

Frustration

The doctrine of frustration provides an excuse for non-performance, however a contract will be frustrated only in 'exceptional circumstances' (Davis)

Step 1: Test for frustration

"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract... It was not this that I promised to do." (Lord Radcliffe in Davis, approved by HC in Codelfa).

"The critical issue is whether the situation resulting from the [new circumstances] is fundamentally different from the situation contemplated by the contract".

- i. Determine what the parties undertook to perform (matter of construction of the terms of the contract in light of the surrounding circumstances);
- ii. Identify frustrating event (must supervene after the making of the contract; Codelfa. Eg in McRae frustration was not available because wreck never existed);
- iii. Compare this to the situation produced by the frustrating event;
- iv. If 'radically' or 'fundamentally' different = frustration. (Non haec in foedera veni = it was not this that I promised to do).

Key elements

- Events must not be brought about through the fault of either party
- The supervening event must make performance impossible, illegal, or radically different from that which was originally undertaken

Examples of frustrating events

Destruction of subject matter

A contract is likely frustrated where the subject matter of the contract is destroyed

- *'In contracts in which performance depends on the continued existence of a person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse performance'* (Taylor v Caldwell)
- Goods Act 1958 s 12 - Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish before the risk passes to the buyer, the agreement is thereby avoided.
- In Taylor v Caldwell, contract for a series of concerts in the Surrey Gardens and Music Hall
 - Hall accidentally burnt down before first concert
 - Contract was frustrated
 - Implied term that the hall would be in existence

Disappearance of the basis of the contract (frustration of purpose)

A contract may be frustrated where the new circumstances mean that the basis or purpose of the contract has disappeared. Performance is still possible, but futile.

- In Krell, contract to hire rooms on Pall Mall on two dates to watch coronation procession of the King through the streets
 - Coronation postponed
 - Contract was frustrated
 - Procession was regarded by both contracting parties as the 'foundation of the contract' (Vaughan Williams LJ)

- Brisbane City Council, contract to have land zoned residential in return for Group Projects carrying out certain works
 - Land was compulsorily acquired by Crown
 - Contract was frustrated
 - Although performance was not rendered impossible, the acquisition ‘*wholly destroyed Group Project’s purpose in undertaking any obligations at all*’
 - Stephen J stressed that ‘*this is NOT the common case of two contracting parties both interested in a commercial venture, one of them supplying to the other, in return for a money payment, goods, land or services.*’ – BCC is not concerned with its own financial or commercial advancement but rather the attainment of ‘appropriate standards of amenity’ in a new subdivisional area – point of distinction between other cases
- Cf: In Herne Bay Steamboat, P leased boat to D for purpose of taking passengers to view the Royal naval review and for a day’s cruise around the fleet
 - Review was cancelled, fleet was still there
 - Contract NOT frustrated
 - Hiring the vessel had two objectives: seeing the review and going around the fleet
 - The object of hire becoming limited was at the risk of Mr Hutton
- ‘The principle should not be taken too far’ – Principles of Contract law at [15.40]
- Latham CJ in Tooheys
 - “When a man agrees to buy a pair of boots for himself, both parties expect that he will be able to wear them. If he has an accident, so that he can no longer wear boots, he nevertheless still has to pay for them. If a man buys or hires a motor car, both parties know that he expects to be able to drive it. The stoppage of the sale of petrol, which would make it impossible for him to drive it, does not excuse him from his obligation to pay the purchase money or the hire for the agreed period.”

Disappearance of state of affairs essential to performance (assumed method of performance impossible)

- A contract may be frustrated by the disappearance of a state of affairs necessary to enable the contract to be performed in the manner contemplated by the parties
- In Codelfa, contract for construction of a railway provided time limits requiring C to work 3 shifts per day 7 days a week
 - Both parties erroneously believed legislation prevented residents from obtaining an injunction to restrain nuisance. Injunction granted restraining C to only work 2 shifts per day 6 days a week
 - Injunction frustrated the contract
 - Mason J – performance by means of a two shift operation was fundamentally different from that contemplated by the contract
 - Aickin J – the situation created by the injunction made it impossible to perform the contract according to its terms.
 - The alternative method of performance would mean the work was not completed by time specified, and this is radically different
- In Tsakiroglou, shipment of groundnuts, normal route (not expressly provided) was via Suez Canal
 - Military operations blocked the Suez Canal
 - Tsakiroglou could have transported the groundnuts via the Cape of Good Hope but didn’t
 - No frustration – no evidence that the buyer attached any importance to the route
 - A contract will not be frustrated where an alternative method of performance, although more onerous, is not ‘radically’ different from that contemplated in the contract.

Illegality

- A contract may be frustrated due to illegality where performance of the contract has become illegal
- In *Fibrosa*, contract to deliver certain machinery to buyers in Poland
 - Germany invaded Poland, Great Britain declared war on Germany, under the Trading with the Enemy Act, it became illegal for UK companies to trade with enemy states
 - Contract was frustrated, provision of the machinery was illegal
 - “a state of war ... must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, as to defeat and destroy the object of a commercial adventure like this.”

Delay/temporary impossibility

- A contract may be frustrated by events that cause or are likely to cause an inordinate delay in the performance of the contract
- Mere delay is not sufficient – must be ‘frustrating delay’
- In *National Carriers*, 10-year lease of warehouse
 - After 5.5 years, vehicular access restricted by road closure, anticipated to last 20 months, during the period, premises was useless
 - Doctrine of frustration applies to leases but will be rare (Lord Wilberforce)
 - There is no doubt that the interruption will have severely dislocated business (have to move goods from warehouse before closure and acquire alternative accommodation)
 - BUT no frustration – does not approach the gravity of a frustrating event
 - Out of 10 years, it will have lost under 2 years of use – not sufficient to frustrate the contract

Death/incapacity

‘...In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.’ (Taylor v Caldwell)

Step 2: Limits

Foreseeable

The event must not have been foreseeable by the parties at the time they entered into the contract

- Where it could be foreseen, it may be presumed that the parties have, at least impliedly, allocated the risk of the event occurring to the party affected
- In *Davis*, contract to build 78 homes in 8 months, took 22 months due to inadequate supplies of labour, incurred extra expenses
 - The possibility of enough labour and materials not being available was ‘before their eyes’ and could have been the subject of special contractual stipulation

Allocation of Risk

- Parties must not have expressly provided for the consequences of the particular event (otherwise performance cannot be ‘radically’ different)

Express provision in contract

- Whether or not a clause in a contract excludes frustration for a particular event is a matter of construction. The particular event may be different in nature to that contemplated at the time of the contract (*Codelfa*)
- In *Codelfa*, cl 18(2)(c) – contract provided that C will not operate the plant and equipment so as to cause a nuisance and looked at the possibility of a restriction on working hours
 - However court held this did not bar frustration

- Mason J – clauses were not so ‘wide-ranging’ as to cover an injunction, and were ‘quite consistent with the contemplated method of work being an essential element of the contract’
- In Fibrosa, cl 7 - “should despatch be hindered or delayed by ... any cause beyond our reasonable control including ... **war**... a reasonable extension of time shall be granted”
 - Clause didn’t apply as a reasonable extension of time couldn’t be given as you cannot predict the length of the war

Implied allocation of risk

- Latham CJ’s wedding dress example in Tooheys
 - “...a lady going to a dressmaker and ordering a dress as a wedding dress, both the intending bride and the dressmaker being aware that the dress was required for, and only for, the purposes of a wedding between the customer and a particular man. The dress is made and delivered. The wedding goes off without “default’ of the lady. No one would suggest that the lady is under no liability to pay for the dress, or even that she was entitled to cancel the order if the dress was only partly made... The true position, all would agree, is that the promise to pay is absolute”
- Davis Contractors v Fairbairn – builders assumed risk of delay
- Herne Bay Steamboat v Hutton – “the object of the hire becoming limited was at the risk of Mr Hutton”, and Epsom cab example discussed in the case
- Tsakiroglou v Noble: “If the parties do not specifically protect themselves against change, the loss must lie where it falls”

Fault

- The frustrating event must not be the fault of the person seeking to rely on it
- ‘Frustration occurs whenever the law recognizes that without default’ (Lord Redcliffe in Davis)