

THE HIGH COURT

[2021] IEHC 749

[2020/6301 P]

BETWEEN

FOOT LOCKER RETAIL IRELAND LIMITED

PLAINTIFF

AND

PERCY NOMINEES LIMITED

DEFENDANT

JUDGMENT of Mr. Justice Brian O'Moore delivered on the 30th day of November, 2021.

1. It was once widely believed that every adult citizen of the United States could remember where they were and what they were doing at the time that they were told of the assassination of President Kennedy. A similar phenomenon of collective memory may not have been triggered by the announcement in Washington D.C. by An Taoiseach, in March 2020, of the dramatic steps needed to limit the spread of Covid-19 in Ireland but the unprecedented nature of these measures, and the speed with which they were introduced, will be remembered by most, if not all, of those affected by them.
2. Against the background of the arrival of Covid-19 in Ireland, and the measures taken by the Government to control the spread of the virus, on 17th March, 2020 the plaintiff ('Foot Locker') decided to close all Foot Locker stores in the State. There were seven Foot Locker stores in operation in Ireland at the time. These included the store at Grafton Street, Dublin 2. Subsequent to this decision, on 24th March, 2020 pursuant to emergency legislation non-essential retail stores (including the Foot Locker shops) were obliged to close.
3. In the months that followed, Foot Locker was legally unable to operate the Grafton Street store as it had in the past. It attempted to engage with its landlord ('Percy Nominees'), the defendant in these proceedings. Such engagement proved fruitless. It is not a matter for me to determine who was in the right and who in the wrong in this regard; indeed, there may be no moral right or wrong side to the argument about what accommodation might have been possible between Foot Locker and Percy Nominees. Foot Locker did reach arrangements with other of its landlords. As an agreement with Percy Nominees was not possible, by letter of 8th June, 2020 the solicitors for Foot Locker wrote to Percy Nominees setting out the tenant's position. In that letter, it was proposed on behalf of Foot Locker that:-

"These premises are held for a term of thirty-five years from the 20th of March 1990. Among the covenants set forth in the lease is the necessity of the tenant to:

- Comply with enactments "*for the time being enforced or any orders or regulations thereunder for the time being enforced*";
- 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 on the upper floor levels such a retail shop or as a public bar and restaurant (with ancillary offices);

- To keep the premises open at all reasonable times during usual business hours.

It is clear since the introduction of the strict regime of retail openings under the Covid-19 pandemic, as declared by the World Health Organisation that our client has been unable to open this premises or make any use thereof for retail purposes since 17th March 2020.

It is now the case that there will be a limited retail opportunity for opening from today the 8th June 2020. However, it is clear that such an opening is nothing like what is either envisaged by or provided for under the said lease. Trading could not be said to be of a high-retail shop and the market rent which is set for this property is completely at odds with the potential or possible legal use to be made of this unit.

As such, our client firstly believes that there is no basis under which there is a liability for rent for the period during which the premises was closed being the period from 17th March 2020 to 7th June 2020 in order for them to comply with the Covid-19 Regulations. Secondly, it is also clear that our client cannot be in a position in which to discharge a rent for premises which simply cannot be operated or used for the purposes which are envisaged in the lease or envisaged under the rent last fixed under the rent review provisions under the lease.

Our client 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." [Original Emphasis]

4. The response of Percy Nominees was unmistakably direct. On the 21st of July 2020, the landlord served a 21-day notice seeking payment of all arrears failing which a petition would be brought to wind up Foot Locker.
5. In the light of the threat of a winding up petition, Foot Locker instituted these proceedings on the 11th September 2020.
6. At the outset, Foot Locker sought a declaration that the lease was frustrated and that Foot Locker had no liability for rental payments under the lease as and from 24th March, 2020. This, at least, was the claim made in the Plenary Summons. The Statement of Claim, delivered on 19th October, 2020, sought somewhat different reliefs. In particular, the declaration sought in the Statement of Claim was a declaration to the effect that the "common intention of the parties has been frustrated in whole or in part". Equally, a declaration was sought that Foot Locker has no liability for rental payments under the lease as and from 24th March, 2020 "or a proportional part thereof".

7. By the time the trial of the action opened before me on 19th October, 2021, the claim made on behalf of Foot Locker had radically altered from one that the common intention of the parties had been frustrated (and that the lease was at an end) to a claim put in this way by counsel for Foot Locker:-

“We’ve claimed that there is 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.”

8. This case therefore presents two issues:-

- (i) Is there such a thing as partial frustration of a lease?
- (ii) If the answer to (i) is in the affirmative, has Foot Locker established an entitlement to a declaration that the lease in respect of Grafton Street has been partially frustrated?

9. I will deal with the issues in the case under the following headings:-

- (a) The Lease;
- (b) The Evidence;
- (c) The Submissions of the Parties;
- (d) Analysis; and
- (e) Conclusion.

A. The Lease

10. The lease is dated 14th March, 1990. Originally, it was between AIIM Nominees Limited (as landlord) and Xtravision PLC (as tenant). Percy Nominees is now the landlord; Foot Locker is now the tenant.

11. While a number of the terms of the lease were emphasised to me by counsel on both sides, the more important ones are those stressed by counsel for Foot Locker. These are:-

“3.4.1. At all times during the said term to observe and comply in all respects with the provisions and the 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 of 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.”

12. The "User" clause at 3.19:-

"3.19. 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.

AND for no other purposes save with the Landlord's written consent which consent shall not be unreasonably refused or delayed but it is hereby agreed and declared that it shall be reasonable for the Landlord to refuse its consent on the grounds that the change of user sought would be substantially increase the rate of insurance in respect of the demised premises or nearby adjoining premises."

13. The "Keep Open" requirement at 3.19.2:-

"3.19.2. 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 purposes of the Tenant's business."

14. The essence of Foot Locker's case, on the lease, is put this way by its counsel:-

"The fact that you are obliged to use it and are covenanted to use it, that is something which, in this case, has to come to an end as a result of the Government restrictions, it cannot be used in accordance with the covenant."

15. I do not accept that the combination of these last two provisions justify, in this case, the creation or application of a doctrine of partial frustration of the lease. These provisions, which lay obligations on the tenant, may well reflect an understanding on the part of the parties when the lease was entered into that the premises would be kept open, in ordinary trading hours, for the purpose of high class retail. However, what constituted "normal trading hours" could change over time; indeed, I suspect that normal trading hours in 1990 were very different to normal trading hours in 2020, before the intervention of the Covid-19 Pandemic. Even without the provision of Clause 3.4.1, I do not think that Clause 3.19.2 required Foot Locker to trade out of the Grafton Street premises during the course of the pandemic at the hours which would apply under more normal circumstances. Contrary to the submission made by counsel for Foot Locker, I do not see how any reasonable or proper interpretation of Clause 3.19.2 could result in Foot Locker being found to be in breach of the keep open provision because it did not open the Grafton Street premises for business at a time when it was illegal to do so and at a time when citizens were legally obliged to stay at home and to travel no more than two kilometres from their residence except in very limited circumstances.

16. When one adds into the mix the requirement on the part of Foot Locker to "comply with enactments" the position is put beyond any doubt. It seems plain to me that the parties

in 1990 hardly foresaw the specific situation of a global pestilence affecting Ireland as profoundly as it has, but in general terms the parties did address the requirement to comply with the law and independently prescribed that the premises must only be kept open "at [...] reasonable times during the usual business hours of the locality [...]".

17. A key part of the Foot Locker case is that the combination of these requirements distinguishes this action from every other case in which the partial frustration of a contract (in particular a lease) was found to be a legal mirage. I do not believe that the construction placed on this combination of clauses supports this submission. If anything, the clauses (taken either alone or in combination) are relevant to the question as to whether or not Foot Locker has established a supervening event frustrating the common intention of the parties (rather than whether or not partial frustration has any legal reality). I do not think that these clauses assist Foot Locker in establishing that there is such a thing as partial frustration of a contract.

B. The Evidence

18. Foot Locker had originally included as part of its claim an argument that there was a common understanding by the parties that Grafton Street had and would continue to have a high level of personal footfall (when the rent was review in January 2006 and again in March 2012). There were therefore witness statements provided by both parties to address this portion of the claim. As it happens, this aspect of the claim was not pursued at trial, so the testimony put before the court was confined to the evidence of one witness on behalf of Foot Locker (John Lowry, Real Estate Director of Foot Locker Europe BV and Real Estate Director of the plaintiff company) and one witness called by Percy Nominees (David Goddard, Director of Percy Nominees and Chief Executive of Davy Real Estate – Percy Nominees being associated with the stock broking and investment firm of Davy).
19. The evidence of both witnesses was of limited use. Unsurprisingly, Mr. Lowry gave evidence that he had been looking for an agreement with Percy Nominees given the closure of the store in Grafton Street (which he said was for a period of 253 days). Mr. Lowry accepted that the original position of Foot Locker had been that the lease was frustrated by which he meant that the lease was "entirely frustrated" as opposed to being "temporarily frustrated". Mr. Lowry further accepted that in replies to interrogatories he had sworn that the intention of Foot Locker was not to trade from the demised premises "for the remainder of the term of the lease". The replies to interrogatories are dated 15th June, 2021. As I have already recorded, by the time the trial opened before me on 19th October, 2021 the position of Foot Locker had changed.
20. Mr. Lowry went on to give evidence that the view of Foot Locker was that "the landlord should share some of the pain [...]". In the replies to interrogatories, Mr. Lowry had accepted that Foot Locker was financially capable of paying the rent, but in his oral evidence he elaborated upon this to the effect that Foot Locker felt that a fair resolution of the issues created by the pandemic would be that half of the rent would be paid. This compromise, however, was not acceptable to Percy Nominees.

21. Mr. Goddard gave evidence (accepted by counsel for Foot Locker as being accurate) about the amounts paid by Foot Locker in respect of rent and insurance and on the balance which, Mr. Goddard swore, was due and owing by Foot Locker to Percy Nominees on foot of the former's obligations under the lease.

22. Mr. Goddard's conclusion on the position taken by Foot Locker with regard to negotiations was that:-

"They'd unilaterally given themselves a discount of half the rent."

23. In response to cross-examination on the pleadings in the case, in my view never a terribly fruitful exercise, Mr. Goddard accepted that he was aware that temporary frustration was part of the plaintiff's case.

24. As I have noted, none of this evidence was of particular assistance in deciding the legal issues which this action, in the focussed form it has taken, requires me to decide. I do not think there is any huge advantage in a witness accepting that there are certain provisions in a lease. Equally, I do not think there is any great benefit from the court's perspective in having a witness concede their awareness of how a claim has developed.

C. The Submissions

25. Foot Locker claims that its entitlement is to continue to occupy the premises in Grafton Street, but to pay no rent for the period that it cannot trade from the premises in the normal way. As I have already noted, Foot Locker says that the combination of the keep open clause and the user clause "mandates" the tenant to operate a high end retail store from the Grafton Street premises during what, in normal times, would be normal trading hours. Counsel for Foot Locker acknowledges that, without the keep open clause, the case currently brought could not be advanced in any way.

26. It is accepted by Foot Locker that there is no Irish authority supporting the concept of the partial frustration of a lease (or of a contract). However, it is submitted that the relevant judgments (of Kelly J. in *Ringsend Property Ltd. v. Donatex Ltd. & Anor.* [2009] IEHC 568 and of Sanfey J. in *Oysters Shuckers Ltd. v. Architecture Manufacture Support (EU) Ltd.* [2020] IEHC 527) are distinguishable because of the combination of the keep open clause and the user clause.

27. It is further submitted that in *Law Society of Ireland v. MIBI* [2017] IESC 31 and *Merck Sharp Dohme Corp. v. Clonmel Healthcare Ltd.* [2019] IESC 65 the Supreme Court had departed from established legal principles (or as counsel for Foot Locker put it "moved the goal posts [...]") and that a similar departure from accepted legal rules should take place here.

28. It was further submitted that it has been accepted, in England and Wales, that a lease could be frustrated, and that (in principle) if a lease is subject to the doctrine of frustration there is no principle reason why a lease should not be subject to a doctrine of temporary or partial frustration; the decision of Master Dagnell in *Bank of New York Mellon (International) Limited v. Cine – UK Limited* [2021] EWHC 1013 (BNY).

29. Foot Locker's counsel also relied upon the decision in *London Trocadero (2015) LLP v. Picturehouse Cinemas Ltd. & Ors.* [2021] EWHC 2591 (Ch), but ultimately accepted that the essence of that decision (relating to unjust enrichment on the part of a landlord) had not been pleaded in these proceedings. Despite the fact that I was told, after counsel had concluded his submission, that an application would be made to amend the pleadings (on the second day of the hearing) to make a claim for unjust enrichment I was then told at the start of the second day that Foot Locker had revised its position, and no such application to amend was ultimately made.
30. The position taken by Percy Nominees is simpler to summarise. Counsel for Percy Nominees submitted primarily that partial frustration (as contended for on behalf of Foot Locker) was unknown in law or (to put it even more trenchantly) was known not to exist. It is to that fundamental issue that I now turn. The second submission was that the lease had not, on the facts, been frustrated in any way.

D. Analysis

31. The essence of the doctrine of frustration is that the contract is treated as being at an end. Both parties are freed from their obligations to each other. At the risk of stating the obvious, it follows that neither party thereafter has an entitlement to receive any benefit from the other. Notwithstanding these elementary propositions, the case made by Foot Locker is that it is free from any obligation to pay rent but nonetheless it is entitled to continue to occupy 44 Grafton Street. This is a form of frustration which does violence to the fundamentals of the doctrine. It results in what counsel for Foot Locker accepted was a "one way street"; benefits flowing to the tenant without any balancing release of liabilities in favour of the landlord. Even if the premises were proposed for another use (for example, as an HSE walk in centre testing for Covid-19), Foot Locker claims that it remains entitled to remain in occupation and to refuse to allow Percy Nominees rent out the premises for such an alternative purpose. Foot Locker's case, therefore, is that the doctrine of partial frustration allows 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.
32. Unsurprisingly, Foot Locker is unable to point to any caselaw that supports the submission which results in this extraordinary conclusion. On the contrary, the authorities are uniformly against the case made by Foot Locker. As I have said, the concept of partial frustration, as enunciated by Foot Locker, is unsupportable at the level of principle. I will now set out why the concept is also contrary to precedent.
33. The speeches of Lord Simon and of Lord Roskill in *National Carriers v. Panalpina Ltd.* [1981] A.C. 675 have loomed large in the Irish caselaw. In his speech, Lord Simon described the doctrine of frustration in this way:-

"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.”

34. Lord Roskell, to similar effect, considered the basis of the doctrine:-

“My Lords, I do not find it necessary to examine in detail the jurisprudential foundation upon which the doctrine of frustration supposedly rests. At least five theories have been advanced at different times. At one time without doubt the implied term theory found most favour, and there is high authority in its support. But weighty judicial opinion has since moved away from that view. What is sometimes called the construction theory has found greater favour. But my Lords, if I may respectfully say so, I think the most satisfactory explanation of the doctrine is that given by Lord Radcliffe in *Davis Contractors v. Fareham U.D.C.* [1956] AC 696 at page 728. 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 tersely summarised in a quotation of five words from the *Aeneid* ‘non haec in foedera veni’. Since in such a case the crucial question must be answered as one of law — see the decision of your Lordships’ House in *Tsakiroglou & Co. Ltd. v. Noble Thorl G.m.b.H.* [1962] A.C. 93 by reference to the particular contract which the parties made and to the particular facts of the case in question, there is, I venture to think, little difference between Lord Radcliffe’s view and the so-called construction theory.”

35. The passage from the *Aeneid* is taken from Aeneas’ address to Dido when, in justifying his decision to leave both Carthage and the Queen, he explains that he had never agreed to marriage. It is difficult to imagine a clearer example of a permanent parting of the ways as opposed to a partial frustration or temporary suspension of relations.

36. Blayney J., with whom Finlay C.J. and Denham J. agreed, referred to both of these passages in *Neville & Sons Ltd. v. Guardian Builders* [1995] 1 ILRM 1. He then continued at para. 29.:-

“I am satisfied that these two quotations from the decision of the House of Lords represent a correct statement of the principles of law applicable to frustration in our law and I am prepared to adopt them as being a correct statement of principle.”

37. In the next portion of his judgment, Blayney J. quoted with approval from the speech of Lord Wilberforce in *Panalpina* a passage which concluded:-

“In any event, the doctrine [of frustration] 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.”

38. It will be recalled that, in *Panalpina*, the “new application” of the doctrine was its application to leases. This was a positively timid extension of the scope 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. The application of the doctrine to leases did not involve its radical reshaping which Foot Locker’s case necessarily requires; in particular, 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.

39. The Supreme Court, therefore, endorsed the portions of the judgments in *Panalpina* which make clear that a frustrated contract is one which is at an end. In *Donatex* Kelly J. considered not only the doctrine of frustration generally but also the particular concept of partial frustration. The judgment is a forthright one. Having considered the doctrine of frustration, emphasising its narrow scope, and having referred to the passage from the speech of Lord Simon in *Panalpina*, Kelly J. drew the conclusion (on the general doctrine) that:-

“If a defence of frustration is made out by the defendants, the contractual obligations are at an end.”

40. This was no obiter observation; instead, this conclusion was fundamental in the court’s finding that the doctrine availed the defendants nothing, as the release of all contractual obligations meant that the plaintiffs were thereby entitled to be repaid the funds they had advanced.

41. Kelly J. then addressed the submission that the arrangements between the parties had been subject to partial frustration - a phrase which appears in inverted commas and italics whenever it is employed in the judgment. The central paragraph (para. 50) is this:-

“As to ‘*partial frustration*’, it is considered in Treitel at paras. 50-07 and following. The author refers to some civil law systems where partial destruction of the subject matter of the contract can lead to the same type of relief in respect of that part as would be available in respect of the whole in cases of total destruction. He cites German law and provisions of the civil code in that jurisdiction. The author goes on ‘*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. There is no such concept as partial or temporary frustration on account of partial or temporary impossibility...the concept of partial discharge in English law is restricted to obligations which are severable, whether in point of time or otherwise.*’ ” [Original Emphases]

42. In the present case, Foot Locker has not established that there has been any partial discharge of severable obligations. The obligation to pay rent, the basic requirement placed on the tenant by any lease, is not a severable obligation. 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.

43. Kelly J. went on to find that:-

“Thus, it can be seen that there is no concept of ‘*partial frustration*’ as such. It might apply if clause 5.1.19 (i) was capable of being severed from the rest of the loan stock instrument. But there is no arguable basis demonstrated for the severability of clause 5.1.19 (i) from the remainder of the contract. It is an integral part of the contract and not a standalone provision such as an arbitration clause.”

Equally, in my view, the obligation to pay rent is “an integral part of the contract [...]”

44. *Donatex* was considered by Sanfey J. in *Oysters Shuckers*. Having set out the portions of the judgment of Kelly J. to which I have referred, Sanfey J. stated at para 86.:-

“I agree with the observations of Kelly J. in this regard. The obligation to pay rent is an integral and indeed fundamental part of the contract. The obligation may be suspended in certain circumstances set out at clause 3.2 of the disputed lease; those circumstances do not apply here. Accordingly, the plaintiff cannot argue that the rent obligation is frustrated, while arguing that the lease itself remains valid.”

45. The Irish authorities, in a consistent and principled way, have decided that partial frustration is not a legal concept applied in these courts. They also establish that the doctrine of frustration, if successfully invoked, results in the termination of the relevant contract (or lease). It is not submitted on behalf of Foot Locker that these cases are wrongly decided. Instead, it is argued that the combination of the Keep Open and User clauses distinguish this case from the earlier Irish authorities. I have already set out why I do not accept this argument. Secondly, it is suggested that I should emulate the Supreme Court (in the *MIBI* and *MSD* cases I have mentioned at paragraph 27 of the judgment) and push out the boundaries of the doctrine of frustration. Apart altogether from the fact that I am not convinced that the Supreme Court radically altered the existing law in the judgments to which I am referred, I do not agree that the doctrine of frustration should (as a matter of principle) be torn from its moorings in the way Foot Locker invites me to do.

46. I have been referred to a number of foreign authorities. None of these assist Foot Locker.

47. The most relevant is the decision in the *BNY* case. Master Dagnall firstly rejected the argument that the leases in question had been frustrated - or “frustrated altogether” as he put it to distinguish this form of frustration from partial frustration. In doing so he expressed the view that enforced closure because of Covid-19 restrictions was a supervening event “capable in principle as giving rise to the frustration of commercial leases [...] especially where, as here, the user clauses only permit in practice what have become impossible uses [...]” (at paragraph 209(b) of the judgment). It is notable that

Master Dagnall considers the user clause in the context of whether the enforced closure constitutes a “supervening event”. I agree with this approach.

48. On the question of partial frustration, Master Dagnall found (at para. 211.a):-

“However, I do have to deal with SportsDirect’s arguments that there has been a ‘temporary frustration’. It seems to me that, arising from the matters above, there are two combined reasons why the Tenants have no real prospects of establishing such to have been or be the case, being:

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*, 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); [...].”

49. This passage summarises, briefly yet comprehensively, the reasons why partial frustration is not available to Foot Locker. To put it even more briefly, the concept of partial frustration is at odds with the doctrine of frustration itself. The latter, as a matter of logic, requires the contract to be treated as at an end. The former, necessarily, requires the contract to remain alive. In those circumstances, if a doctrine of partial frustration is to be introduced it would require legislation rather than development through case law.

50. Foot Locker’s reliance on other authorities is also misplaced. In *London Trocadero*, the relevant analysis of Deputy Judge Vos was in respect of unjust enrichment arising from total failure of basis. As noted earlier, Foot Locker does not make this case and abandoned an application to amend its pleadings in order to advance such a claim. The *John Lewis Properties Plc. v. Viscount Chelsea* [1993] 2 EGLR 77 decision, which counsel for Foot Locker very decently accepted was “in many ways against [him] ... ” is well summarised in *BNY* at paragraph 218 of the judgment, where Master Dagnall states:-

“Moreover, the *John Lewis* case makes clear that illegality amounting to an excuse of one obligation does not itself relieve liability to pay Rent. I note that this also seems to have been the view of Chief Master Marsh in the *Commerz Real* case (and which perhaps was a stronger case than these as there was actually a ‘keep open’ covenant).”

This decision puts the Covid-19 restrictions in their proper place. They may provide a reason for not meeting a contractual obligation. They do not however necessarily cause a contract to be frustrated.

E. Conclusion

51. Having considered all the submissions made on behalf of Foot Locker, I conclude that the concept of partial frustration (as advanced on its behalf) is not one which exists in Irish law.
52. While it is therefore not necessary for me to decide the second issue, I should say that I would also have found in favour of Percy Nominees on this point. The parties had clearly provided for compliance by the tenant with all legal requirements governing the operation of the shop in Grafton Street. The obligation to keep the store open, so heavily emphasised in the tenant's submissions, is one which is caveated by reference to normal trading hours and reasonable times. While a pandemic was hardly considered a possibility by AIIM and Xtravision when the lease was executed in 1990, they can be expected to have known of the ongoing campaigns of violence which, while centred on Northern Ireland, had brought bombs to the centre of Dublin. In agreeing that the tenant would comply with "[...] any and every enactment [...]" the parties can be taken to have contemplated the possibility that the shop would be closed in emergency situations; the lease nonetheless made no provision for a suspension of rent in such circumstances, unlike (for example) if the premises were destroyed or damaged (Clause 5.2). Equally, as I have already set out, I do not think that any fair reading of the lease requires the tenant to keep the store open for business when (a) it is illegal to do so or (b) it would constitute a danger to public health to do so.
53. I would therefore have concluded that the forced closure of the store did not constitute a frustration of the lease. Naturally, that decision would have been made on the limited evidence before me, and confined to the facts of this case.
54. I will therefore dismiss the claims made by Foot Locker. I will list the action for mention on the 2nd of December 2021 at 10am for the purpose of dealing with any outstanding matters. These include the counterclaim of Percy Nominees, to which I have already briefly referred. Percy Nominees have counterclaimed for the balance of the outstanding rent due since March 2020, insurance premia unpaid by Foot Locker since that time and interest. Given my decision on Foot Locker's claim, I do not anticipate any significant dispute on the Order to be made on the counterclaim.