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"I'm late! I'm late! For a very important date!"

Delay and Other Down the Rabbit Hole Adventures of Alice Surrounding Delayed Substantial Completion/Opening of the Leased Premises"

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"I'm late! I'm late! For a very important date!"

Delay and Other Down the Rabbit Hole Adventures of Alice Surrounding Delayed Substantial Completion/Opening of the Leased Premises"

We've all received that panicked call – they haven't started construction and there's no way they are going to get done on time. What can we do?

Construction delays are so ubiquitous, we ought to know better. This paper addresses delay in the context of substantial completion of a shopping centre or a tenant's fit-up.

I have divided this paper into three parts. In Part 1, I address these issues from the tenant's perspective and suggest mechanisms to identify a faltering project in the early stages so that the tenant can escape and pursue opportunities elsewhere. I also look at the use of liquidated damages and penalties when faced with landlord delay. In Part 2, I approach delay from the landlord's perspective and look at the additional remedies available to the landlord as a consequence of tenant delay – both delay that impacts the landlord's work schedule and delay that is limited to the tenant's construction activities. In Part 3, I look at the use of force majeure clauses and the legal construct of frustration.

PART 1 TENANT REMEDIES AS A CONSEQUENCE OF LANDLORD DELAY

So often, it is a very fine line between best intentions and self-delusion. As a tenant relying on a landlord to build a shopping centre or to provide turn-key premises there is no substitution for due diligence to ensure the landlord has the skill-set and experience to complete the promised construction within the promised time frame.

Imagine you are a tenant, waiting outside the doors to your brand new store, ready to move in. Imagine your despair when you realize the construction of the shopping centre or your premises has not yet been completed and the landlord is not ready to deliver possession. What can you do in the circumstances?

In this Part 1, I will outline two tenant remedies: liquidated damages and penalty clauses but first, I would like to address the importance of dealing with delay by reference to milestones so that the tenant never finds itself waiting until the promised completion date to deal with landlord delay or more importantly, the landlord's decision (or inability) not to proceed.

1A. Milestone Schedules and Early Termination Rights

TIP: Clearly stipulate the date by which the work is to be completed.

Too often, we see the parties agree that certain work is to be completed by either the landlord or the tenant, whether it be the construction of the shopping centre, a turn-key fit-up, or leasehold improvements to be done by the tenant, but the

parties have failed to stipulate the "by when". I see this most often in the context of the completion of landlord's work to the leased premises or property. I'm certain the tenant is expecting the work to be done by their move-in date but this is not stipulated in the lease. I also suggest that the landlord not just be required to promise to complete its work by a stipulated date but that it also agree to start the work by a certain date and to thereafter continuously diligently prosecute the work to completion.

Merely stipulating the date by which the work is to be completed, however, is not sufficient. We often see offers and leases that provide that the landlord will complete the construction of the shopping centre by an agreed date some two years in the future, but what happens if the landlord has not started construction in 6 months, or 12 months, or 18 months? Imagine the frustration and lost opportunity costs suffered by the tenant while it waits for the promised completion date in order to address this default. It has, after all, signed a binding lease with the landlord and cannot take the risk of just walking away. If the tenant does not address this in the lease, it will be left with having to rely on the principles of anticipatory breach and fundamental breach in order to walk away from the deal in advance of the promised completion date. To address this I suggest that the parties agree upon construction milestones that if not met will be a clear indicator that the landlord is electing not to proceed with the project. These milestones may include major markers such as:

TIP: Use milestones to monitor the landlord's intentions and to give the tenant an early exit strategy

(a) by ■, the Landlord shall have delivered to the Tenant evidence satisfactory to the Tenant, acting reasonably, that the Landlord has applied for and is actively pursuing from the appropriate municipal authorities municipal site plan approval with respect to the Site Plan;

(b) by ■, the Landlord shall have delivered to the Tenant evidence satisfactory to the Tenant, acting reasonably, that the Landlord has obtained site plan approval and has applied for and is actively pursuing an excavation permit from the City with respect to the Landlord's Work;

(c) within ■ days after obtaining site plan approval, the Landlord shall have obtained an excavation permit;

(d) within ■ days after obtaining the excavation permit, the Landlord shall have completed all necessary excavations, poured the footings and completed the installation of all services to the Building; and

(e) by ■, the Landlord shall have both delivered to the Tenant evidence satisfactory to the Tenant, acting reasonably, that the Landlord has obtained a superstructure permit from the City with respect to the Landlord's Work, and shall by no later than ■ have substantially performed the work contemplated by such permit, including without limitation, the construction of the exterior walls, roof and the installation of the exterior windows of the Building.

Again, to be clear, these milestones are not to be taken from the landlord's construction schedule. They are intended to be clear indicators of non-performance and as such, should allow for a significant period of time to have elapsed from the date the landlord intends to achieve these milestones as set out in its construction schedule and what is included in the lease as indicators of non-performance.

The consequences of the failure by the landlord to meet each of the stipulated milestones should then be dealt with separately. For example, it may be that the parties decide that if either of the first two milestones are not met (i.e. the landlord's application for site plan approval and obtaining the same), the tenant (or perhaps either party) may within an agreed period, elect to terminate the lease without recourse, but if any of the remaining milestones are not met, not only may the tenant elect to terminate the lease, but the landlord will agree to pay a liquidated damage amount on account of the tenant's damages, or should the tenant not elect to terminate, will find the tenant swing space if it needs to vacate its current location or pay the overholding rent.

TIP: Ensure the tenant's fixturing period and rent commencement date are adjusted

Whether or not a milestone schedule is adopted, it is imperative that the lease also address the "what if" – as in, what happens if the landlord fails to complete its work by the agreed date. Unless some form of early warning system that the landlord is not proceeding with the project , like my suggested milestone schedule, is adopted, it is unlikely even a tenant with significant bargaining power will be able to get the landlord to agree that the tenant may terminate the lease as a consequence of the landlord failing to complete its work by the agreed date. It would simply be too unfair to the landlord to permit the tenant to walk away simply because the work is not completed. There must be a step down of consequences to address the variability of the damages suffered by the tenant depending upon how late the landlord is and what is left to be completed. A familiar step down, is a consequent delay in the rent commencement date. Often this postponement of the rent commencement is on a two for one basis; that is, the rent commencement date is postponed by two days for each day the landlord's work is delayed. In addition to this, the tenant will also need to be mindful that its fixturing period likewise be extended so that it does not commence until the completion of the landlord's work. Otherwise, the landlord's delay will encroach on and reduce the intended period the tenant was to have enjoyed to complete its work.

1B. Blackout Periods

For retail tenants, the timing of the delivery of their leased premises is crucial. By including a blackout period in the lease, the tenant reserves the right to refuse delivery of the premises during a certain time period and to delay the rent commencement date.

The blackout period is another of the large retailer's tools to deal with landlord delay in the completion of construction. By using a blackout period, the tenant is able to avoid the financial

consequences of being required to accept possession of the premises at a less than ideal time in their retail cycle.

1C. Liquidated Damages

A stipulation in the lease that the landlord will pay the tenant an agreed amount in liquidated damages if the landlord is delayed in completing its work is often used by strong tenants to address delay.

TIP: Use a liquidated damage amount where the tenant's actual damages may be difficult to prove

Liquidated damages are a genuine pre-estimate of the losses that will be suffered in the circumstances where a contract is breached.[1] A claim for liquidated damages should specify both the amount that the injured party will be entitled to recover along with a description of how that amount was calculated.

For example, the tenant will want to provide in the lease that if the landlord fails to substantially complete the landlord's work and deliver possession of the leased premises to the tenant by the agreed date, the landlord will pay the tenant X dollars as liquidated damages and not as a penalty. The provision should also state that the precise amount of the tenant's actual damages will be difficult to calculate and that the landlord agrees that the stipulated sum represents a genuine and reasonable estimate of the tenant's actual damages that will be incurred by the tenant due to the landlord's default in this regard.

Despite the fact that the tenant will suffer actual damages as a consequence of the landlord's delay, these damages may be difficult to prove in a court of law. A liquidated damage claim is particularly beneficial because the tenant does not have to prove its actual losses. The downside, is of course, that unless the landlord agrees that the liquidated damage claim is not in substitution of the tenant's right to sue the landlord for its actual losses, the liquidated damage claim may be all that the tenant can claim from the landlord as a consequence of the landlord's delay.

TIP: In order to be enforceable, the pre-estimate must be both genuine and reasonable

Depending on the strength of the landlord's covenant, the tenant will also want to secure the payment of this liquidated damage claim. This is most often done by way requiring the landlord to provide a letter of credit in the amount of the liquidated damage claim.

Finally, in a perfect world, the tenant will also want to provide that the liquidated damage amount is without prejudice to any other remedies available to the tenant and that if the actual damages suffered by the tenant exceed the stipulated liquidated damage amount, the tenant is entitle to seek the shortfall between the tenant's actual damages and the liquidated damage amount.

[1] See *Canadian General Electric Co v Canadian Rubber Co*, 52 SCR 349 at p 351.

When drafting a liquidated damage clause, you must ensure that the estimate is a genuine pre-estimate of the damages likely to be suffered by the tenant if the landlord fails to complete its work and deliver vacant possession of the leased premises by the agreed date.[2] The estimate must also be reasonable. If the estimate is not both genuine and reasonable, then the court is likely to find that the liquidated claim is an unenforceable penalty clause.[3]

1D. Penalty Clauses

If the agreed liquidated damage amount is not a genuine and reasonable pre-estimate of the tenant's anticipated damages, the clause may be interpreted as a "penalty clause" and found to be unenforceable. Unlike a liquidated damage claim, a penalty clause stipulates the payment of an amount upon breach regardless of the damages actually sustained.[4] A penalty is intended to punish the wrongdoer for its default.

However, if the penalty clause includes or is based on a genuine pre-estimate of the tenant's damages, the penalty clause may be enforced by the court. Keep in mind, however, that this is little more than a liquidated damage clause dressed as a penalty clause[5] and the onus will be on the tenant to establish that it is not a penalty despite being called a penalty.

TIP: If the stipulated amount is intended to punish the wrongdoer, it is probably a penalty and will not be enforceable.

A penalty clause may also be enforceable, but not in the way the tenant intended, in that it may be utilized by the landlord to limit the amount of damages to which the tenant is entitled. That is, if the amount of the penalty is less than the actual damages suffered by the tenant, the penalty may be enforceable by the landlord as an upper limit on the tenant's recovery for the landlord's breach.[6]

That being said, penalty clauses are generally not unenforceable. This is especially true if the amount of the penalty is extravagant, extortionate, unconscionable, or unreasonable.[7] Clearly, penalty clauses are to be avoided in common law jurisdictions.

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[2] *Nguyen v Tran*, 2012 ONSC 2418 at para. 60
[3] *Ibid.* at para 60-62.
[4] *Canadian General Electric Co v Canadian Rubber Co of Montreal* (1915), 52 SCR 349 at 351.
[5] John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at p 970.
[6] *Elsley v JG Collins Ins Agencies*, [1979] 2 SCR 916 at p 937. Also *see* John D. McCamus, *The Law of Contracts*, 2d ed (Toronto: Irwin Law, 2012) at p 969.
[7] *Nguyen v Tran*, 2012 ONSC 2418 at para 60.

1E. Penal Clauses

TIP: In Quebec, the Civil Code permits penal clauses so long as the amount claimed is not vague, discretionary or abusive.

The distinction between a liquidated damages clause and penalty clause does not apply in Quebec. In Quebec, the *Civil Code* permits "penal clauses". In a penal clause, the parties assess the anticipated damages and require the offending party pay a penalty if it fails to perform its obligation.[8]

If the penal clause is stipulated for a mere delay in performance of the obligation, then the party enforcing the clause may enforce **both** the penalty and the specific performance of the obligation.[9] For example, if a landlord is late in the completion construction of the tenant's building, and the contract contains a penalty clause for delay, the tenant can claim the penalty under the penal clause for late delivery as well as require the landlord to complete construction on time.

It is important to note that just because penal clauses are enforceable in Quebec this does not mean that extravagant and unreasonable damages will be enforced. A penal clause will not be valid if the amount is vague, discretionary, or abusive.[10] A penal clause in Quebec may be abusive if it appears to be excessive when compared to the value of the actual damages caused to the party relying on the clause.[11] Further, the amount of the penalty may be reduced if the tenant has benefitted from partial performance.[12]

PART 2 LANDLORD REMEDIES AS A CONSEQUENCE OF TENANT DELAY

The tenant may also have certain construction related responsibilities in the lease. Some of these may relate to the work to be performed by the tenant, as for example, its tenant fit-up and leasehold improvements, or may be in relation to the landlord's work, as for example, approving plans or material selections in the context of the landlord's work. Any delay by the tenant in meeting these responsibilities has the potential to delay the landlord's construction schedule or delay the tenant's promised opening date or otherwise impact the landlord.

TIP: Deal with tenant delay on a clause by clause basis rather than an omnibus provision.

Due to the variety of ways delay can arise and the consequent variety of ramifications to the landlord, I suggest that tenant delay be addressed on a situation by situation basis in the lease rather than an omnibus-type of provision.

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[8] Art 1622 CCQ.
[9] *Ibid*.
[10] *Consumers' Choice Awards (3416968 Canada Inc) c Toitures Trois étoiles inc*, 2010 QCCQ 1064 at para 19; Art 1623 CCQ.
[11] *Corovessis c 6656285 Canada inc*, 2011 QCCS 476 at para 56.
[12] Art 1623 CCQ.

If the lease requires the landlord to obtain the tenant's approval of the landlord's drawings, provide that such approval must be given within a stipulated period and then provide what will happen if the tenant fails to reply within the stipulated timeframe. In the case of this kind of delay, it may be that the most satisfactory consequence of the tenant's failure to reply is that the drawings are deemed to have been approved thus allowing the landlord to proceed with its work without delay. If, however, the tenant's conduct actually delays the completion of the landlord's work, the landlord will want to ensure that the rent commencement date is not impacted and this may mean deeming it to commence regardless of the fact that the landlord's work is not yet completed and the commencement date has not occurred.

On the other hand, a failure by the tenant to complete its work and open for business calls for an entirely different remedy, as for example, a liquidated damage claim or, in Quebec, a penal clause, in favour of the landlord (please see my above comments in relation to liquidated damage claims and penal clauses which will likewise apply to the landlord), thus both compensating the landlord for its anticipated losses but also providing the tenant with a financial incentive to complete its work as promised.

It is important to remember that the landlord's usual remedies in the lease will also generally apply to this kind of default by the tenant – assuming of course, that these tenant obligations are drafted as covenants by the tenant, as for example, "The Tenant will reply to the Landlord's request for approval of the Landlord's plans within XX days" or "The Tenant shall complete the Tenant's Work and open for business in the whole of the Leased Premises by not later than XX". Most leases give the landlord the right to cure the tenant's default, at the tenant's cost plus the landlord's administrative fee, should the tenant fail to do so after XX days notice, thus allowing the landlord the discretion to itself complete the tenant's work. The lease will also typically permit the landlord to terminate the lease for a breach of any tenant obligation, including these construction-type obligations. Regretfully, while these remedies are powerful in other contexts, they are often too blunt an instrument in the construction context and this is why I have suggested above that delay defaults be dealt with on a one by one specific basis so that the best result is achieved.

TIP: Avoid delays by providing for an effective dispute resolution mechanism

Delay is ubiquitous. No matter how carefully a construction project is managed, there will be multiple "opportunities" for delay. One effective avoidance or containment strategy is to ensure that the lease includes a cost effective and timely mechanism for resolving construction disputes. If the parties are disputing whether requested work is an extra or a correction of a deficiency, it will make sense to provide that the work is to proceed while this difference of opinion is referred to an agreed expert for decision. If the expert decides that the work is an extra, the party requesting the work is responsible for both the additional cost of the work and any consequent delay in the other party's construction schedule. If, however, the expert decides that the requested work is the correction of a deficiency, the opposite will occur, i.e. the party requesting the work will not be responsible for either the cost to correct the deficiency or any delay caused in the completion of the work.

Because the timing of fixturing periods, rent commencement dates and the like are generally dependent upon when work is completed or substantially performed, it is important to include some mechanism for determining these dates. Generally speaking, the parties agree that the landlord's architect's certification of substantial performance and completion of the landlord's work will bind both parties, and likewise, the tenant's architect's certification of substantial performance and completion of the tenant's work will bind both parties. In each case, the parties are relying on the professionalism and independence of the other's architects. As such, it is also usual to provide that the architects must be licensed in the province of the project and at arm's length to the party retaining them.

PART 3 FORCE MAJEURE AND THE LAW OF FRUSTRATION

Inclement and unseasonal weather, strikes and labour unrest, unavailability of construction materials – the list of events outside of the parties' control that can delay or impede the construction is long and daunting. In this Part 3, I will discuss two methods used to deal with such events: force majeure clauses and the doctrine of frustration.

3A. *Force majeure*

Force majeure or *vis major* in Latin, means "superior force." In law, force majeure is a civil law concept, meaning a force majeure clause must be specifically included in the lease to be effective. Courts will not "read in" a force majeure clause if it is not been provided for.

A force majeure clause is intended to provide the landlord and the tenant with a degree of certainty when facing an event beyond the control of the relying party, such as an act of God, strikes, or war.[13]

An effective force majeure clause consists of three parts: (1) a list of triggering events; (2) a description of the impact on the party relying on the clause; and (3) the effect of invoking the clause.

(1) Triggering Events

The force majeure clause in a commercial lease will typically refer to a number of triggering events. Flood, lightning, earthquake, or other act of God, riot, strikes, picketing, and sabotage are all examples of common triggering events. When the benefit of the force majeure clause is in favour of the landlord alone, as it often is in a landlord's standard form of lease, this list may extend to inability to procure materials, failure to obtain a requisite permit or authorization from a governmental authority, by reason of being unable to obtain the material, goods, equipment, service, utilities or labour required to enable it to fulfil such obligation or by reason of any statute, law or order-in-council, or any regulation or order passed or made pursuant thereto or by reason of the order or direction of any administrator, controller or board, or any

[13] Laurie Sanderson and Brian Kahane, "Force Majeure: Drafting for the Unexpected", Six Minute Leasing Lawyer 2007-02-21 at p 1.

governmental department or officer or other authority, or by reason of not being able to obtain any permission or authority required thereby.

When drafting the lease, the parties need to consider which triggering events to include. The list of triggering events should be tailored to the transaction and the needs of both parties. For example, it will be more important to list "earthquake" as a triggering event in a lease for an Ottawa property than for a property that is not located in a seismically active area of the country.

TIP: Consider each triggering event to confirm it is appropriate to your situation

Equally importantly, because the triggering of the force majeure clause will relieve the obligated party from performance until the triggering event subsides, thus shifting the burden of the consequences of the delayed performance on the other party, it is imperative that we be careful in our selection of triggering events. Some triggering events are not unforeseeable and are in fact avoidable with proper forward planning and foresight. For example, an elevator cab is a long lead item. The party responsible for installing the cab should not, in my view, be relieved of responsibility for delayed performance as a consequence of its failure to provide for this timing issue by ordering the cab early in the construction process.

(2) The Necessary Impact on the Relying Party

Once a list of triggering events has been determined, it is important to limit the application of the force majeure clause to only those triggering events that result in delay, hindrance, or prevention of a party's obligation under the lease.

The party relying on the force majeure clause should not be permitted to suspend its obligations under the lease if it is possible to reduce or avoid the impact of the triggering event. If possible, include an obligation on the part of the relying party to both advise the other of the force majeure event and proactively mitigate the impact of the delay. We may do this by requiring the relying party to, where reasonably possible, provide a "work-around plan," indicating the steps it will take to minimize the impact of the force majeure event.

(3) the effect of invoking the clause

The third step in constructing an effective force majeure clause involves addressing the effect of invoking the clause. In other words, what happens to the parties' contractual obligations when there is a triggering event, and perhaps more importantly, which of the parties' respective obligations will be excluded from the application of the force majeure clause. The tenant's obligation to pay rent is always excluded, but what of the landlord's financial obligations under the lease, as for example,

TIP: Require the party relying on force majeure to mitigate the impact of the triggering event.

its obligation to pay the tenant a fit-up allowance? Surely, this should be likewise excluded.

Landlords may also want to exclude the tenant's obligation to complete their fit-up and open for business from the protection of force majeure. Now for the harder question, what about the landlord's obligation to complete its construction by the agreed date? The tenant may be operating its store or restaurant from other leased premises under an expiring (or expired) lease, it has hired staff who are expecting to start working on a stipulated date, it has ordered inventory that must be paid for despite the fact the space has not been handed over to the tenant.

Tenants with significant bargaining power will want to ensure that at least certain kinds of force majeure events do not apply to the landlord's obligation to complete its work by the agreed deadline. More specifically, strong tenants will want to exclude construction-type triggering events such as strikes, an inability to obtain materials and the like. I understand that many will find this totally repugnant but the fact is that only the landlord is in a position to mitigate the impact of these delays on the construction schedule, and with control comes responsibility. Yes, it will mean that the landlord is going to have to spend more money to get the work done within the agreed time frame, but on balance, this seems fairer than depositing the consequences of the landlord's delay squarely on the tenant's shoulders. Likewise, it seems fair to me to require the tenant to contractually agree to proactively take steps to mitigate the consequences of the landlord's delay in completing its work. There are no winners in these kinds of situations – everyone is going to suffer. The point is to limit the damages by proactive conduct by both parties.

TIP: Consider what obligations should be excluded from the protection of the force majeure clause.

3B. Frustration

Frustration is similar to the concept of force majeure, except that the doctrine of frustration applies only if an unforeseen event fundamentally destroys the basic, shared assumptions that underlie the contract.[14] Worded differently, frustration occurs when a situation arises for which the parties made no provision in the contract and performance of that contract becomes "a thing radically different from which was undertaken by the contract."[15] Frustration is a common law contract concept that will be applied by the court in certain circumstances. [16]

TIP: Only certain provinces accept the application of frustration to commercial leases.

[14] *Troika Land Development Corp v West Jasper Properties Inc*, 2009 ABQB 590 at para 29; citing G. Treitel, *Frustration and Force Majeure*, 2d ed. (London: Sweet and Maxwell, 2004) at para 1-001.
[15] *Naylor Group v Ellis-Don Construction Ltd*, 2001 SCC 58 at para 53; citing *Peter Kiewit Sons' Co v Eakins Construction Ltd*, [1960] SCR 361 at 368.
[16] See Joseph T. Robertson's excellent paper "Frustrated Leases: "Do to Never – But Rarely If Ever" (1982), 60 Can. Bar Rev. 619

To establish frustration, the party wishing to rely on frustration must establish:

> (1) the purpose that was frustrated was fundamental to the agreement so that the agreement makes little sense without it;
>
> (2) the frustration was so severe that it could be fairly regarded as within the risk that the parties assumed under the contract; [and]
>
> (3) the non-occurrence of the frustrating event was a basic assumption of the agreement.[17]

Whether an event will be considered to have frustrated the contract will depend on the facts of each case. A frustrating event may be something as significant as destruction of the leased building,[18] or surprisingly, where it was discovered that the cost of installing new windows was ten times what had been contemplated at the time of the offer due to a lack of sufficient structural integrity in the building.[19]

If a court determines that the lease is frustrated, both the landlord and tenant will be excused from performing their obligations under the lease.[20]

Please be aware that the application of frustration to commercial leases depends on jurisdiction. Most provinces have not applied the doctrine of frustration to commercial leases. In Ontario, cases go both ways. In a 1985 Ontario case, the court suggested that frustration did not apply to commercial leases.[21] In a more recent October 2013 case, the court went in the opposite direction and resurrected the doctrine and applied it to a commercial lease.[22] Confusing to say the least.

In British Columbia there is no confusion, frustration is applicable to leases through the *Commercial Tenancy Act*. [23]

Manitoba has discussed, but not implemented, legislative reform that would add the common law principle of frustration to their *Frustrated Contracts Act*.[24]
Whereas a force majeure clause assigns risk and proactively accounts for future events, frustration excuses the parties from their obligations due to unforeseen events that frustrate

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[17] Adrian Hartog & Elizabeth Putname "Leases and the Doctrine of Frustration" in *Six-Minute Commercial Leasing Lawyer 2005. Proceedings of a Conference Held February 16, 2005* (Toronto: The Law Society of Upper Canada, 2005) at 20-2.
[18] *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* , 2000 CanLII 22663 (ON SC) at para 184, citing *Taylor v Caldwell* (1863) 3 B&S 826, 122 ER 309.
[19] *First Real Properties Limited v Biogen Idec Canada Inc*, 2013 ONSC 6281.
[20] *Supra note 18* at para 185.
[21] *MSM Construction Ltd v Deiuliis* (1985), 49 OR (2d) 633 (Ont HCJ at 636).
[22] *First Real Properties Limited v Biogen Idec Canada Inc*. 2013 ONSC 6281.
[23] *Commercial Tenancy Act*, RBSC 1996, c C57 s 30.
[24] *Fundamental Breach and Frustration in Commercial Tenancies* (Manitoba Law Reform Commission, 1996) at 24.

the performance of the contract. I expect that in most instances, both landlords and tenants will be better served by including properly drafted force majeure clauses than relying on the possible application of frustration.

CONCLUSION

As with any breach of contract, there are a multitude of remedies, including specific performance, damages and injunctive relief, which I have not addressed, having chosen to focus my attention on avoidance and mitigation mechanisms, and failing that, the most direct and cost effective remedies.

The comments contained in this article provide general information only. They should not be regarded as or relied upon as legal advice or opinions. Gowling Lafleur Henderson LLP would be pleased to provide more information or specific advice on matters of interest to the reader.

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