

# Consequences of frustration

## Under common law

- Automatic termination of the contract (*Scanlan's New Neon*)
- Frustration will discharge most future obligations under the contract, but rights which would survive termination will survive frustration, i.e. accrued rights (*Cutter v Powell*)
- The contract common law approach is generally to 'leave the losses where they fall' (*Fibrosa*)
  - Action for debt claims not available where right to payment has not accrued
- Subject to restitutionary claims, where available for:
  - Return of money paid (or relief from obligation to pay money due) on the basis of total failure of consideration (e.g. *Fibrosa v Fairbairn*)
    - Applying to facts: consider if goods were actually delivered. If not, distinguish *Fibrosa*
  - Party who has fully performed his/her obligations before the frustrating event is likely to have a right to payment (under restitution)
  - BUT not available for partial performance as in *Cutter v Powell*
- Criticised as too harsh, potential to lead to unfair outcomes (thus legislation tries to overcome this)

## Consequences under statute

### ACL section 36

- Money that was paid before the contract was frustrated must be repaid (*Fibrosa*)
- Money that was owing before the contract was frustrated need not be paid

### ACL section 37

- However, if the recipient incurred expenses related to the contract, and the court considers it 'just' in the circumstances, it can allow retention or recovery in whole or part up to the total amount that was paid or owing
- Nb: 'recipient' is usually person arguing that contract was not frustrated

### ACL section 38

- If one of the parties has received a non-monetary but nonetheless valuable benefit before the contract was frustrated, the other party will recover an amount that the court considers 'just' having regard to all the circumstances of the case.

### ACL s 35 (3): excluded contracts

- Legislation does not apply to:
  - Charter-parties (except a time charter-party or charter-party by way of demise)
  - Any contract (other than a charter-party) for the carriage of goods by sea
  - Any contract of insurance (with exceptions)

### ACL section 39: calculation of expenses incurred

- In estimating the amount of any expenses incurred by any party to a discharged contract, the court may include an amount that appears reasonable for:
  - a) Overhead expenses
  - b) Work or services performed personally by the party
- Example: service time / costs

### ACL s 40: when amounts payable under contract of insurance excluded

- Cannot take into account amounts payable to a party under a contract of insurance

ACL s 41: when contracts provisions continue to have affect despite frustration

- If contract is frustrated, but parties want to continue it, they can

ACL s 42: performed part of contract not frustrated

- If obligation is divisible, and frustrating event only applies to one / some obligations, only affected obligations are frustrated, the rest remain on foot

ACL s 43: nature of action

- All actions and proceedings to recover amounts under this part are taken to be founded on simple contract

ACL s 44: limitation period

- Subject to part II of the *Limitation of Actions Act 1959*, a cause of action under this part is taken to have first accrued at the time of discharge

## Vitiating factors - Duress

- Duress is concerned with pressure applied by one party to induce the other party to enter into a contract or to modify an existing contract
- Forms of duress:
  - Duress to person (threats or harm / prosecution of a family member)
  - Duress of goods (detention or threats of destruction) – accepted in *Hawker*
  - Economic duress (threats to breach a contract unless P enters into terms that are more favourable to D) – *North Ocean Shipping*
  - Task is to distinguish legitimate (negotiating strategy) from illegitimate pressure

## Elements

- Lord Scarman in *Universe Tankships v International Transport Workers Federation*:
  - 1) There must be pressure amounting to compulsion of will or absence of choice
  - 2) That pressure must be illegitimate

### First element: impaired consent

- Lord Scarman in *Universe Tankships* spoke of ‘compulsion of the will’
  - Victim so overborne that he/she is incapable of acting as a free and independent party
  - He added that it is not a lack of will but an intentional submission because there is no other practical choice
  - So the will is impaired, inhibited not destroyed
- McHugh J in *Crescendo Management*:
  - ‘A person who is the subject of duress knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action.’
- For economic duress:
  - Must be ‘the most urgent commercial necessity’ (Scarman in *Universe Tankships*)

### Second element: illegitimate pressure

- McHugh J in *Crescendo Management v Westpac NSWSC* stated:
  - Courts should ‘ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate
  - Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed.

- Economic duress:
  - Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress (McHugh J in *Crescendo*)
    - I.e, must have something unconscionable or unlawful to amount to illegitimate pressure
- In determining if pressure is legitimate, must consider (*Universe*, Scarman LJ):
  - The nature of the threat (which is many but not all cases will be decisive); and
  - The nature of the demand made

#### Threat of unlawful action

- Is usually illegitimate
  - Example: threat to person or property
- However, threat of breach of contract may not always be illegitimate
  - Example: a bona fide but mistaken belief about contractual obligations leading to a valid compromise or settlement of claim

#### Threat of lawful action

- Is usually legitimate (but not always)
- Threat of lawful action is illegitimate if there is no justifiable connection between the threat and the demand (e.g. blackmail)
- Proportionality between a threat and demand is also relevant

#### Causation

- Pressure must have been a factor in P's decision to enter contract, but not necessarily sole factor (McHugh J in *Crescendo Management*)
- Causation (and the absence of choice) may be evidenced by:
  - Protest, expeditious steps to set contract aside
  - Absence of independent advice
  - Lack of alternative courses of action
- The more serious the threat is, the less likelihood of protest etc. (see Lord Scarman: 'Victim's silence will not assist the bully')
- Onus is on the defendant to show that the pressure made no contribution to the decision (if illegitimate pressure established) (*Crescendo Management*)

#### Economic duress

- Consider: if [D] threatened to breach the contract in the event that [P] does not enter into a contract at a lower price (*Crescendo*)
- A threat to economic interests must be shown to be such as to leave the plaintiff with no practical or realistic alternative but to submit (*Universe Tankships*)
  - Example: in *Universe Tankships*, Universe had no practical choice as they needed their ship as a matter of 'the most urgent commercial necessity'. The pressure was illegitimate as the payment was not made in the context of trade dispute.
  - Example: in *Crescendo*, although the bank applied illegitimate pressure in withholding the funds, the pressure did not cause the company to execute the mortgage as the mortgage was executed before the relevant pressure was applied.
- Nb: the HCA is yet to make a determination on the requirements of economic duress, thus case law from NSW jurisdiction is used (*Crescendo*), which is persuasive but not binding

# Undue influence

## Actual undue influence

- Very rare and hard to make out
- 'It is necessary for [the plaintiff] to prove affirmatively that [the defendant] exerted undue influence on [the plaintiff] to enter into the particular transaction which is impugned'  
(*Barclays Bank plc v O'Brien*)

## Presumed undue influence

- Undue influence is presumed in equity where there is a relationship of influence:
  - If the plaintiff can prove that a relationship of influence existed between the parties prior to a contract, then:
    - There is a presumption that P was unduly influenced by D
    - This presumption represents a shift of the evidential burden of proving undue influence
- What is a 'relationship of influence':
  - Dixon J in *Johnson v Buttress*: relationships 'naturally involving an ascendancy or influence over that other'
    - In such a case 'it is the duty to use his position of influence in the interests of no-one but the man who is governed by his judgment, gives him dependence and intrusts him with his welfare'

## Deemed relationships of influence

- Includes (not exhaustive):
  - Parent and child
  - Guardian and ward (*Johnson v Buttress*)
  - Religious advisor and disciple (e.g. *Hartigan v Krishna*)
    - In *Krishna*, the NSWSC found that:
      - Gift in question was generated by religious enthusiasm, rather than the spiritual influence of another individual
      - The extreme improvidence of the gift and the lack of legal advice emphasised that the plaintiff was 'susceptible to be influenced even by the slightest and most subtle indications appearing to favour the donation'
      - Thus presumption not rebutted
  - Solicitor and client (e.g. *Westmelton v Archer and Schulman* (1982) VICSC)
    - In *Westmelton*, Archer dealt fairly and honestly and openly with a sophisticated and well informed corporate client, and the company wasn't relying upon legal advice from Archer regarding monetary potential of the profit sharing rights. Thus he was able to rebut the presumption
  - Doctor and patient
- Does not include:
  - Husband and wife
  - Financial adviser and client
  - Teacher and student
  - Child and parent

### Relationships of influence in fact

- If no deemed relationship of influence, the weaker party must prove there was a relationship of influence in fact for a presumption of influence to arise
- TEST: there will be a relationship of influence in fact where there is evidence that the plaintiff placed confidence and trust in the defendant and relied on them for guidance (*Johnson v Buttress*)

### Gifts: two categories of equitable intervention

- 1) The court is satisfied the gift was a result of influence expressly used
- 2) The relations between the donor and donee have been such as to raise presumption that donee has influenced donor (*Johnson v Buttress*)

### Rebutting the presumption

- Once a presumption of influence arises, undue influence will be made out unless the presumption can be rebutted by the stronger party (onus shifts)
- TEST: Presumption can be rebutted by proving that the P entered into the contract as a result of free exercise of will and informed judgment
  - This requires establishing that the plaintiff 'knew and understood what he or she was doing, and that he or she was acting independently of the influence of the dominant party' (Brereton J *Tulloch v Baybon & Ors*, NSWSC)
  - Influential considerations in deciding whether a plaintiff was acting independently is whether:
    - The plaintiff was given competent advice by an independent and well informed adviser, and
      - Nb: this is not conclusive rule of law (*Inche Noriah v Shaik Allie Bin Omar*), but might prove that the defendant did not take advantage of the plaintiff
    - Whether there was adequate time to reflect on that advice
  - Inadequacy of consideration is relevant, but not decisive
    - HCA in *Johnson v Buttress*: If the transaction in question is not a gift, but a purchase, then the adequacy of consideration becomes a material question
  - Court will consider the circumstances of the case and the age, character and experience of the plaintiff (Dixon J in *Johnson v Buttress*, HCA)
    - E.g. Buttress was 67 years old, illiterate and dependant on Johnson
  - Example of being unable to rebut presumption: Johnson could not show that the transfer of land was the result of the free exercise of Buttress's independent will in *Johnson v Buttress*
  - Example of rebutting presumption: in *Westmelton*, the presumption of attorney / client relationship was rebutted because the client was more knowledgeable in business happening than lawyer