel*, para. 11-028, p. 416). The current author of *Wylie on Irish Landlord and Tenant Law* (4th Ed., Bloomsbury Professional 2022) expresses the view that the application of the doctrine of frustration to leases is likely to be *"very rare"* (although the author refers to an unreported case of *Irish Leisure Industries Limited v. Gaiety Theatre Enterprises Limited* (Unreported, High Court, O'Higgins C.J., 12th February, 1957) in which a lease was found to have been frustrated albeit that the author states that the case may not have been a true example of frustration at all (*Wylie* at para. 26.20 - 26.21, pp. 608 – 609)).

117. Before turning to some of the cases in which courts have considered the circumstances in which a lease might be frustrated, I should record my agreement with the description by *McDermott and McDermott* of the modern test for frustration as being *"multi-factorial"* (at para. 21.15, p. 1285). The authors cite the judgment of Rix L.J. for the Court of Appeal of England and Wales in *The Sea Angel* as support for that description. Rix L.J. referred to the various factors to be considered but also stressed the fact that, since the doctrine of frustration is ultimately one of justice, it is necessary to consider the consequences of a finding of frustration, or otherwise, and to measure those consequences against the demands of justice. At pp. 664 and 665 of his judgment, Rix L.J. set out the factors to be considered in determining whether a contract has been frustrated in a particular case as follows:

> *"*111. *In my judgment, the application of the doctrine of frustration requires a multifactorial approach. Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties' knowledge, expectations,*

assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."

118. Rix L.J. continued:

"Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances".

119. I agree with that approach, and it seems to me to be consistent with the approach endorsed by the Supreme Court in *Neville*. Also consistent with that approach is the dictum of Rix L.J. in relation to the relevance of justice as a factor to consider. He said:

"112. *What the 'radically different' test, however, does not in itself tell us is that the doctrine is one of justice, as has been repeatedly affirmed on the highest authority. Ultimately the application of the test cannot safely be performed without the consequences of the decision, one way or the other, being measured against the demands of justice. Part of that calculation is the consideration that the frustration of a contract may well mean that the contractual allocation of risk is reversed.… If the provisions of a contract in their literal sense are to make way for the absolving effect of frustration, then that must, in my judgment, be in the interests of justice and not*

against those interests. Since the purpose of the doctrine is to do justice, then its application cannot be divorced from considerations of justice. Those considerations are among the most important of the factors which a tribunal has to bear in mind."

120. I agree that it is appropriate, when considering whether a contract has been frustrated, to measure the consequence of a finding of frustration against the demands of justice. That is the correct approach regardless of whether a party is claiming actual and complete or full-blown frustration or, as here, "*partial*" or "*temporary*" frustration (should such a concept exist). That is exactly the approach which was followed by the trial judge when he considered the consequences of finding that the lease agreement between Foot Locker and Percy had been *"partially"* or *"temporarily"* frustrated, namely, that Foot Locker, on its own case, would be entitled to remain in occupation without paying the rent reserved under the lease and that Percy would be prevented from recovering possession or using the premises for other permitted purposes. He described this outcome as a *"one way street"*, which, as noted, was a description accepted by Foot Locker. In so doing, the trial judge was doing precisely what Rix L.J. suggested should be done, namely he was considering whether such an outcome would do justice to the parties in this case. He clearly felt that it would not. I completely agree.

121. I am, also, quite satisfied that, on the particular facts of this case, Foot Locker would not have been in a position to satisfy the *"proportionality test"*, as it has been described, had it advanced a case that the lease had been totally frustrated. That was the test applied by the courts in some of the cases involving leases, which were relied upon by both parties to the appeal, in determining whether a lease has been frustrated by reason of a supervening event. This is what Percy's counsel described at the hearing as the *"numbers game"*.

122. The issue was considered by the House of Lords in *National Carriers*: Having confirmed that the doctrine of frustration was applicable to leases, the court went on to consider whether the test of frustration was actually met on the facts. That case concerned a ten-year

lease, commencing on 1st January, 1974, for a warehouse. The tenant covenanted not to use it otherwise than as a warehouse without the landlord's consent. In May 1979, the street which provided the only vehicular access to the warehouse was closed by the local authority because of the dangerous condition of a nearby building. It was expected that the street was likely to be closed for about 20 months, during which, the tenant could not use the premises as a warehouse. The landlord brought an action for recovery of unpaid rent. The tenant claimed that the lease had been frustrated by the events that had occurred. That argument failed, ultimately, in the House of Lords on two grounds: Firstly, the court held that, having regard to the likely length of the continuance of the lease after the interruption of user in relation to the term originally granted, the lease was not frustrated. Applying the *"proportionality"* test, the interruption was found not to be sufficiently serious so as to discharge the contract. (There were about three more years of the lease remaining when the beneficial use was likely to be restored). In rejecting the argument of frustration, Lord Wilberforce said:

> *"[N]o doubt, even with this limited interruption the appellant's business will have been severely dislocated. It will have had to move goods from the warehouse before the closure and to acquire alternative accommodation. After reopening the reverse process must take place. But this does not approach the gravity of a frustrating event. Out of ten years it will have lost under two years of use: there will be nearly three years left after the interruption has ceased. This is a case, similar to others, where the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end."* (at pp. 697 – 698)

123. Secondly, the lease made provision for the suspension of the tenant's obligation to pay rent in the case of damage or destruction caused by fire, but in no other circumstances. Lord Wilberforce said:

> *"The obligation to pay rent under the lease is unconditional, with a sole exception for the case of fire, as to which the lease provides for a suspension of the obligation. No provision is made for suspension in any other case: the obligation remains."* (p. 698)

124. The same can be said in the present case, in circumstances where the parties agreed that the tenant's rent obligation would be suspended in the case of damage to, or destruction of, the premises caused by one of the *"insured risks"* (Clause 5.2).

125. Returning to *National Carriers*, Lord Simon noted (at p. 706) that the *"length of the unexpired term* [of the lease] *will be a potent factor"*. He then described the *"proportionality"* test as follows:

> *"Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative - what relation does the likely period of interruption bear to the outstanding period for performance? But this must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms?"* (p. 707)

126. He then considered the period of the interruption (estimating that the total interruption would be about one-sixth of the total term of the lease), he concluded that the tenants had not demonstrated a triable issue that the closure of the road "s*o significantly changed the nature of the outstanding rights and obligations under the lease from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations*" (p. 707).

127. He too pointed to the fact that the parties had provided for a suspension of rent only in the case of fire damage and felt that "*the parties can hardly have contemplated that the expressly-provided-for fire risk was the only possible source of interruption of the business of the warehouse - some possible interruption from some cause or other cannot have been beyond the reasonable contemplation of the parties"* (p. 707). It seems to me that those observations could equally apply in this case. Lord Simon concluded his speech by suggesting that consideration should be given to whether the doctrine of frustration could be made *"more flexible in relation to leases"*, seeming to suggest that the matter was one for legislation (p. 707).

128. In applying this *"proportionality"* test to a determination as to whether a lease has been frustrated in the case of a supervening event, the authorities demonstrate that the court is required to consider, not only the length of time left to run in the lease after the temporary issue has resolved, but also the period of interruption in the context of the total term of the lease. That is clear from Lord Simon's speech in *National Carriers,* and from the judgment of Finlay Geoghegan J. in *Drocarne* (a case which did not involve a lease but rather a master development agreement) (see the discussion at pp. 45 – 50 of the *Drocarne* judgment).

129. Foot Locker would not have been in a position to satisfy the proportionality test had it made a case that the lease was fully frustrated as opposed to "*partially*" or "*temporarily*" frustrated. While Foot Locker was unable to open, and trade from, the Grafton Street Store for a total of 253 days between March 2020 and May 2021, that period of closure has to be seen in the context of a 35-year lease with almost four years to run after the restrictions were lifted to permit the Grafton Street Store to be reopened. On any view, this would fail the proportionality test as it could not be said that the performance of the parties' obligations under the lease, with effect from the lifting of the restrictions, would differ so significantly from what the parties reasonably contemplated upon entering the lease that it would be unjust to require the parties to comply

with their obligations under the lease for the remainder of the term. It is clear, therefore, that Foot Locker could not have established frustration of the lease.

130. In circumstances where the lease was clearly not frustrated, this begs the question as to whether there is any scope for the court to find that the lease has been *"partially"* or "*temporarily"* frustrated, as a result of the Covid-19 restrictions. The trial judge answered that question in the negative. In my view, he was quite correct in doing so. The authorities from this jurisdiction and from other comparable jurisdictions (including our neighbours in England and Wales) all weigh heavily against the recognition of the concept of "*partial*" or "*temporary*" frustration of a contract, specifically a lease. The trial judge made clear his view that, even without prior authority on this point, such a concept had no place in Irish law as it would be so fundamentally inconsistent with the essence of the doctrine of frustration itself (including the conditions for its fulfilment and the consequences of its application). It was his view that no amount of flexibility which might be applied to the doctrine could accommodate a concept such as *"partial"* or *"temporary"* frustration. I am in complete agreement with the trial judge on this issue.

131. The trial judge's emphatic rejection of the existence of "*partial" or "temporary"* frustration has the support of precedent, both national and international, and academic commentary. I will refer first to the Irish cases which rule out the availability of *"partial"* or *"temporary"* frustration in Irish law. I do not accept Foot Locker's assertion that these cases can be distinguished, primarily on the basis that the contracts at issue in the cases did not include clauses akin to the *"user"* and *"keep open"* covenants in this case, and I refer, here, to my analysis of those provisions earlier in this judgment (section 4). The most significant case, for present purposes, is the judgment of Kelly J. in *Donatex*, on which considerable reliance was properly placed by the trial judge. That case involved an application for summary judgment under a loan stock instrument on foot of an accelerated repayment provision of that instrument

and under a guarantee. One of the grounds on which the defendants sought to resist summary judgment was that the relevant provision of the instrument was frustrated or, alternatively, "*partially*" frustrated. Kelly J. found that both those defences were not arguable.

132. In dealing with the defence of frustration, Kelly J. referred to many of the authorities discussed earlier, including *National Carriers* and *Neville,* and stated that the defence of frustration was *"one of limited application and narrowness"* and noted that the authorities demonstrate the *"narrow scope"* for its invocation. He further noted that the parties had expressly provided that, on the occurrence of the events contemplated in the particular clause of the instrument, the risk of immediate repayment was to fall on the defendants. He held that, if the defence of frustration was made out by the defendants, the contractual obligations would be at an end and that, in those circumstances, the plaintiff would be entitled to repayment of the monies advanced. The defence of frustration, therefore, availed the defendants nothing.

133. Kelly J. then went on to consider the defendants' alternative contention which was that there was *"partial frustration"* in respect of the relevant clause of the instrument. The defendants argued that the relevant clause had been frustrated but that the remainder of the obligations under the contract continued to exist. He referred to the submission made on behalf of the defendants as advancing a *"most extraordinary proposition unsupported by any authority that* [the relevant clause] *... although now frustrated would, at some stage in the future, through some unexplained and I expect, inexplicable alchemy, revive itself, but framed differently, so as to exclude the 30 month period referred to in it"*. He described that part of the proposition as being *"clearly devoid of substance"* (p. 17). He then cited from the then-current version of *Treitel, The Law of Contract* (11th Ed. 2003) in which the author had considered whether the concept of "*partial frustration*" was part of English law (paras. 50-07, onwards). Having referred to some civil law systems where something akin to "*partial frustratio*n" exists, Kelly J. noted that *Treitel* went on to say:

> *"…these rules have no direct counterpart in English law, under which, in cases of partial impossibility, the contract is either frustrated or remains in force. <u>There is no such concept as partial or temporary frustration on account of partial or temporary impossibility</u>…the concept of partial discharge in English law is restricted to obligations which are 'severable', whether in point of time or otherwise."* (quoted by Kelly J. at pp. 17 – 18, emphasis in judgment)

134. Kelly J. concluded that there was no concept of *"partial frustration"* as such in Irish law. It might apply if the relevant clause was capable of being severed from the rest of the loan stock instrument, but it was not, as it was *"an integral part of the contract and not a standalone provision such as an arbitration clause"*. He concluded, therefore, that no defence of *"partial frustration"* was available to the defendants. There is no suggestion in this case that the covenant in the lease providing for Foot Locker to pay the rent reserved under the lease is severable from the other provisions of the contract. It is undoubtedly an *"integral part of the contract"* and *"not a standalone provision"*.

135. *Donatex* was considered and followed by Sanfey J. in his very comprehensive judgment in *Oysters Shuckers*. That case involved an application, by a tenant who was substantially in arrears for rent, for an interlocutory injunction restraining the landlord from taking possession of restaurant premises the subject of the lease between the parties, which was unable to open while the Covid-19 restrictions were in force. One of the arguments advanced by the tenant was that the tenant's rental obligations under the lease were *"temporarily suspended and/or partially frustrated"*. In rejecting that argument, Sanfey J. referred, with approval, to what Kelly J. had stated in *Donatex* as to the non-availability of the concept of "*partial*" or "*temporary*" frustration in Irish law, save in very limited circumstances where a particular provision of a contract could be severed from the rest of the contract. Sanfey J. held that the obligation to pay rent is an *"integral and indeed fundamental part of the contract"*. He noted

that (as in the present case under Clause 5.2 of the lease), while the obligation to pay rent could be suspended in certain circumstances, provided for under Clause 3.2 of the lease in that case, those circumstances did not arise in that case. He held, therefore, that the tenant could not argue that the rent obligation was frustrated while, at the same time, arguing that the lease itself remained valid.

136. Meenan J. reached a similar conclusion in *Treacy v. Lee James Menswear Limited & James O'Regan* [2022] IEHC 600. That was also an application for summary judgment for the payment of rent and unpaid insurance premia under a lease. The substantive defence put forward on behalf of the defendants was that the lease had been frustrated by reason of the Covid-19 restrictions. Noting that, in effect, the defendants were relying on a claimed defence of *"partial frustration"*, Meenan J. referred to *Donatex* and *Oyster Shuckers* as well as the judgment of the trial judge in this case (O'Moore J.) and concluded that the authorities were *"overwhelmingly against the defence being put forward by the defendants"*. He held that, while it might be argued that the doctrine of frustration was an *"evolving one"*, the tenant's contention that it was discharged of its obligations to pay rent for so long as the Covid-19 restrictions were in place had no basis in Irish law. He held that, whilst the Covid-19 restrictions were in force, the tenant continued to remain in possession and to enjoy rights afforded, by law, to a tenant. He, accordingly, granted summary judgment against the defendants in the case.

137. While Foot Locker contended that these judgments were delivered in summary or interlocutory proceedings and did not involve a lease which contained covenants similar to the "*user*" and "*keep open"* covenants in this case (though I am unpersuaded on the latter point), I do not believe that these considerations in any way detract from the correctness of the conclusions of law drawn in those judgments, which, in my view, are soundly based on principle and reflect the incongruity of a claim for "*partial"* or "*temporary"* frustration with the circumstances relied upon in those cases, including the very same Covid-19 restrictions at issue

in this case. The authors of two of the leading texts on contract law (*Clark* and *McDermott and McDermott*) proceed on the basis that the law was correctly stated in *Donatex,* and that the common law does not recognise "*partial"* or "*temporary*" frustration on the grounds of partial or temporary impossibility of performing certain contractual obligations (unless there are distinct and several provisions of the contract which can be severed from the balance of the contract: see *Clark* pp. 793, para. 18-126 and *McDermott and McDermott* para. 21.90, pp. 1324-1325). They make clear that the reason for this is that if the conditions for frustration exist then the entire contract is at an end. Similar views are expressed in the leading English textbooks including the current version of *Frustration and Force Majeure* by *Peel*, the relevant passage from an earlier version of which was cited by Kelly J. in *Donatex*. *Peel* refers to some of the recent English cases which have ruled out the possibility of *"partial"* or "*temporary*" frustration of a lease (see *Peel* at paras. 5-006 – 5-007, pp. 198 – 199; para. 11-035, pp. 419 – 420).

138. It is appropriate now to refer briefly to some of the recent English decisions which considered the impact of equivalent Covid-19 restrictions in that jurisdiction on contractual arrangements.

139. There are three English cases on point: The first in time is *Commerz Real* (judgment delivered on 16th April, 2021). The claim in that case was for rent payable under a lease of a perfume shop in a shopping centre. The business was obliged to close for certain periods between March 2020 and April 2021, under similar Covid-19 restrictions as were introduced here. The lease contained similar covenants to those at issue in this case including the tenant's covenant to pay the rent without any deductions, to keep the premises open, and to maintain active trade during the shopping centre's opening hours unless prevented from doing so because of damage from an *"insured risk"* or where to do so would be unlawful. There was also a provision in the lease, similar to Clause 5.2 of the lease in this case, which provided for the suspension of the obligation to pay rent if the premises were damaged by an insured risk.

Summary judgment was granted to the landlord by Chief Master Marsh. While the judgment does not discuss "*partial"* or "*temporary"* frustration, as such, it does refer to the circumstances in which the obligation to keep open and to trade (under the covenants just mentioned), may be suspended (in the context of the Covid-19 restrictions). The court held that the tenant's obligation to pay rent continued unless the rent cesser provisions in the lease suspended that obligation. The starting point was the express terms of the lease. The court stated that, during periods of lockdown, the obligation to trade was suspended (given that one of the circumstances in which the tenant was permitted not to keep open and trade, under the relevant covenant, was where it would be unlawful to do so). The court concluded that there was nothing in the relevant clause that had the effect of suspending the tenant's obligation to pay rent. The court looked at the rent suspension provisions (very similar to Clause 5.2 in this case) which, it considered, clearly set out the circumstances in which the tenant would be relieved of the obligation to pay rent, namely, in cases of physical damage to the premises, until the premises were reinstated. The court held that there was no basis for construing the provisions of the lease so that they would apply in the event of the shopping centre, or the premises themselves, being closed due to a legal requirement. The court stated, *"the obligation to keep open and to trade is suspended but that is a quite different matter"* (para. 51).

140. The judgment in that case was referred to in the next case in time, which is *Cine-UK* (judgment delivered on 22nd April 2021). That was another application for summary judgment brought by two landlords against their tenants for rent under three leases of commercial premises in respect of the period during which the Covid-19 restrictions were in place in England and Wales. The landlords claimed that the rents continued to fall due notwithstanding the existence and effect of the Covid-19 restrictions. The tenants asserted that, for various different reasons, they did not have to pay all or part of the rent due. The leases were for 15 years (in the case of two of the leases) and for 35 years (in the case of one of the leases). They

all contained the usual covenant by the tenants to pay rent quarterly in advance. The leases also contained provisions which restricted the use of the premises to particular uses, being that of a multiplex cinema, that of a bingo hall and ancillary operations, and that of a retail sports and leisure goods shop. Each of the leases contained provision for the suspension of the obligation to pay rent where the premises were destroyed or damaged by an *"insured risk"* under the relevant lease. One of the arguments raised by the tenants to resist summary judgment was that there had been a *"temporary frustration"* of the leases over the periods of lockdown where the premises were required to close under the relevant Covid-19 restrictions resulting in rent not being payable for the period of those restrictions. The landlords contended that there was no frustration at all and that there was no such thing as a *"temporary frustration"* in law. Master Dagnall in the High Court of Justice Queens Bench Division considered those arguments in detail and referred to the leading cases (many of which have been discussed earlier in this judgment) including *National Carriers* and *The Sea Angel*. He held that there was no prospect of it being shown that any of the leases were frustrated. He further held that there were two combined reasons why the tenants had no real prospect of establishing *"temporary frustration"* of the leases. Those reasons are set out as follows (at para. 211):

> *"a. First, that there is no such thing as a 'temporary frustration', effectively suspending the contract for a period of time, in law. Both Treitel and the case-law, in particular my initial citations from Panalpina* [*National Carriers*]*, make clear that frustration has the effect of discharging the contract and ending it. That is one reason why such a 'radical difference' has to exist. Frustration does not suspend the contract, rather it terminates it and so that it does not subsequently revive. What the Tenants are seeking to do is to introduce one possible version of the flexibility that Lord Simon said would require statute. There is no case-law as to general 'temporary frustration' (I consider the question of 'supervening event' separately below);*

b. Second, in order to have a 'temporary frustration' there could not be a 'full frustration'. However, the doctrine of frustration is dependent on a 'radical difference' having occurred which renders it unjust for the contract to continue. It is difficult to see how, whereas here (see above), such a sufficient 'radical difference' does not exist, there can be any frustration at all. If there could be such a temporary frustration then Panalpina [*National Carriers*] *would have been a classic case of it and would have been decided differently. The same applies in these cases."*

141. The court, therefore, rejected the arguments based on frustration and *"temporary frustration"* and held that they had no prospects of success. The court did, however, go on to consider the circumstances in which a party could be released from an obligation which had become impossible to perform legally by reason of some supervening event. I will return to that issue shortly as it featured in Foot Locker's submissions to this Court.

142. The third case is that of *London Trocadero* (judgment delivered on 28th September, 2021). That was another claim for the payment of rent by a landlord in respect of two leases of cinema premises at the Trocadero Centre in London. The tenants claimed that they were not liable for rent and service charges during the periods when the premises could not be used as a cinema due to the Covid-19 restrictions. They did not rely on frustration or alleged *"temporary frustration"* but rather on the basis that there was either an implied term to that effect in the lease, or that there had been a failure of consideration (or a failure of basis). They maintained that that was the case notwithstanding that they accepted that the two leases were not frustrated, and that the landlord was not in breach of the terms of the leases.

143. The High Court (Deputy Judge Vos) rejected those defences and granted summary judgment for the arrears of rent in favour of the landlord. The judge's conclusions on the implied term argument are not relevant for present purposes. While his ultimate conclusions on the failure of consideration/failure of basis are of limited relevance in light of Foot Locker's

decision not to pursue an amendment of its claim to include one of unjust enrichment, the judge did make some relevant observations on the availability, or otherwise, of the doctrine of "*temporary"* or "*partial"* frustration in English law. One of the leases at issue in that case was for a term of 35 years, the other was for a shorter period of 27 years. The main lease at issue, the longer of the two leases, was very similar to the lease in the present case, as it contained covenants similar to those being relied upon by Foot Locker, including a covenant to pay rent "*without any deduction whatsoever*" (similar to the *reddendum* clause and Clause 3.1.1), a covenant to "*comply with all obligations imposed by … any Act or Acts of Parliament or legislation"* (similar to Clause 3.4.1), and a covenant not to use the premises other than for the "*Permitted Use"* as a cinema (similar to the "*user"* covenant under Clause 3.19) and to keep the premises open for trading during certain minimum trading hours so far as that was permitted by law (similar to the *"keep open"* covenant under Clause 3.19.2). The lease also contained a rent-suspension clause similar to that contained in the lease in this case (similar to Clause 5.2 in this case).

144. The court rejected the failure of consideration/failure of basis argument as a defence to the contractual claim made by the landlord, in circumstances where the contract remained in existence. While frustration was not raised as a defence, the judge considered it as an example of one of the situations where the law considers it inappropriate to hold the parties to the strict terms of their contract (see: para. 167). The judge stressed, however, the narrow confines within which the doctrine of frustration operates and referred to an extract from the speech of Lord Hailsham in *National Carriers*. The judge then continued (at para. 168):

> *"Allowing failure of basis as a self-standing concept to provide a defence to a contractual claim would be tantamount to extending the doctrine of frustration so as to allow obligations under a contract to be suspended as a result of what might be termed temporary or partial frustration. There is of course no such principle as the law*

currently stands. It is clear that frustration brings a contract to an end and discharges the parties from all of their future obligations. Indeed, the possibility of temporary frustration was a significant issue in the Cine-UK case decided by Master Dagnall and was rejected by him. It is perhaps telling that the Defendants in this case do not put forward partial or temporary frustration as a defence."

145. The judge refused to extend the reach of failure of basis to provide a defence to the landlord's claim in that case. Such an extension would be inappropriately encroaching on the law of unjust enrichment. He felt that it would also *"run the risk of giving rise to significant unfairness or injustice"* (para. 170). He continued:

"In circumstances where neither party is at fault, the court would arbitrarily allocate the entire loss to one party or the other. However, it would be doing so against the background of a contract which continues to exist and where both parties have continuing rights and obligations under the contract. In the present case, for example, the Landlord would not have possession of the premises and would have an ongoing obligation to provide services in relation to the premises. In these circumstances, it seems to me that it would not be right, as a matter of contract law, for the court to intervene by removing one particular obligation of one of the parties."

146. In my view, leaving aside his rejection, as a matter of principle, of the concept of "*temporary*" or *"partial"* frustration in English law, the judge's reticence, in that case, to extend the failure of basis defence where it would allow the tenant to continue occupation of the premises, to the exclusion of the landlord who would have ongoing obligations under the lease, without paying rent, has considerable resonance with this case. A similar principled objection can be made to the existence of a concept of *"temporary"* or "*partial"* frustration in Irish law and to the entitlement of Foot Locker to rely on such a defence to avoid its obligation to pay the

rent reserved under the lease in compliance with its covenant to do so (as provided for in the *reddendum* clause and Clause 3.1.1).

147. One of the unsuccessful defendants in *Cine-UK* and the unsuccessful defendants in *London Trocadero* appealed to the Court of Appeal. In both appeals, the tenants relied on the following grounds in resisting the payment of rent for the periods when the use of the premises as a cinema was rendered unlawful by the Covid-19 restrictions: (a) that the restrictions caused a failure of basis so as to relieve them of the obligation to pay rent for those periods when the restrictions were in force; and (b) that there was an implied term of the lease that the tenants should be relieved of their obligations to pay rent where the premises could not lawfully be used as a cinema. The parties in this case informed this Court that the appeals were dismissed in a judgment delivered by the Court of Appeal of England and Wales in July 2022 in *Bank of New York Mellon (International) Limited v. Cine-UK* and *London Trocadero (2015) LLP v. Picturehouse Cinemas Limited, Gallery Cinemas Limited and Cineworld Cinemas* [2022] EWCA Civ. 1021. However, since the grounds relied upon by the parties in that appeal did not include a claim that the leases had been frustrated or "*temporarily*" or "*partially*" frustrated, and since the judgment of the Court of Appeal (delivered by Sir Julian Flaux C) does not consider those issues, it is, in my view, unnecessary to consider that judgment any further.

148. It can be seen from this review of the English cases that the English Courts have rejected the concept of *"temporary"* or *"partial"* frustration, both generally and in the context of leases, including attempts by tenants to avoid their rental obligations under leases which are very similar to the lease at issue in this case, because of their inability to open for business during the currency of the Covid-19 restrictions. The trial judge considered some of these cases in his judgment and I agree that they too significantly undermine the case made on the appeal by Foot Locker. It is notable that a number of the leases considered in those cases contained covenants very similar to those in the lease in this case, including covenants similar to the "*user*"

and "*keep open"* covenants. The fact that the tenants' arguments in those cases failed, further undermines Foot Locker's attempt to distinguish the Irish cases from the present case on the grounds that the contracts considered in the Irish cases did not include clauses similar to the "*user*" and "*keep open"* clauses contained in the lease. In cases where the relevant contracts and leases contained similar clauses, the result was the same.

149. Where a party's obligations under contract are temporarily rendered unlawful or impossible to perform, by virtue of a supervening event, such as the enactment of a measure which renders that performance impossible or illegal for a temporary period, that party may be able to argue that it has a defence or an excuse for non-performance of the relevant obligation while that situation persists with such a defence coming to an end when that situation ceases. In such a case, the supervening event does not frustrate the contract or lease, as a whole, but merely provides an excuse or defence for the non-performance of a particular obligation under that contract or lease, as the case may be.

150. That is the explanation for the decision in *Minnevitch* where the defendant was held not to be in breach of its contract with a group of musicians to play for two of the six days for which they were contracted to play because on those two days all places of public entertainment had to close due to the death of the King. He was, however, held to be in breach of contract by refusing to permit them to play for the following four days. That is an example of a supervening event which gave a temporary excuse or defence for non-performance but did not give rise to frustration of the contract. It was not a case of *"partial frustration"* and does not assist Foot Locker in its attempt to derive support from the cases involving temporary impossibility or illegality, for its case of *"partial"* or "*temporary*" frustration.

151. The same goes for Foot Locker's reliance on *John Lewis.* That was another case of temporary impossibility providing an excuse for non-performance of a particular covenant in the lease which did not afford a defence to a claim for rent. That case and *Cricklewood* are cited by

Peel as example of cases concerning supervening events which made performance of a particular covenant in a lease illegal (see *Peel*, para. 11-034, pp. 418 – 419).

152. In *Cricklewood*, a tenant under a 99-year lease covenanted to build shops on the demised premises. Wartime restrictions introduced by the Government made it illegal to construct the shops. The landlord sought payment of the rent under the lease. The tenant contended that the obligation to pay rent had been excused or discharged by frustration since the wartime restrictions made it impossible to erect the shops. In holding that even if the doctrine of frustration could apply to a lease (and the court was divided on that issue), the House of Lords held that the circumstances did not justify the application of the doctrine of frustration. The lease had not been discharged by frustration and the tenant remained liable for the rent. The Law Lords considered the circumstances in which temporary impossibility or illegality may provide a defence to, or excuse for, the non-performance of a particular covenant in a lease but would not provide a defence to a claim for payment of rent. For example, Lord Russell stated:

> *"It may well be that circumstances may arise during the currency of the term* [of the lease] *which render it difficult, or even impossible, for one party or the other to carry out some of its obligations as landlord or tenant, circumstances which might afford a defence to a claim for damages for their breach, but the lease would remain… Some of the obligations thereunder may from time to time, from various circumstances become difficult or impossible of performance by one or other of the parties; but, in my opinion, it cannot have applied to it the doctrine of frustration. The rent will continue to be payable in accordance with the terms of the document."* (at pp. 233 – 234).

153. Lord Porter stated:

> *"Some terms of the tenancy may be impossible of performance at least for the time being but the tenancy itself is not thereby necessarily determined. Its basis still exists.*

Building may not be feasible, yet I do not think that the tenancy has come to an end for that reason." (at p. 242)

154. Lord Goddard said:

"If however the tenants came under an obligation to build, but were prevented from so doing by the orders [i.e., the wartime restrictions], *they would furnish them with a good defence, were they sued for breach of their covenant to build, but not to a claim for rent under this lease."* (at p. 244)

155. A very similar issue arose in the *John Lewis* case where the court (Mummery J.) reached a similar conclusion. Having referred to the speech of Lord Russell in *Cricklewood* to the effect that *"there may be excuses for non-performance of building contracts short of frustration"*, Mummery J. said that *"[i]n such a case the consequence would be that liability for rent would continue in accordance with the terms of the lease, but there might be an excuse for non-performance of the building covenant"* (at p. 132). Mummery J. held that:

"... there may exist lawful excuses for non-performance of building covenant in a long lease and such excuses would provide a defence to an action for forfeiture for breach of covenant, even though they would not provide a defence to a claim for rent." (at p. 132)

156. The possibility of a tenant having a defence to a claim for rent in circumstances where, by reason of a supervening event, the use of the premises, as envisaged under the lease, was rendered impossible or unlawful, on a temporary basis, was considered again more recently in some of the Covid-19 cases referred to earlier. The issue was considered and decisively rejected by the court in *Cine-UK*. Having referred to various cases including *John Lewis*, the court in that case held that the tenants had no real prospect in succeeding in contending that the Covid-19 restrictions amounted to a supervening event which temporarily suspended their obligations to pay rent under the relevant leases. While the performance of an obligation under the lease which has been rendered illegal may be suspended for the period during which it is illegal, it

was held that the performance of other obligations is not excused. Moreover, it was held that the case law establishes that the illegality amounting to an excuse of one obligation does not itself relieve the tenant of its liability to pay rent (which was also the conclusion of the court in *Commerz Real*, at para. 51 and *Cine-UK* at para. 218).

157. I agree with Percy that Foot Locker's attempts to establish that the lease in this case has been "*partially*" or "*temporarily*" frustrated during the period of the Covid-19 restrictions (so as to relieve it of the obligation to pay rent under the lease for the period of those restrictions), derive no support from these cases. The supervening impossibility/illegality cases relied on provide no support for Foot Locker's case. As the trial judge pointed out, had Percy sought to enforce the "*user*" or "*keep open"* covenants during the period of those restrictions, or sought to forfeit the lease by reason of Foot Locker's failure to comply with those covenants, those cases would likely have afforded an excuse or a defence to Foot Locker for its inability to comply with those covenants. They do not, however, afford any basis for its case on "*temporary*" or "*partial"* frustration.

158. It is appropriate here, I think, to note that in his Preface to *Peel*, the author notes that notwithstanding the "*seismic events"* which, in the past, had led to the development of English law in the area of frustration, the Covid-19 pandemic has not resulted in a *"radical re-appraisal"* of English law. Referring to the *Cine-UK* case, *Peel* notes that *"tenants left with premises that cannot be used, or used profitably, have not succeeded in their argument that the lease is frustrated, or that they have an excuse for non-payment of rent"* and that lessees of aircraft have not fared any better (referring to two other cases which Percy have relied in this appeal but which I do not believe are necessary to address, *Salam Air SAOC v. Latam Airlines Group S.A.* [2020] EWHC 2414 and *Willingham Trust S.P. Services (Dublin) Limited v. Spice Jet Limited* [2021] EWHC 1117 (Comm)) (see the preface to *Peel*, pp. vii – ix).

159. In summary, therefore, I entirely agree with the trial judge that there does not exist, as a matter of Irish law, a concept of *"partial"* or *"temporary"* frustration as contended for by Foot Locker on this appeal. Such a concept is contrary to principle and authority. As a matter of principle, it is impossible to see how a contract can be frustrated (with the effect that it is automatically discharged and at an end) for a period and then revived or resurrected when that period is over. That is conceptually impossible, as a matter of principle and, in the words of the trial judge, *"does violence to the fundamentals of the doctrine"* of frustration. So too is it entirely contrary to well-founded authority, including decisions of a number of High Court judges and case law from other jurisdictions. Notwithstanding the stated "*flexibility*" of the doctrine of frustration, it would be stretching that doctrine well beyond breaking point for the Court to permit, as a matter of principle, a doctrine of "*temporary*" or "*partial*" frustration to arise and to have the effect for which Foot Locker contends.

160. As I have observed earlier, it has been said that when determining whether circumstances which have arisen meet the test of frustration of a contract, consideration must be given to the consequences of the decision and how they may be *"measured against the demands of justice"* (per Rix L.J. in *The Sea Angel*). Consideration of the doctrine of frustration, in any particular case, must involve considerations of justice. In my view, the trial judge did just that when considering the consequences were the court to find that the lease had been "*temporarily*" or "*partially*" frustrated. The judge rightly considered that this was a *"one way street"* with Foot Locker being entitled to remain in possession of the premises without the obligation to pay rent until the restrictions were lifted. That would not, in my view, be consistent with the interests of justice. The parties agreed in the lease on the circumstances in which rent would be suspended, and could have, but did not, agree for such a suspension in other circumstances, including those which have arisen in this case. The effect of their agreement, therefore, was that Foot Locker should bear the burden of any inability to carry on business from the premises

except where that inability is caused by what would be destruction or damage to the premises by any of the *"insured risks"* under the lease.

161. Since a decision to dismiss Foot Locker's appeal does, in my view, accord with the interests of justice. I see no reason to *"make new law"* or to extend the boundaries of the existing law to accommodate the case made by Foot Locker in the appeal. I am content to proceed on the basis of the existing law which, in my view, is soundly based on principle and authority. Any alteration of the allocation of risk agreed by the parties to the lease so as to provide for a suspension of a tenant's obligation to pay rent under a lease, as a result of the Covid-19 restrictions, where the possibility of such restrictions was not provided for in the lease, is a matter for the Oireachtas and not for the courts.

9. Conclusions

162. In conclusion, I would dismiss Foot Locker's appeal. I agree with the trial judge that the concept of "*partial*" or "*temporary*" frustration of a lease does not exist as a matter of Irish law. I also agree that, even if it did, there would be no basis for applying that doctrine in this case, so as to afford Foot Locker a defence to its failure to comply with the covenant in the lease to pay the rent without deductions. The result is, in my view, entirely consistent with principle, established authority and the interests of justice. For those reasons, I am declining Foot Locker's invitation to the court to *"make new law"* in this area. I would, therefore, dismiss Foot Locker's appeal.

10. Provisional View on Costs

163. As Foot Locker has been entirely unsuccessful in its appeal, and as Percy has been entirely successful, it is my provisional view that, having regard to the provisions of ss. 168 and 169 of the Legal Services Regulation Act, 2015, and O. 99 of the Rules of the Superior Courts, Percy should be entitled to its costs of the appeal. If Footlocker wishes to dispute this costs proposal or seek any other order it should so indicate in writing to the Court of Appeal office

within six days from the electronic delivery of this judgment, and the court will list the matter for a short hearing on Tuesday, 9th April, 2024 at 9.00 am. In default of any such application, the proposed costs order will be made.

164. Haughton J. and Pilkington J. have confirmed their agreement to this judgment and to the proposed orders.