Denying Contractual Relief to Greenhouse Gas Emitters?

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Introduction

"Climate change is the defining issue of our time and we are at a defining moment".[1] In one sense it is an easy issue to address, "we know what we must do. We must stop the emissions of greenhouse gases.".[2] Despite this it is one that we have failed to address so far. New Zealand has sought to address emissions through legislation, primarily the Climate Change Response Act 2002. However, between 2017 and 2018, our gross emissions decreased by just 1%.[3] It is no wonder then that people have turned to the courts and climate change litigation to try and address this issue. So far this has been met with little success in New Zealand. A leading reason for this is the nature of climate change. We are all simultaneously responsible for the problem and not; everyone contributes to climate change through the emissions they produce, but because each contribution is small in the global context, no one is held responsible for the problem. Effectively addressing climate change requires this to change. People need to be held accountable for their emissions and law is an obvious way to do this.

This dissertation looks at one area, contract law, where this could be done. It aims to show that contract law is a suitable area in which to hold parties accountable for their emissions. It cannot solve the emissions problem alone, but it can make a worthwhile contribution. In general, measures that encourage the reduction of emissions and hold emitters accountable are desirable. However, this paper takes the approach that in the context of contract law this should be done in a way that builds on the existing law rather than redesigning contract law around the goal of emissions reduction. Therefore, it provides a specific framework for the courts to follow in a particular area of contract law, the provision of relief after disruption by climate change, and a normative basis for that framework.

Currently, where an event attributable to climate change disrupts contractual performance, the parties to the contract may be able to claim relief despite their emissions and so contribution to the problem. For example, an oil company, who contracts with a construction company to build a petrol station, will likely be eligible for relief when a climate change attributable event disrupts performance of this contract. This is the case even where the oil company has knowledge of their emissions, and the environmental effects of these, but has failed to address

[1] United Nations "Climate Change" < https://www.un.org/en/sections/issues-depth/climate-change/>.
[2] Greta Thunberg "You did not act in time" (Houses of Parliament, United Kingdom, 23 April 2019).
[3] Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990-2018* (April 2020) at 3.

them. This dissertation argues that in this situation the typical approach to causation is not suitable and should be set aside. It proposes a new approach, under which relief from disruption by climate change attributable events could be denied to parties on the basis of their emissions without needing to demonstrate they were capable of preventing the event. In relation to some forms of relief, such as under frustration, this would involve a full denial of relief, but in areas where damages are involved, relief could be denied in part. This approach may seem radical but "if society has to wait until each "slice of the pie" can be precisely allocated to each responsible actor" to hold them accountable, it will likely be too late.[4]

This dissertation is made up of four parts. Part 1 will provide an overview of the existing legal approach to emissions in New Zealand. In doing so it will identify the need for further action. It will also draw out the relevant conclusions for this dissertation from a couple of ground-breaking climate change cases. In particular, the second of these cases, *Smith v Fonterra*, will be used to introduce the difficulties tort law has in dealing with climate change. Part 2 evaluates the appropriateness of contract law as an area in which to hold parties accountable for their emissions. In particular, it uses the difficulties tort law faces to highlight the strengths a contract law approach could have in this area. A different approach to causation from the typical 'but for' approach is advocated for using analogy to existing principles present elsewhere in both contract and the wider law.

Part 3 then looks at the contract law applicable to disruption of contractual performance by climate change attributable events. Frustration, force majeure clauses and cancellation are all considered. The elements of these are set out, before looking at how these could be applied to the relevant situation. Finally, Part 4 sets out what the proposal this dissertation advocates for would look like. This proposal would apply when three elements are satisfied: the party seeking relief has knowledge of their emissions and their consequences, they have failed to take reasonable steps to address these emissions, and relief is sought on the basis of an event attributable to climate change. Where all three are satisfied, it is proposed that relief be partially or fully denied. The proposal is then applied to a series of hypothetical scenarios to illustrate how it would operate in practice. The success of this will be assessed against both whether it does something to help address climate change and whether it does so without distorting the

[4] Myanna Dellinger "An "Act of God"? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change" (2016) 67 Hastings LJ 1551 at 1592.

existing law. This proposal is a significant advance, but major changes are necessary to solve the complex problem that is climate change.

Part 1: Current Legal Approach to Emissions and Climate Change Liability

Relevant Legislation

The primary piece of climate change legislation in New Zealand is the Climate Change Response Act 2002. The policies and schemes provided for in this Act are designed to allow New Zealand to meet their international emissions obligations.[5] Part of this involved setting up the New Zealand Emissions Trading Scheme (NZ ETS).[6] The basic idea of this scheme was that emission units could be earned for sequestering greenhouse gases (by planting trees) and had to be surrendered for greenhouse gas emissions.[7] The first issue with this approach to emissions is that the NZ ETS, the Act's primary strategy, has so far been largely ineffective at reducing emissions.[8] This is primarily attributed to the low carbon price[9] and the exclusion of agriculture from the scheme.[10] Two amendments to the Climate Change Response Act were recently enacted. The first of these set a new emissions target of zero net emissions (excluding biogenic methane) by 2050 and created a Climate Change Commission to help ensure this target is met.[11] The second reforms the NZ ETS, in particular by allowing for the setting of a cap on emissions units and price controls.[12]

Hopefully these reforms will be successful in reducing future emissions. However, there is another issue with this being the sole way in which New Zealand law addresses emissions. Regardless of the future success of this Act at reducing emissions, the effects of past emissions on the climate will be ongoing for many decades.[13] The burden of these effects often does not fall on the largest contributors to the problem and the Act does not address this.

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[5] Climate Change Response Act 2002, s 3.
[6] Part 4.
[7] Euan Mason "The New Zealand Emissions Trading Scheme: What has gone wrong and what might we achieve?" (2013) 58(2) New Zealand Journal of Forestry 30 at 31.
[8] Easwaran Narassimhan and others "Carbon pricing in practice: a review of existing emissions trading systems" (2018) 18(8) Climate Policy 967 at 974.
[9] Julia Harker, Prue Taylor and Stephen Knight-Lenihan "Multi-level governance and climate change mitigation in New Zealand: lost opportunities" (2016) 17(4) Climate Policy 485 at 494.
[10] Paola Villoria-Sáez and others "Effectiveness of greenhouse-gas Emission Trading Schemes implementation: a review on legislations" (2016) 127 Journal of Cleaner Production 49 at 53.
[11] Climate Change Response (Zero Carbon) Amendment Act 2019, s 8.
[12] Climate Change Response (Emissions Trading Reform) Amendment Act 2020, s 50.
[13] Katherine L Ricke and Ken Caldeira "Maximum warming occurs about one decade after a carbon dioxide emission" (2014) 9(12) Environ Res Lett 1 at 6.

Climate Change Litigation

Climate change litigation attempts to address these shortcomings by forcing parties to take steps to reduce their emissions and prevent future loss or by redistributing the financial effect of climate change related loss to the major contributors. This has taken a number of forms around the world and has included both governments and private parties as defendants.[14] So far these claims have had limited success, particularly in New Zealand.[15] Two cases are of particular note in the context of this dissertation. *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* (*Urgenda*) is a ground-breaking case because the plaintiff succeeded in arguing that the Dutch State's legal duty to ensure the protection of the right to life required them to set larger emission reduction targets.[16] *Smith v Fonterra Co-operative Group Ltd*[17] is the first case in New Zealand where a claimant has tried to hold private parties accountable in tort for their emissions. Mr Smith was somewhat successful in that his claim of a new tortious duty was allowed to proceed.[18]

Urgenda

In this case the plaintiff organisation successfully sought an order directing the Dutch State to reduce their greenhouse gas emissions to a lower level than the current target they had set.[19] The Dutch Supreme Court held that Articles 2 and 8 of the European Convention on Human Rights (ECHR), which protect respectively the right to life and the right to respect for private and family life, applied to the problem of climate change.[20] This decision was made despite the State's arguments that their emissions were minimal on the global scale and other countries were not taking responsibility.[21] The court justified this decision by reference to the points that

[14] Helen Winkelmann, Chief Justice of New Zealand, Susan Glazebrook and Ellen France, Judges of the Supreme Court of New Zealand "Climate Change and the Law" (Asia Pacific Judicial Colloquium, Singapore, 28-30 May 2019) at [39].
[15] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733, [2018] 2 NZLR 160 at [179]; and *Smith v Fonterra Co-operative Group Ltd* [2020] NZHC 419, [2020] 2 NZLR 394 at [109].
[16] *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* ECLI:NL:HR:2019:19/00135 [*Urgenda*] (English translation).
[17] *Smith v Fonterra*, above n 15.
[18] At [104].
[19] *Urgenda* (English translation), above n 16, at [2.3.2], [9].
[20] At [5.8].
[21] At [5.7.1].

if these arguments were accepted no one would take responsibility and that any reduction in global emissions reduces the risk of reaching dangerous climate change thresholds.[22]

This decision was significant because it was the first time globally that a court had ordered a state to reduce its greenhouse gas emissions.[23] However, this decision is unlikely to be replicated in New Zealand, at least not under our current legislative framework.[24] The New Zealand Bill of Rights Act (NZBORA) does contain the right not to be deprived of life,[25] similar to the right contained in Article 2 of the ECHR.[26] However, even if the courts were to interpret this as placing a positive duty on the New Zealand Government to address climate change, their ability to enforce this duty is very limited. NZBORA does not give the courts power to strike down or change other legislation which is inconsistent with it.[27] Therefore, even if the courts were to interpret section 8 in the broad manner outlined, the most they would be able to do is make a formal declaration that an enactment, such as the Climate Change Response Act, was inconsistent with NZBORA.[28]

Smith v Fonterra

Mr Smith brought claims in tort against seven companies whose businesses involved significant greenhouse gas emissions.[29] He argued that these emissions contribute to climate change and its adverse effects which will cause him harm.[30] He alleged the defendants' actions constituted three causes of action: public nuisance, negligence and breach of a new emerging tortious duty.[31] On the basis of these, he sought declarations and injunctions requiring the defendants to reduce their emissions to net zero by 2030.[32]

[22] At [5.7.7], [5.7.8].
[23] Elbert R De Jong "Dutch State Ordered to Cut Carbon Emissions" (2015) 6(3) EJRR 448 at 448.
[24] Charles Owen "Climate Change in New Zealand: Constitutional Limitations on Potential Government Liability" (LLB (Hons) Dissertation, University of Otago, 2016) at 10.
[25] New Zealand Bill of Rights Act 1990 [NZBORA], s 8.
[26] Convention for the Protection of Human Rights and Fundamental Freedoms [1953] ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953), art 2.
[27] NZBORA, s 4.
[28] See *Taylor v Attorney-General of New Zealand* [2015] NZHC 1706, [2015] 3 NZLR 791 at [66] where this remedy was accepted.
[29] *Smith v Fonterra,* above n 15, at [1]–[2].
[30] At [8]-[16].
[31] At [2].
[32] At [2].

The defendants applied to the High Court to have this claim struck out and Wylie J delivered judgement on these applications in early 2020. The claims in public nuisance and negligence were struck out but the claim of an inchoate tortious duty was allowed to proceed.[33] His decision is of relevance to this dissertation for two reasons. Firstly, in declining to strike out the new tortious duty, Wylie J indicated that the courts have not ruled out holding private parties accountable for their emissions through the common law. Secondly, a number of the issues he raises with the use of tort law to impose liability for emissions are valuable in shaping discussion on the suitability of contract law to hold parties accountable for their emissions.

One of the principal issues Wylie J had with the claim in public nuisance was Mr Smith's standing to bring the cause of action.[34] He did not consider Mr Smith had suffered the requisite 'special damage' and the chain of causation was long and indirect.[35]

A similar issue of proximity was raised in relation to the negligence claim.[36] Wylie J did not accept there was a proximate relationship between Mr Smith and the defendants as they had no relationship and importantly, the New Zealand government, not the defendants, was the best placed entity within New Zealand to address the alleged damage.[37] Linked to this were several issues with disproportionate liability.[38] The alleged duty would both subject the defendants to greater obligations than other emitters and hold them legally responsible for damage caused primarily by other entities.[39] Additionally, the alleged duty would create an open class of plaintiffs and so indeterminate liability.[40]

Another crucial issue with the negligence claim was the requirement for causation.[41] The usual 'but for' test could not be met, and an alternative material contribution test was not judged to be appropriate for this situation.[42] Finally, several policy concerns weighed against imposition of the duty of care required for negligence.[43] Building on the indeterminate liability concern

[33] At [73], [100], [104].
[34] At [59].
[35] At [62], [63].
[36] At [89].
[37] At [92].
[38] At [93].
[39] At [94]-[95].
[40] At [96].
[41] At [83].
[42] At [84]-[88].
[43] At [98].

above, Wylie J pointed out that the nature of climate change would mean every New Zealander could be both a potential plaintiff and defendant.[44] The judge also suggested that allowing the alleged duty would be inconsistent with the legislation Parliament has already put in place to deal with climate change, an area they are likely better suited to deal with.[45]

Wylie J had a number of concerns about the inchoate duty claim. He thought many of the policy reasons that weighed against a duty of care in negligence would also apply to this duty and be difficult to overcome.[46] He also referred to the fact that, while the common law is capable of evolution, this would be more of a leap forward than a gradual development.[47] Despite this, he allowed the claim to proceed to trial.[48] In doing so he admitted that the question of whether existing tort law could evolve to make corporations responsible for their emissions was at least arguable enough to warrant a hearing.[49]

Suitability of Tort Law

Smith v Fonterra demonstrates the numerous difficulties involved in applying tort law to climate change. The problem of emissions has been described as "the paradigmatic anti-tort" due to everyone and no one being responsible for the problem.[50] However, this dissertation does not seek to argue that tort law should not be used to make emitters liable for their emissions. In fact, as will later be argued, it would be inconsistent for tort law to impose liability without contract law also having some response. Instead, this paper uses the difficulties with tort law both to demonstrate why other areas of the law should also be explored in relation to accountability for emissions, and to highlight the strengths a contract law approach could have in this area.

[44] At [98(b)-(c)].
[45] At [98(d)-(h)].
[46] At [102].
[47] At [102].
[48] At [103].
[49] At [103].
[50] Douglas Kysar "What Climate Change Can Do About Tort Law" (2011) 41 Env L 1 at 3-4 as cited in Elizabeth Fisher, Eloise Scotford and Emily Barritt "The Legally Disruptive Nature of Climate Change" (2017) 80(2) MLR 173 at 190.

Part 2: Suitability of Contract Law to Hold Parties Accountable for their Emissions

Court's Involvement in this Area

In *Smith v Fonterra*, Wylie J raised concern over whether the issues raised were justiciable, stating that New Zealand's response to climate change involves policy judgements the courts are not well suited to dealing with.[51] However, this did not prevent him from allowing Mr Smith's claim of a novel tortious duty to proceed to trial.[52] As he comments, the common law can respond in new ways as required and evolves through extension of existing legal obligations and analogy to principles present elsewhere in the law.[53] This is what the proposal advocated for here aims to do. Furthermore, the proposal advanced by this paper presents significantly more narrow issues for judicial consideration than those raised by Mr Smith's claim.

The main area of contention, when applying the proposal as set out in Part 4 below, is likely to be whether the party seeking relief has taken reasonable steps to reduce their emissions. Not only is this a far narrower issue than raised by a claim in tort, it is also very similar to inquiries already commonly conducted by the courts. Within the area of contractual relief, the courts already have to determine whether a plaintiff who is seeking damages has taken reasonable steps to mitigate their loss.[54] Therefore, this inquiry should not be considered outside of the court's jurisdiction.

Advantages Over Tort Law

A number of the issues raised by the High Court in *Smith v Fonterra* are avoided when contract law is used.

[51] *Smith v Fonterra*, above n 15, at [98(g)].
[52] At [103].
[53] At [101].
[54] *Walop No 3 Ltd v Para Franchising Ltd* CA20/03, 23 February 2004 at [7].

Causation and Alternative Rationales

One of the major issues with using tort law to hold emitters accountable is the element of causation. It is an inherent feature of climate change related loss that no one party caused the loss, rather everyone, to varying degrees, cumulatively did. In tort law, the test usually used is the 'but for' test, which asks whether the loss would have occurred 'but for' the defendant's actions.[55] NZ climate scientists have recently released research containing a methodology for estimating the proportion of the risk of a given weather event occurring (e.g. drought or flood) that is attributable to climate change[56]. This is done by simulating conditions e.g. rainfall with and without the impact of anthropogenic forcings (emissions). Therefore, it is possible to say with reasonable confidence that a particular weather event would not have occurred at the intensity it did without the influence of anthropogenic emissions. However, it is not possible, at least currently, to say that without a single emitter's emissions a particular weather event would not have occurred. Therefore, the 'but for' test will always fail.

In certain limited situations the courts have applied a different test of causation where the 'but for' test has not seemed appropriate.[57] One example of this is *Fairchild v Glenhaven Funeral Services Ltd*.[58] This case dealt with a situation where the plaintiff developed a mesothelioma because of inhaling asbestos dust at work but it was not possible to prove whether this occurred as the result of breach by employer A, B or both.[59] Therefore, on a 'but for' test the plaintiff's negligence claim would fail against both employers.[60] However, the House of Lords held that in these circumstances the 'but for' test could be varied, and causation found on the basis the employers contributed to the risk of the condition developing and so made a material contribution to the plaintiff's condition.[61] While this indicates there is some flexibility in the courts' approach to the test for causation in tort, the modified approaches that have been developed so far will likely also fail in the climate change liability scenario. For example, the 'material contribution' test is unlikely to be satisfied given the extremely high number of

[55] *Smith v Fonterra*, above n 15, at [83].
[56] David J Frame and others "Climate change attribution and the economic costs of extreme weather events: a study on damages from extreme rainfall and drought" (2020) Climatic Change 1 at 3.
[57] *Accident Compensation Corp v Ambros* [2007] NZCA 304, [2008] NZLR 340 at [26].
[58] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32.
[59] At [2].
[60] At [2].
[61] At [34].

contributors involved and so the relatively small contribution each has made to the resulting damage.

However, in the context of contract law there is room for a different approach to causation in the situation of holding an emitter accountable by withholding relief. In *Urgenda* the court held that the Dutch State was obliged to take steps to reduce their emissions to particular levels on the basis of its duty to protect people's lives from real and immediate risks.[62] This decision was made despite the fact that the Netherland's emissions are minimal in the global context and so reducing their emissions will not be enough to protect their people from the consequences of climate change.[63]

Parties to a contract could be said to have a duty to not take steps that could disrupt either party's performance of the contract, breach of which affects their ability to receive relief from that disruption. Such a duty is not necessarily a part of contract law generally. There is support for the doctrine of efficient breach, that a party may choose to breach a contract at will if they pay compensation for doing so.[64] This aids efficiency as it allows a party to place a financial value on the act of breaching and so choose to breach where the profit from doing so will exceed the compensation required.[65] However, this doctrine is not universally applied. For example, specific performance is sometimes ordered for breach of contract instead of damages. At the very least this is used when damages would be inadequate and there has been some suggestion that the court should always evaluate which remedy is most appropriate.[66] Therefore, the doctrine of efficient breach does yield to the interests of justice and should not prevent the duty advocated for applying in the area of climate change attributable disruption. This duty is already reflected in the element of frustration, that relief is not available for self-induced frustration.[67]

If this duty is treated in the same way the State's duty in Urgenda was, it therefore becomes irrelevant that performance of this duty would not prevent disruption of the contract's performance. The relevant fact is simply that the emitter has not taken reasonable steps to

[62] *Urgenda* (English translation), above n 16, at [5.8].
[63] At [5.7.1].
[64] Daphna Lewinsohn-Zamir, Alan D. Schwartz and Urs Schweizer "The Questionable Efficiency of the Efficient-Breach Doctrine" (2012) 168(1) Journal of Institutional and Theoretical Economics 5 at 5.
[65] At 5.
[66] *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 at 631.
[67] *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC) at 90.

reduce their contribution to the disruption of the contract and therefore, should be partially or fully denied access to relief mechanisms that would otherwise be available. There are several rationales that could be used to support this argument; equitable doctrines, reflection of community values and true construction of the contract.

One relevant equitable doctrine is that a party should not benefit from their own wrong. In England, this has been considered the rationale behind the rule against relief for self-induced frustration.[68] While the emitter's 'wrong' is not a direct cause of the disruptive event, they are still contributing to the problem and a strict approach to causation is likely not appropriate for equity. Ideas of justice and fairness remain relevant to the concept of unconscionable conduct, relief from which underlies many equitable principles.[69] Seeking relief from an event that your own actions have contributed to could be considered unconscionable, justifying a broad approach to causation. Therefore, allowing the emitter full relief may be inconsistent with this doctrine.

Another relevant equitable doctrine, that perhaps provides a stronger rationale, is the 'clean hands' doctrine. This refers to the equitable approach to claims for relief – that relief should only be provided where the party claiming has not themselves done something wrong.[70] It is arguable that by contributing to climate change through unreasonable emissions, the emitter has dirtied their hands and so should be denied relief, at least partially, under this doctrine. It could be argued that these equitable considerations should not broadly apply to all relief in the relevant situation, but just where equitable remedies such as specific performance are sought. However, there is precedent for ideas found within equity also being present in the wider law. For example, the maxim ex turpi causa non oritur actio, that no right of action arises from a shameful cause, is very similar to the equitable principle that no party should benefit from their own wrong and operates as a defence in tort.[71] Therefore, it is not reasonable to suggest that the principles contained in these equitable doctrines should apply to contractual relief beyond the specifically equitable remedies.

[68] *Constantine (Joseph) Steamship Line Ltd. v. Imperial Smelting Corporation Ltd* [1942] AC 154 (HL) at 200.
[69] *Muschinski v Dodds* (1985) 160 CLR 583 at 452.
[70] Charles Ricket *Laws of New Zealand* Equity (online ed) at [12].
[71] Stephen Todd *Tort – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [59.21.7.01].

There are several areas in the law of contractual relief where the law restricts party's contractual freedom on the basis of community values. An example of this is the rule against penalties. In *127 Hobson Street Ltd v Honey Bees Preschool Ltd*, the judge referred to the rule against penalties as a justified interference with contractual freedom because penalty clauses, of the type made unenforceable, are contrary to public policy.[72] The rule reflects values like the idea that parties should not be able to use their bargaining power to include oppressive terms.[73] Under this doctrine a clause will be unenforceable if it provides a consequence for breach "out of all proportion to the legitimate interests of the innocent party in performance".[74] A consequence is out of proportion if it is extravagant or unconscionable.[75] Therefore, applying this doctrine involves the court deciding whether relief, that the parties have provided for, should be available on the grounds of public policy considerations.

Similarly, there have been suggestions that duress should be available even where both the threat and demand are individually lawful acts.[76] In this situation, classification as duress is occurring by reference to social morality.[77] It should be noted that lawful act duress is a largely theoretical concept in New Zealand to date.[78] Theorists have argued that it is for the legislature, through statute, to say what behaviour a party can engage in.[79] However, as Professor Birks points out, this allows the use of clearly unacceptable but technically legal means of compulsion until the legislature can respond and declare this behaviour illegal.[80] Given the delay this involves, lawful act duress may therefore be an appropriate response, at least in situations where the conduct clearly breaches community standards.[81] The area of relief after climate change related disruption of performance could therefore be another area in which contract law reflects community values. A party being able to claim relief in a situation where they have contributed to the cause of disruption to performance could be seen as going against these values and therefore, withholding relief would reflect them.

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[72] *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2020] NZSC 53, (2020) 20 NZCPR 840 at [57].
[73] *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67, 2016 AC 1172 at [257], [262].
[74] *127 Hobson Street*, above n 72, at [56].
[75] At [55].
[76] *Dold v Murphy* [2020] NZCA 313 at [69].
[77] Peter Birks *An Introduction to the Law of Restitution* (Clarendon Press, Oxford, 1989) at 177 as cited in *CTN Cash & Carry Ltd v Gallaher Ltd* [1993] EWCA Civ 19, [1994] 4 All ER 714 at 718.
[78] *Dold v Murphy*, above n 76, at [69].
[79] James Edelman and Elise Bant *Unjust Enrichment* (2nd ed, Hart, Oxford, 2016) at 217 as cited in *Dold v Murphy*, above n 76, at [78].
[80] Birks, above n 77, at 177 as cited in *CTN Cash & Carry*, above n 77, at 718.
[81] Birks, above n 77, at 177 as cited in *CTN Cash & Carry*, above n 77, at 718.

The idea, that on the true construction of the contract relief is not available in these circumstances, could be used as a rationale for denying relief. This would fit well with the widely accepted 'true construction' theory of frustration.[82] There are two different bases on which this construction could be reached. Firstly, where the contract contains an obligation of good faith, contributing to climate change through unreasonable emissions may be seen as a breach of this obligation as it risks disrupting contractual performance. As a breaching party, relief could be denied to them. Where an obligation of good faith does not apply, it is still possible to argue that the parties would not have intended relief to be available in these circumstances. The contemplated scenarios involve situations where the non-emitting party has done nothing wrong, save having the misfortune to be the victim of an event outside their control. On the other hand, it is now common knowledge that emissions not only contribute to climate change, but that this in turn results in more intense and frequent weather events. Therefore, it is not absurd to suggest the parties might not have intended relief to be available for the emitter in these circumstances. This would provide a strong basis for denying relief.

Standing/Proximate Relationship

Tortious duties have the potential to apply to anyone and therefore, the court has had to develop criteria by which to decide who owes whom tortious duties. In torts such as negligence this involves considering whether a proximate relationship exists between the plaintiff and the defendants.[83] However, in the contract context, the existence of a contract between the parties will in itself create a proximate relationship between them. Therefore, this issue, which can be difficult to satisfy in tort, will always be satisfied in the contract context.

Indeterminate liability

The indeterminate liability involved in allowing tortious liability for emissions does not arise in contract law for a number of reasons. Firstly, the emitter is not being required to pay damages. They are merely losing their entitlement to relief under the contract and therefore, their 'liability' is limited to the extent of this. The sole possible exception to this is in the area of court ordered relief following cancellation, where 'liability' could potentially involve the

[82] *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 NZLR 149 at [50].
[83] Todd, above n 71, at [59.5.3.02].

emitting party having to pay the other party to the contract. Secondly, the emitter's 'liability' is also limited in relation to the loss from which 'liability' can arise. A defendant in tort could in theory be liable for any damage resulting from any event attributable to climate change. In contrast, under contract an emitter's 'liability' would be limited to the specific scenario where a contract which they are a party to is disrupted by an event attributable to climate change.

Disproportionate Liability

Each scenario in contract law, like tort, would involve holding a particular emitter/s accountable while not holding any other emitters legally responsible. However, in contract law there is a clear rationale for holding that specific emitter accountable as opposed to others. While other emitters have contributed to the problem, they are not using the consequences of that problem to get relief from their contractual obligations. This would also reflect the equitable 'clean hands' approach to the provision of relief. Additionally, equivalent emitters would receive the same treatment in relation to their own contracts. Therefore, while their 'liability' is not equal for each individual event, it is equal in a broader sense. Furthermore, the proposed approach's response can, in some circumstances, be flexible, in that relief can be reduced, not necessarily always refused all together. This would allow it to respond proportionately by reducing relief relative to the emitter's emission levels or inversely relative to the level of steps they have taken to reduce their emissions.

Imposition of Liability in an Area Already Regulated by Parliament

As in the tort context, the scenarios being discussed do not involve illegal behaviour. The emitters in question are assumed to be complying with all the relevant regulations and Acts passed by Parliament. Therefore, holding emitters accountable in the proposed manner would, as in tort law, involve obligations additional to those provided by Parliament. However, while tort law involves imposing obligations, contract law involves voluntary obligations that parties have chosen to take on.[84] Entering a contract inherently involves taking on additional obligations. As discussed above, it is at least arguable that the parties would not have intended relief to be available in the relevant circumstances. Implicit in this is the idea that on entering the contract they voluntarily took on an obligation not to contribute to the possible disruption

[84] Todd, above n 71, at [59.1.1.03].

of the contract by emitting unreasonably. Even if the parties are not taken to have intended relief to be denied, as discussed above there is precedent for the application of community values to the law of contract remedies. In particular, in the area of lawful act duress this involves viewing as illegitimate behaviour which, while not illegal, goes against social morality.[85] Not taking reasonable actions to reduce your emissions is arguably, in present society, immoral behaviour that justifies excluding relief.

Consistency with Wider Law on Emissions

In the immediately preceding discussion, it is argued that existing regulations on emissions should not prevent the common law holding emitters accountable in the way proposed. However, given the exponential growth in climate change litigation in recent years,[86] it is also sensible to consider the consistency between the approach proposed and the other developments being argued for.

As indicated above, this proposal is not offered as a replacement for imposition of liability through tort law. In contrast, it is submitted that liability in tort without an approach similar to that proposed for contract law would be inconsistent and lead to absurdities. Imagine an extreme storm attributable to climate change occurs. This storm disrupts performance of a contract an oil company has and causes extensive loss for others. The oil company has contributed to the occurrence of this event through their emissions. Some of the people who suffered loss bring a claim in tort against the oil company and they are held accountable for this loss. Simultaneously, without my proposal, the oil company is able to claim relief from their contractual obligations using the doctrine of frustration. This scenario makes very little sense. The emitter is both being held responsible for loss in a situation they have no connection to beyond their emissions and not being held responsible in a situation they have a clear connection to via contract. For the law to remain coherent it is therefore important that any accountability in tort be accompanied by accountability in contract.

This proposal would also be consistent with other potential future successes in climate change litigation. Another area of climate change litigation identified as significant is the holding of

[85] Birks, above n 77, at 177 as cited in *CTN Cash & Carry*, above n 77, at 718.
[86] Winkelmann, Glazebrook and France, above n 14, at [38].

governments accountable for their commitments to reduce emissions.[87] A finding similar to that in *Urgenda*, that the Government was obliged to take action to address climate change,[88] would also be consistent with holding them accountable through contract law. It is important to note however, that the proposal advocated for does not depend on the success of any of these areas of climate change litigation. The argument in Part 2 is developed on the basis of principles found within existing law and so does not depend on development in other areas.

[87] At [40]-[41].
[88] *Urgenda* (English translation), above n 16, at [5.8].

Part 3: Legal Response to Disruption of Contractual Performance

One way in which climate change becomes relevant to contract law is when an event attributable to climate change disrupts performance of a contract. A number of different areas of contract law are engaged when contractual performance is disrupted. This section looks at how three of these, frustration, force majeure clauses and cancellation, could respond to contractual disruption by climate change related events. Construction of the contract is relevant to the first two of these, so is briefly discussed first. In particular, this part considers how a party's emissions could affect their entitlement to relief.

Construction

The scope of both frustration and force majeure clauses depend to some extent on construction of the contract. As discussed below, the true construction theory of frustration has been accepted by the Supreme Court.[89] Force majeure clauses are of course clauses included within the contract itself and so will be interpreted within the context of the rest of the contract and the surrounding circumstances, as well as commercial sense.[90] Therefore, it will be beneficial to my proposal if, on the true construction of a contract, the parties can be seen as intending entitlement to relief to be affected where a party has contributed to the disruptive event through their emissions.

Where a party has indicated a commitment to environmental protection, this may be a relevant factor in the interpretation of contracts they enter into. For example, in *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* the Court of Appeal refers to Mobil NZ's statement of willingness in 1993 to remedy its contamination of a site, not because the law required it, but "because it was committed to environmental excellence".[91] While the Supreme Court overturned this judgement, rejecting the idea that Mobil would take responsibility for contamination by preceding companies in the Mobil Group,[92] this does not negate Mobil's statement that remedy of its contamination was motivated by commitment to

[89] *Planet Kids*, above n 82, at [50].
[90] See *Air New Zealand Ltd v New Zealand Airline Pilots Association Inc* [2016] NZCA 131, [2016] 2 NZLR 829 where the Court of Appeal considered these factors in a four-step approach.
[91] *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZCA 390, [2016] 2 NZLR 281 at [70].
[92] *Mobil Oil New Zealand Ltd v Development Auckland Ltd* [2016] NZSC 89, [2017] 1 NZLR 48 at [75].

environmental acceptance. Since then companies have become increasingly aware of their environmental reputation and so being seen to accept responsibility for a problem they have undeniably contributed to, if not directly caused, is an understandable approach for an emitter to take. Importantly, contract law does not look at the specific party's subjective intention but at what a reasonable person would think they intended in the circumstances.[93] This argument will be even stronger when the relevant party has expressly committed to taking action to address climate change.[94] Therefore, it is at least arguable that parties to a contract would be taken to not have intended relief to be available to a party who contributed to the disruptive event with their emissions.

Frustration

Elements

The doctrine of frustration in its modern form operates to discharge both parties from their obligations under the contract where an event has disrupted the contract.[95] Therefore, frustration generally operates on an all or nothing basis, bringing the entire contract to an end at the occurrence of the frustrating event.[96] Frustration is a flexible tool designed to avoid the injustice of forcing parties to perform a contract in drastically different circumstances than contemplated.[97]

Planet Kids Ltd v Auckland Council[98] is the leading case in New Zealand on the approach to frustration. The majority referred favourably to the widely accepted true construction rationale for frustration, that a contract is frustrated if, on the true construction of the contract, taking into account the surrounding circumstances, it is not wide enough to apply to the situation that has arisen.[99] In deciding whether this has occurred, they endorsed a multi-factorial approach.[100]

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[93] *Firm Pi 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].
[94] Note: expressing commitment is not the same as taking reasonable steps to reduce their emissions, so statement to this effect would not later mean my proposal does not apply to them.
[95] Bryn Jones "Unscrambling the Eggs of Modern Frustration" (LLB (Hons) Dissertation, University of Otago, 2014) at 18.
[96] John Frederick Burrows, Stephen Todd and Jeremy Finn *Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 783.
[97] *Planet Kids*, above n 82, at [8].
[98] *Planet Kids*, above n 82.
[99] At [50].
[100] At [62].

As part of this, they suggested the tests, whether performance has become radically different from that contemplated by the contract or whether the event has destroyed a basic assumption the parties made in entering the contract, should be taken into account.[101]

There are also several other elements that qualify when frustration occurs. One of these is that frustration "should not be due to the act or election of the party".[102] This is commonly referred to as the principle that discharge from the contract is not available for self-induced frustration.[103] Perhaps the most straightforward example of where frustration would be prevented by self-inducement is where the party has themselves destroyed the subject matter of the contract. For example, a party who contracted to deliver the other party a horse but poisoned the horse prior to delivery.[104]

Another is the issue of foreseeability. The fact that an event is foreseeable will not necessarily prevent the frustration doctrine being applied.[105] However, at the very least, the fact the parties foresaw, or should have foreseen, the disruptive event will be relevant to the frustration inquiry. For example in *Hawke's Bay Electric Board v Thomas Borthwick & Sons (Australasia) Ltd* the judge considered that risk of loss by earthquake occurring should have been foreseen given that earthquakes occur frequently in New Zealand.[106] This determination contributed to his conclusion that, in the absence of a clause assigning risk, the true construction of the contract must be that the parties would bear the risk of such an earthquake occurring and so the contract was not frustrated.[107]

Application

In most respects, climate change related events can be dealt with by frustration in the same way as other disruptive events. However, the areas of self-induced frustration and foreseeability present unique challenges when dealing with an event attributable to climate change.

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[101] At [51]-[54], [62].
[102] *Maritime National Fish Ltd*, above n 67, at 90.
[103] Stephen Todd and Matthew Barber *Commercial Law in New Zealand* (online ed, LexisNexis) at [8.1.4].
[104] *Inchbald v Western Neilgherry Coffee, Tea, & Cinchona Plantation Co Ltd* (1864) 17 CBNS 733 (Comm Pleas) at 741 as cited in *Constantine (Joseph) Steamship Line Ltd*, above n 68, at 183.
[105] *Planet Kids*, above n 82, at [158].
[106] *Hawke's Bay Electric-Power Board v Thomas Borthwick & Sons (Australasia) Ltd* [1933] NZLR 873 at 883.
[107] At 884-885.

Self-induced Frustration

Some weather events such as floods and droughts, or their intensity, can now be attributed to climate change.[108] It is no longer disputed in law that climate change is happening and is doing so as a result of anthropogenic emissions. This is reflected by the fact that in *Smith v Fonterra* the defendants did not even try to dispute this fact, admitting the contents of an Intergovernmental Panel on Climate Change report that states conclusions to that effect.[109] Therefore, where a party to a contract disrupted by an event attributable to climate change is an emitter they can be said to have contributed to the disruptive event. The requirement that frustration not be self-induced has been expressed in many different ways.[110] The cases reviewed do not explicitly discuss a test for this, but it is likely most, if not all, can be explained by use of a 'but for' causation test. This seems to be less as result of an unwritten rule, and more by virtue of the type of cases that have appeared before the courts. For example, in *Maritime National Fish Ltd v Ocean Trawlers* it was alleged that a contract to charter a boat was frustrated by the charterer not obtaining a licence to operate the boat as intended.[111] However, this was self-induced, as the charterer had been granted three licences and elected to use these for boats they owned.[112] In such a case there is no need to consider how direct causation is required to be, because causation is so clear on the facts. However, as argued in Part 2, there is room in contract law for a different approach to causation.

Assuming a different approach to causation is accepted, another issue with the principle that discharge is not available for self-induced frustration arises. This principle is often described as preventing discharge where either party has caused the event.[113] The issue this creates is that if the non-emitter is the one seeking to rely on frustration, the emitter could use their own contribution to the disruptive event to prevent discharge of the contract. This seems inconsistent with the rationale behind the self-induced frustration rule, that people should not be allowed to benefit from their own wrong.[114]

[108] Frame and others, above n 56, at 3.
[109] *Smith v Fonterra*, above n 15, at [28]-[30]; and Intergovernmental Panel on Climate Change *Special Report: Global Warming of 1.5°C* (October 2018).
[110] *Maritime National Fish Ltd*, above n 67, at 90.
[111] At 87.
[112] At 90.
[113] Todd and Barber, above n 103, at [8.1.4].
[114] *Halsbury's Laws of Australia* (online ed, LexisNexis) Contract at [110-9835].

This inconsistency does not appear to have to been addressed in New Zealand cases. This is likely because the action of the party said to lead to the frustrating event will often also be a breach of contract. Therefore, the 'innocent' party could rely on cancellation instead. However, it has been addressed overseas, in both England and Australian cases. In *F C Shepherd & Co Ltd v Jerrom* an employee being sent to prison was held to frustrate his employment contract.[115] While the court argued that it was the act of the judge, not the employee, that caused this event, they also stated that the employee could not use his own default to avoid the contract being held frustrated.[116] The Australian case of *Penrith District Rugby Club Ltd v Fittler* addresses the issue more directly.[117] The judge stated that it would be "grossly inequitable" if the party could use the fact it caused the frustrating event to prevent the other party getting discharge of the contract and held that the contract was frustrated.[118]

The reason for the either party approach to self-induced frustration is likely the principle that frustration "does not depend on application or election by the parties but occurs automatically by operation of law to discharge the contract…".[119] However, as has been identified in the literature, in reality frustration is "advanced" by one party and often opposed by the other.[120] Therefore, in *Penrith,* Santow J held that this principle should be varied so that where frustration is induced by one party, the contract is not discharged automatically but at the application of the innocent party.[121]

Adopting this approach in New Zealand and restricting the rule against self-induced frustration to inducement by the applying party would address the issue identified above of an emitter using their contribution to the event to prevent discharge. For a number of reasons, I think New Zealand courts are likely to be open to taking this approach. Firstly, while it conflicts with the principle of automatic discharge, courts in similar jurisdictions have not treated this as a barrier.[122] New Zealand courts have not ruled out taking the same approach, the issue is just one that has not arisen previously. Secondly, in William Young J's judgement in *Planet Kids*, the unusual circumstance of the party arguing frustration not being the one unable to perform

[115] *F C Shepherd & Co Ltd v Jerrom* [1987] QB 301 (CA) at 336.
[116] At 326, 336.
[117] *Penrith District Rugby League Football Club Ltd v Fittler* BC9600163.
[118] At 54.
[119] *Planet Kids*, above n 82, at [48].
[120] Donald Westlake Greig and JLR Davis *The Law of Contract* (The Law Book Company, Sydney, 1987) at 1322 cited in *Penrith*, above n 117, at 55.
[121] *Penrith*, above n 117, at 56.
[122] See *Penrith*, above n 117, at 56.

caused him to take a novel approach to frustration, considering how the situation would be dealt with if frustration was not held to have occurred.[123] This suggests that New Zealand courts might be willing to take different approaches to whether a contract has been frustrated depending on which party is seeking to rely on it. Thirdly and finally, *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[124] provides additional supportive English authority. In this case, the court held that the contract, without an express termination clause, could be terminated on reasonable notice because the situation had radically changed.[125] This is similar to allowing a party to discharge a contract via frustration on application in that it allows the party to choose whether to terminate the contract. While the *Staffordshire* judgement has faced significant criticism, this has centred primarily on the reliance on inflation as having changed circumstances enough to allow this termination.[126] In contrast, the approach I am suggesting New Zealand adopts would not change the requirements around what is a frustrating event, merely allowing discharge by application in a limited circumstance.

Foreseeability

The latest IPCC report predicts that in the near future climate change will cause an increase in the frequency and intensity of both droughts and extreme rainfall events.[127] New Zealand courts have accepted the assessments and predictions made in IPCC reports as reliable scientific evidence of climate change's future effects.[128] These effects are expected to occur in New Zealand, with predictions of increased flooding in the South Island and western North Island and an increase in the frequency and severity of droughts in the eastern North Island.[129] With these changes, weather events that were previously unforeseeable, such as very severe storms and associated extreme flooding, are likely to become increasingly foreseeable.[130] Foreseeability is therefore a more complicated issue in relation to events attributable to climate change.

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[123] *Planet Kids*, above n 82, at [174]-[175].
[124] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 1 WLR 1387.
[125] At 777.
[126] *Gore District Council v Power Co Ltd* [1996] 1 NZLR 58 at 67-68.
[127] Intergovernmental Panel on Climate Change *Special Report: Climate Change and Land* (August 2019) at [A.5.1]
[128] See for example *Hemi v Waikato District Council* [2010] NZEnvC 216 in which the Environment Court's decision relied on sea level rise values based on the 2007 IPCC assessment report.
[129] Ministry for the Environment *Climate Change Projections for New Zealand: Atmosphere Projections Based on Simulations from the IPCC Fifth Assessment, 2nd Edition* (MFE 1385, September 2018) at 13.
[130] Jocelyn L Knoll and Shannon L Bjorklund "Force Majeure and Climate Change: What is the New Normal?" (2014) 8(1) Journal of the ACCL 29 at 50.

Foreseeability of the event does not operate as a strict barrier to frustration but instead as a factor in the frustration inquiry. In relation to weather related events, this can be illustrated by comparing two cases. In *Hawke's Bay Electric-Power Board* the contract was held not to be frustrated by an earthquake, despite it being one of the largest earthquakes ever felt in New Zealand.[131] In contrast, in *Staunton and King v Wellington Education Board* a gale of wind that was one of the heaviest ever experienced in the district was held to frustrate the contract.[132] This indicates that whether an event's foreseeability precludes frustration is dependent not just on the degree of foreseeability but also on the contract's context. This is confirmed by the majority judgement in *Planet Kids*, which stated that a foreseeable event can exclude frustration, but this is only because it creates the inference the parties assumed the risk of that event occurring, and this inference can be displaced by evidence of contrary intention.[133]

The majority also stated that a high degree of foreseeability is needed to exclude frustration; the event must "be one any person of ordinary intelligence would regard as likely to occur".[134] Additionally, once this level is met, it would make sense that the higher the degree of foreseeability, the harder it would be to displace the inference that frustration is excluded. Therefore, as severe weather events become more likely and so more foreseeable, frustration will become less likely to be available for them. However, unless our emissions decrease, the increase in severity and frequency of events is predicted to be an ongoing change.[135] Therefore, it is reasonable to expect that, while previously unforeseeable events will become reasonably foreseeable, even more extreme events will occur that are relatively unforeseeable. Additionally, the consequences of the event, not just the event's occurrence, have to be foreseeable.[136] Predicting the consequences of an event is likely harder as it is dependent on more factors. As a result, it is unlikely that foreseeability will prevent all weather events from frustrating contracts.

Foreseeability presents a slightly different challenge in relation to the climate change attributable event of sea level rise due to its gradual nature. The IPCC was already predicting

[131] *Hawkes Bay Electric-Power Board*, above n 106, at 882, 885.
[132] *Staunton and King v Wellington Education Board* (1909) 28 NZLR 449 at 452, 456.
[133] *Planet Kids*, above n 82, at [158]-[159].
[134] At [158].
[135] Noah S Diffenbaugh, Deepti Singh and Justin S Mankin "Unprecedented climate events: Historical changes, aspirational targets, and national commitments" (2018) 4(2) Science Advances 1 at 7.
[136] *Planet Kids*, above n 82, at [158].

sea level rise of 66cm by 2100 in their 1990 report.[137] Therefore, it is unlikely that many contracts will exist where the risk of sea level rise was not foreseeable at the time of formation. However, it is possible sea level rise at a significantly more rapid rate than predicted would be considered unforeseeable. Inflation, similar to sea level rise in that its occurrence will be foreseen but perhaps not its rate, has been considered in several cases. In *Wates Ltd v Greater London Council,* the court indicated that inflation, although a foreseen event, could potentially frustrate a contract where it occurred at a rate radically different from that contemplated.[138] In *The Power Co Ltd v Gore District Council*, the court decided that the contract had not been frustrated by rapid inflation.[139] However, in doing so they did not say that inflation would never be capable of frustrating a contract. Additionally, as mentioned above, the consequences of an event must also be foreseen.[140] In this area, sea level rise differs from inflation. While inflation's effects will change gradually with the rate of inflation, sea level rise's effects will likely become significant rapidly when a threshold is reached and so may be less predictable. This increases the likelihood that future sea level rise will be capable of frustrating events.

Force Majeure Clauses

Elements

The French phrase 'force majeure' translates to 'greater force'.[141] Force majeure clauses set out what is to happen when an event prevents or inhibits performance, usually operating to relieve the party from its obligations during this period without incurring liability for damages.[142] They often apply to circumstances typically covered by frustration and, where they do cover an event, will exclude the doctrine of frustration.[143]

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[137] Intergovernmental Panel on Climate Change *Climate Change: The IPCC Scientific Assessment* (June 1990) at 277.
[138] *Wates Ltd v Greater London Council* (1983) 25 BLR 1 at 35 as cited in *The Power Co Ltd v Gore District Council* [1997] 1 NZLR 537 at 553.
[139] *The Power Co Ltd*, above n 138, at 555.
[140] Planet Kids, above n 82, at [158].
[141] Merriam-Webster "Force Majeure" <https://www.merriam-webster.com/dictionary/force%20majeure>.
[142] International Chamber of Commerce "Force Majeure Clauses in Commercial Contracts: General Considerations" < https://iccwbo.org/content/uploads/sites/3/2020/03/2020-forcemajeure-commcontracts.pdf>.
[143] Todd and Barber, above n 103, at [8.1.5].

Force majeure clauses can take the form of a general clause, a list of specific force majeure events or a combination of the two.[144] This dissertation will focus on the general clause form. The elements of a general form force majeure clause will depend on the wording of the clause but typically they will include some variation on external causation, unavoidability and unforeseeability. In relation to specific clauses, it is enough to briefly state that application of my proposal will depend on whether a specific clause can be interpreted as incorporating the above requirements typically found in general clauses. If it can, it can be treated in the same way as a general clause. For example, in the International Chamber of Commerce (ICC) Force Majeure Clause, specified events are presumed to meet the external causation requirement but will not operate as a force majeure if the other party can prove otherwise.[145] As specific clauses vary, this paper cannot provide a comprehensive answer to when the relevant requirements will be capable of incorporation.

Application

Depending on the wording of the force majeure clause's requirements around external causation, it may be interpreted as denying relief to an emitter where the force majeure event is attributable to climate change. A clause that refers generally to the party seeking relief not having caused the event could be treated in a similar manner to the self-induced element in frustration, as argued for in Part 2. However, interpretation in this manner is less persuasive where the clause uses language such as that in the ICC Force Majeure Clause "that its failure to perform was caused by an impediment beyond its reasonable control".[146] This likely raises the same problem as the 'but for' test as discussed in Parts 1 and 2; that climate change and so extreme weather events would still be occurring without an individual emitter's emissions.

Unavoidability conditions may also be capable of the above interpretation. A good example is a clause containing a requirement that the claiming party "do everything within its control to prevent or minimise the event's occurrence and its effect".[147] It is within an emitter's control to reduce their emissions and doing so may have the potential to reduce the intensity of an extreme weather event, particularly given the threshold basis on which climate change is

[144] Knoll and Bjorklund, above n 130, at 34.
[145] International Chamber of Commerce "ICC Force Majeure Clause (Long Form) (March 2020) <https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf> at [3].
[146] At [1].
[147] Knoll and Bjorklund, above n 130, at 35.

thought to operate.[148] Other clauses may use similar wording, but qualified by terms like 'reasonable'. The proposal I advocate for, as set out in Part 4, would still be capable of applying in the presence of such qualifiers.

Unlike in relation to frustration, the foreseeability element is likely to involve a clear and threshold-based test. For example, the ICC clause provides that the party invoking the clause must show that impediment to performance by the event "could not reasonably have been foreseen at the time of the conclusion of the contract".[149] However, despite this different approach, the application to climate change-based events is likely to be similar to that of frustration. Events which previously would have triggered a force majeure clause will no longer do so, but other even more extreme events will occur which do trigger the clauses.

Cancellation

Elements

Sections 36 to 59 of the Contract and Commercial Law Act 2017 (CCLA) govern the cancellation of contracts. A party is entitled to cancel the contract where the other party repudiates by making it clear they do not intend to perform, or complete performance of, their obligations under the contract.[150] Cancellation is also available[151] if the other party breaches or clearly will breach a term in the contract where performance of that term has been agreed to be essential or the effect of the breach will be to substantially reduce or change the benefit or substantially increase or change the burden of the contract for the cancelling party.[152] Cancellation brings the contract to an end and so any future obligations no longer have to be performed.[153] However, obligations that had already arisen for performance and were not performed can still be sued on.[154]

[148] Stephen H Schneider "Abrupt non-linear climate change, irreversibility and surprise" (2004) 14(3) Global Environmental Change 245 at 246.
[149] International Chamber of Commerce, above n 145, at [1].
[150] Contract and Commercial Law Act 2017 [CCLA], s 36.
[151] For completeness, it should be noted that s 37 of the CCLA also allows for cancellation where the party has been induced to enter the contract by a misrepresentation meeting one of several criteria; however, this is not considered likely to be relevant for this paper's purpose.
[152] Section 37.
[153] Section 42(1)(a).
[154] Section 42(3).

Where a contract has been cancelled, the court has discretion to grant relief if doing so is just and practicable.[155] The range of relief which can be ordered is wide and includes directing a party to pay, or transfer property to the other party.[156] The court also has discretion in what matters it has regard to in considering whether, or what, relief to grant as section 45 lists as one of the matters the court must have regard to, "any other matters that the court thinks proper".

Application

Where an event disrupts contractual performance but does not constitute a frustrating event or force majeure event, a party to the contract may be entitled to cancel the contract on the basis of the other party's resulting failure to perform their obligations as specified in the contract. Where this occurs in relation to an event attributable to climate change, a party's emissions, and so contribution to the disruptive event, could be considered by the court in deciding whether to, and what, relief to grant. This would be possible because of the wide discretion that sections 43 and 45 of the CCLA provide.

[155] Section 43(1).
[156] Section 43(3).

Part 4: Proposal for Using Contract Law to Hold Parties Accountable for their Emissions

In Part 2, I argued that contract law is suitable to hold parties to account for their emissions. This Part moves on to outline how I propose this is done. As stated in Part 3, the proposed approach is intended to apply where an event attributable to climate change has disrupted contractual performance. It seeks to identify when relief, otherwise available under frustration, force majeure clauses or cancellation, should be withheld, partially or fully, to a party on the basis of their emissions. After outlining the elements of this proposal, I will explore how this would apply to several hypothetical scenarios. This will illustrate how the proposal can be adapted to fit a number of different situations involving a variety of contract law responses and parties.

Elements

I propose an approach containing three elements:

- Knowledge held by the party seeking relief of their emissions and their environmental consequences
- Failure to take reasonable steps to address those emissions
- Seeking relief on the basis of an event attributable to climate change

Where all three of these elements are met, my proposal would apply, withholding relief partially or fully.

Knowledge

The first element, and one which should almost always be easily satisfied, is knowledge held by the party of their emissions and the consequences of these for the environment. This would be assessed objectively, in keeping with the general objective approach in contract law.[157] Therefore, constructive knowledge would be sufficient. In today's society, it is extremely unlikely a party will not have knowledge of their emissions. This would only require knowledge that the party's actions result in emissions, not of the exact quantity of emissions produced. In relation to the second part of this element, it is now officially accepted that

[157] See *Firm Pi*, above n 93, at [60].

anthropogenic emissions are causing climate change.[158] Therefore, it is extremely unlikely that anyone contracting in New Zealand would be unaware of this. There are likely to be some parties that deny this position. However, given the conclusive evidence to support it, claimed denial should not prevent knowledge of emissions' environmental consequences being presumed.

The one area in which this element might be contentious is in relation to very long running contracts. It is possible parties to these contracts might have lacked the relevant knowledge at the time they entered the contract. Potentially, in this scenario, the party's behaviour following the point they can be fixed with knowledge could still be considered.

In Part 2, I presented a series of rationales for holding that emitters, who have not taken reasonable steps to reduce their emissions and so contribution to the disruption of the contract, should be denied, partially or fully, relief that would otherwise be available. Under one of these rationales, true construction of the contract, knowledge would likely be required at the date of entering the contract. This is because it is difficult to infer intention in relation to something the parties were oblivious to. The exception would be where the contract involves a good faith obligation. Once the party became aware of their emissions, their behaviour in continuing to emit unreasonably would likely not be acting in good faith. However, the other rationales would allow parties' behaviour post-knowledge to be considered, despite a lack of knowledge at contract formation. There is no particular reason why a duty justified by equitable principles or community values has to arise at the start of a contract. Therefore, on the basis of these, a party, who lacks knowledge at formation but later gains it, could be held accountable for emissions after that date.

Failure to take Reasonable Steps

It is very rare for an individual or company to have net zero emissions. Therefore, unless some element relating to a party's emissions is included, the proposal would involve denying contractual relief in the relevant situation to effectively everyone in New Zealand. Additionally, it is likely not yet realistic to expect many individuals and companies in many

[158] Ministry for the Environment "Evidence for Climate Change" < https://www.mfe.govt.nz/climate-change/why-climate-change-matters/evidence-climate-change>.

industries to reduce their emissions to zero. Therefore, this leads me to the conclusion that my proposal should contain an element related to the party's emissions.

Two possible options for this are linking relief denial to a party's emission levels or to the level of steps they have taken to reduce their emissions. I find the latter more persuasive for a number of reasons. The former does prima facie appear to provide a higher level of certainty. However, this has a high potential of becoming arbitrary. While in relation to cancellation it is possible to reduce relief proportionally to emission levels, this is less practical in relation to frustration and force majeure clauses. Therefore, some emissions level would have to be determined at which relief ceases to be available. There is no clear indicator of where this level should be. For example, should it be set so high that even an individual with absurdly high emissions will not be denied relief? Or low enough that even a small business with green initiatives is denied relief? It is entirely possible that a level selected could result in both of these outcomes.

An approach that links reliefs to whether the party has taken reasonable steps to reduce their emissions would address the arbitrariness issue. It also fits well with the rationales given above. All three rationales discussed, to some extent rely on society's view of when behaviour is 'wrong', goes against community values or is irresponsible. In our current society, not only does almost everyone have some level of direct emissions, they also use products and services the production of which require emissions. Therefore, it is likely more accurate to say that it is not producing emissions that is currently viewed as 'wrong' but doing so at an unreasonable level. A requirement of reasonable steps would also be consistent with the use of reasonableness as a qualifier in many force majeure clauses. Therefore, I consider that a crucial element of my proposal is that relief is denied only to emitters who have not taken reasonable steps to reduce their emissions. As the duty, discussed in Part 2, arises out of the contract, it is the party's actions during the duration of the contract that should be relevant to this inquiry.

Another thing that should be considered at the same time as determining whether a party has taken reasonable steps to address their emissions, is whether they have contributed to climate change denial. Some companies with major emissions have been found to have covertly funded climate change denial.[159] The motivation behind this was presumably to convince the public that the company's own actions were not harmful. This would also have indirectly increased

[159] Dellinger, above n 4, at 1594.

the funding companies' contribution to the problem by causing inaction by others misled by the false claims. This sort of cover up would almost undeniably be viewed as wrong by society. Therefore, if a party can be shown to fund the climate change denial movement, this should be taken as sufficient for my proposal to apply to them.

The other party (Party B) to the contract having themselves taken reasonable steps to reduce their emissions makes the denial of relief even more justified but should not be a required element of my proposal. Where Party A is seeking to rely on frustration or a force majeure clause, they are being denied relief on the basis of their unreasonable contribution to the disruptive event. Party B will presumably be opposing relief as otherwise they could agree to waive Party A's relevant obligations under the contract. Therefore, the fact that Party B is innocent, in the sense that they did not also unreasonably contribute to the disruptive event, makes denying Party A relief and so requiring them to comply with their contractual obligations even more justifiable. However, even when this is not the case and Party B also unreasonably contributed to the disruptive event, Party A should still be denied relief. Party B may have committed the same 'wrong', but they are not the one seeking relief and so trying to benefit from that 'wrong'. However, in relation to cancellation, both parties' contribution to the event should be considered in determining whether and what relief to order, not just the contribution of the party that cancelled the contract.

Event Attributable to Climate Change

Finally, the event that disrupted the contract must be attributable to climate change. As discussed in Part 2, New Zealand climate scientists have developed a methodology by which they use simulations of weather conditions to estimate the proportion of the risk of a given weather event occurring that is attributable to anthropogenic emissions.[160] A proportion of more than 0.5 would indicate that the probability of the event occurring in a world without anthropogenic emissions is less than half the probability of the event occurring in a world with anthropogenic emissions. I therefore consider that use of this methodology, or a similar one, and the setting of a threshold of 0.5 is appropriate in determining that the relevant event is attributable to climate change.

[160] Frame and others, above n 56, at 3.

Hypothetical Scenarios

Scenario A

Party A is an oil company with knowledge of their emissions and the consequences of these for the environment and that has not taken reasonable steps to reduce their emissions. Party B is a construction company who has taken reasonable steps to reduce their emissions. There is a contract between them for Party B to build a new petrol station for Party A. The contract specifies a completion date and makes completion by this date an essential term. A severe storm sets back construction, making completion by the agreed date impossible. This storm can be attributed to climate change.

Prima facie, Party A has the right to cancel this contract, given Party B's failure to fulfil an essential term. Therefore, application of my proposal would involve the court taking into account Party A's emissions when considering relief under s 43 of the CCLA. In a similar situation without Party A's emissions, relief could include Party A receiving back money it had pre-paid under the contract or Party B being compensated for the expenditure incurred and work performed prior to cancellation.[161] Under my proposal, the recommended outcome would therefore either be a reduction in the relief given to Party A or an increase in the relief given to Party B from what the court would otherwise order in a situation the same in every way except Party A's emissions. If the contract was interpreted in such a way that frustration or a force majeure clause would otherwise apply, application of my proposal would involve Party A not being able to rely on these because of their contribution to the event via unreasonable emissions. As discussed in Part 3, if Party B were the party seeking to rely on frustration or a force majeure clause, this would not be affected by my proposal.

Scenario B

Party A is the New Zealand Government with knowledge of New Zealand's emissions and the consequences of these for the environment and who has not taken reasonable steps to reduce these emissions. Party B is a construction company who has taken reasonable steps to reduce their emissions. There is a contract between them for Party B to build a road for Party A. The

[161] See CCLA, s 45.

contract specifies a completion date and makes completion by this date an essential term. A severe storm sets back construction, making completion by the agreed date impossible. This storm can be attributed to climate change.

This scenario is very similar to Scenario A but involves the New Zealand Government as the emitter. There is no good reason why the proposal made should not apply to the Government as well as to private parties. If anything, there is more inclination towards holding governments accountable for emissions, both in the courts and the literature. For example, in *Smith v Fonterra* Wylie J commented that the New Zealand Government is "the most appropriately placed entity… to address the complex and collective problems presented by climate change".[162] United States' academic Myanna Dellinger also suggests that the case for denying contractual relief is stronger in relation to Governments due to their enhanced ability to combat climate change through regulation.[163] Application to the Government could be done on the same basis as for private parties with one notable difference. This is that relief would be denied to the Government on the basis of a lack of reasonable steps to reduce New Zealand's emissions as a whole, not their own direct emissions. This is appropriate because the Government has the ability to address all New Zealand emissions through regulation.

Given the similarity to scenario A, the relief otherwise available would be similar and my proposal would operate in the same way in relation to relief for scenario B as for A. The involvement of the Government in the contract, as has been argued, should not change this.

Scenario C

Party A is a dairy company with knowledge of their emissions and the consequences of these for the environment and that has not taken reasonable steps to reduce their emissions. Party B is a retailer who has taken reasonable steps to reduce their emissions. There is a contract between them for Party A to supply milk products to Party B on a regular and ongoing basis. A severe drought disrupts milk production, preventing Party A from fulfilling the supply contract. This storm can be attributed to climate change.

[162] *Smith v Fonterra*, above n 15, at [92].
[163] Dellinger, above n 4, at 1589-1590.

The main difference between this scenario and Scenario A is that here the emitter is also the party who is in breach of their obligations under the contract as a result of the disruptive event. Therefore, Party B is the party who may have a right to cancel the contract. However, this does not change the position of my proposal, that Party A's emissions should be considered by the court in determining relief. Where frustration or a force majeure clause are otherwise engaged, under my proposal, Party A, but not Party B, should be prevented from relying on them.

Scenario D

Party A is an oil company with knowledge of their emissions and the consequences of these for the environment and that has not taken reasonable steps to reduce their emissions. Party B is the owner of a petrol station who has taken reasonable steps to reduce their emissions. There is a contract between them for Party A to lease the petrol station from Party B. A severe storm destroys the road that the petrol station serviced. This storm can be attributed to climate change.

This scenario differs from the preceding ones in that the disruptive event has not caused either party to breach their obligations under the contract. However, while Party A is technically still receiving the benefit of use of the petrol station, the contract was likely formed on the assumption that the road would continue to exist and so the petrol station would be accessible by customers. This situation therefore likely falls within one of the tests approved of in *Planet Kids*, that a basic assumption the parties made when entering the contract has been destroyed.[164] Therefore, except for the application of my proposal, Party A may have been able to rely on frustration to end the contract. A force majeure clause may alternatively have been applicable. Unlike situations where cancellation is available, in this situation the application of my proposal will mean that the only way the contract can end as a result of the disruptive event is at the election of Party B.

Contracting Out?

The doctrine of frustration will not apply where the parties have expressly allocated risk for the situation that has arisen. Force Majeure clauses obviously require the presence of a clause in the contract. Additionally, section 34 of the CCLA allows parties to contract out of the

[164] *Planet Kids*, above n 82, at [51]-[54], [62].

statutory relief provisions in sections 35-49 for misrepresentation, repudiation or breach of contract by expressly providing for an alternative approach to relief. Therefore, currently it would be possible for parties to contract out of my proposal.

If parties responded to the courts adopting it by contracting out, this would reduce the contracts to which it could be applied. Therefore, the effectiveness of my proposal would be limited. In practise, this would not necessarily occur. Both parties to the contract would have to agree to include a provision in the contract, contracting out of my proposal. Where one party is taking reasonable steps to reduce their emissions, they may not be easily persuaded to do so. However, where the 'emitter' is a large company with high bargaining power, they may be able to force a contracting out clause on the other party.

This could be addressed by making the proposal compulsory, without the ability to contract out of it. Contractual freedom is not unlimited in New Zealand. There are several areas in which the law does not allow parties to contract out or does not allow them to include a particular term. Therefore, it may be possible to prevent parties contracting out of my proposal.

One example of where the law does not allow parties to contract out is the Fair Trading Act 1986 and Consumer Guarantees Act 1993. Both statutes contain a general rule against contracting out of their provisions.[165] Both Acts do contain an exception to their rule against contracting out for parties in trade where it is fair and reasonable for them to be bound by their agreement's provisions.[166] My proposal can however, be distinguished from the provisions in these Acts, justifying a rule against contracting out for all parties, including those in business. The provisions in the two relevant acts are rules against, for example, conduct likely to mislead or deceive. This rule is different from my proposal in that the conduct it prevents is only likely to cause loss for the other party to the contract. In contrast, my proposal seeks to prevent conduct which contributes to loss experienced by everyone. Therefore, the other party to the contract should not be able to waive the benefit of this proposal, as they would not have the authority to do so. Additionally, the 'fair and reasonable' part of the exception to no contracting out suggests there may sometimes be a good reason for a provision which conflicts with the

[165] Fair Trading Act 1986, s 5C; and Consumer Guarantees Act 1993, s 43(1),
[166] Fair Trading Act, s 5D; and Consumer Guarantees Act, s 43.

Acts' provisions. It does not seem likely that there is a good reason for allowing a party to benefit from an event they have unreasonably contributed to.

This point leads into penalty clauses. Penalty clauses are not enforceable where they provide a consequence for breach "out of all proportion to the legitimate interests of the innocent party in performance".[167] Unlike the no contracting out rules in the above Acts, there is no situation in which a penalty clause of this type will be enforced. The difference between these rules is likely because there is no good policy reason for allowing penalty clauses of this type even among commercial parties. This could arguably also apply to provisions attempting to contract out of my proposal, therefore justifying not allowing parties to contract out of it.

[167] *127 Hobson Street*, above n 72, at [56].

Conclusion

Climate change has become a universal issue that we have commonly accepted needs to be addressed. Therefore, more than ever before, there is public appetite for change that does this. This is evidenced by the global growth of climate change litigation, against both governments and private companies.[168] However, even if these succeed, change in one area of the law is likely not enough. The complexity and urgency of climate change cannot be dealt with by one change. Instead, every system in our society needs to be looked at to both ensure it is not encouraging emissions and to see whether it can be developed to discourage emissions.

In this paper, I aimed to show that contract law was an area in which the existing law could be developed, to discourage emissions. The success of my proposal on how to achieve this can be assessed by considering whether it does two things. Firstly, does it do something to help address climate change? And secondly, does it do so without distorting the existing law?

I began by outlining the existing legal position law in New Zealand on emissions. The lack of success to date by the Climate Change Response Act clearly demonstrates the need for further action. While tort may seem like a promising area for this, the decision in *Smith v Fonterra* reveals the many difficulties with this. *Urgenda,* on the other hand, demonstrates a willingness to consider causation in a broader sense than is typical, to deal with the issues with responsibility inherent to climate change.

Drawing on these cases, I evaluated the suitability of contract law to hold parties accountable for their emissions. The most significant issue faced when trying to hold parties accountable for their emissions in any area of law is causation. To address this, I suggested that in this area of climate change attributable disruption, parties should have a duty to not take steps that could disrupt performance of the contract. By treating this duty in the same way the State's duty in *Urgenda* was, the issues of a direct causation requirement are avoided. Instead, accountability depends on whether the emitter has taken reasonable steps to reduce their emissions and so contribution to disruption of the contract. Existing concepts in New Zealand law, including equitable doctrines, reflection of community values in contract law and the true construction of a contract, justify the existence, and advocated treatment, of this duty. Contract law also

[168] Winkelmann, Glazebrook and France, above n 14, at [38].

avoids many of the other issues faced by tort, and accountability in this area is consistent with both existing, and possible future, law on emissions.

The second half of this paper moved into the specific, highlighting the areas of contract law amenable to the approach proposed and then considering how this approach would work in practise. The conclusion I reach is that, where a contract has been disrupted by an event attributable to climate change, a party who has knowledge of their emissions and their consequences but has failed to take reasonable steps to reduce them, should be wholly or partially denied relief from the event's effects.

I believe this conclusion achieves both the things it sets out to do. Firstly, reducing available relief contingent on a party's actions to address their emissions should provide an additional incentive to take steps to reduce their emissions. Reductions in emissions, particularly by the companies that are major emitters, will help to address climate change. The second criterion is more complicated to assess, but, I contend, still met. Throughout this paper, any change I have proposed to the existing law has been supported by areas of the existing law in which a similar approach has been taken. Obviously, the approach proposed involves change, but part of the nature of common law is that it can be developed. If anything warrants change to the common law, addressing climate change does.

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