

LAWS1075 CONDENSED

Semester 1, 2018

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Step 2: Determine whether the contract can be TERMINATED or FRUSTRATED?

2.1 Are there grounds for FRUSTRATION?

What are the requirements for frustration?

Frustration occurs whenever the law recognises that (*Davis Contractors v Fareham*, as confirmed in *Codelfa v SRA*):

- (1) without default of either party,
- (2) a contractual obligation has become incapable of being performed
- (3) because circumstances would render performance **radically different** from that undertaken by the contract.

(*Non haec in foedera veni. It was not this that I promised to do.*)

Examples:

- When there has been a **destruction of the subject** matter of the contract (*Taylor v Caldwell*)
- When the **foundation, purpose or basis** of the contract ceases to exist (*Krell v Henry*)
- When the frustrating event has given rise to a **fundamentally different situation from that contemplated** (*Brisbane City Council*)
- The disappearance of a **state of affairs necessary to enable the contract** to be performed in the manner contemplated by the parties (*Codelfa*)

What are the limitations on frustration?

- (1) Must **not** have been **contemplated or provided** for in contract (*Codelfa v SRA*)
- (2) Must **not** have been an event that was **reasonably foreseen** (*Davis Contractors v Fareham*)
- (3) Must have occurred **without fault of the party seeking to rely** on frustration (*Bank Line v Arthur Capel*)

What are the consequences of frustration?

COMMON LAW: Contract comes to an end immediately, with most future obligations being discharged, however rights and liabilities which have accrued unconditionally (prior to frustration) remain in place (*Fibrosa v Fairbairn*).

- If total failure + money already paid, restitution can be undertaken.
- If partial consideration + payment done, not entitled (by common law) to recover a payment made in respect of that performance i.e. must go to statute.

STATUTE: Frustrated Contracts Act 1978 (NSW).

2.2 Are there grounds for TERMINATION?

2.2.1 By Agreement

How can it be terminated through the original contract?

There may be an express right to terminate.

- Clause may specify length of the contract (after which it expires)
- Clauses may grant parties (one or both) a right to terminate
 - At will
 - After a specified period of time
 - After a certain event has eventuated

If there is no express clause, there may be an implied right to terminate with reasonable notice (*Crawford Fitting*).

Contracts “*should be construed practically, so as to give effect to the parties’ presumed commercial purposes and so as to not defeat the achievement of such purposes by an excessively narrow and artificially restricted construction*” (*Pan Foods v ANZ Group* [2000]).

How can it be terminated through a subsequent agreement?

Two interpretations of SA:

- (1) A SA may terminate and replace the original, in which case it ceases to operate (*Concut v Worell*).
 - **Novation**: where a subsequent contract doesn't change obligations but substitutes the parties. Treated as a new contract discharging the initial one (*Vickery v Woods (1952)*)
 - (2) A subsequent agreement in writing may modify an existing contract (*Suttor v Gundowda*).
- If a subsequent agreement is made to release the non-performing party from the original contract; “fresh consideration” must be given (*McDermott v Black*).
 - Can be done in a contract called **an accord and satisfaction**: the purchase of a release from an obligation whether arising under contract / tort by means of any valuable consideration, not being the actual performance of the obligation itself.
 - The accord = the agreement by which the obligation is discharged.
 - The satisfaction = the consideration which makes the agreement operative.
 - Two forms of fresh consideration for **an A&S**: (1) a promise; (2) actually doing the promised act.
 - If a SA is silent as to what happens to the original agreement, examine the intention of the parties (as disclosed by the terms and circumstances of the subsequent agreement).

Certain contracts are required to be in writing (i.e. Conveyancing Act 1919 (NSW)).

- An original contract required to be in writing may be terminated by a **subsequent oral contract** (*Tallerman v Nathan's Merchandise (1957) CLR*)
- Writing is required where the subsequent contract seeks to **vary** (since this creates an interest in land) the original contract (*Suttor v Gundowda (1950) CLR*). Dispositions of interests in land must also be in writing.

How can it be terminated by abandonment?

- (1) If both parties indicate the contract does not need to be performed any further (inferred agreement to discharge the contract) (*DTR Nominees v Mona*)
- (2) If an “*inordinate*” period of time has passed without call for performance by either party (*Fitzgerald v Masters*)
 - Unlikely to be deemed abandoned by court if there is part performance by one party.

2.2.2 For Failure of Contingent Condition

How can a contract be terminated by contingent condition?

A contingent condition makes the performance of the contract conditional upon the occurrence of a specified event that neither party promises will occur.

How can the word condition be used differently?

- Depends on the language used (*McTier v Haupt*).
- **Contingent**: if it is not fulfilled, there is no breach – contract is **voidable** (no right to damages).
- **Promissory**: essential term of contract. If not fulfilled, there is a breach – entitled to termination and damages.

What are the different types of contingent conditions?

Condition precedent: must be fulfilled before parties are bound to perform (*Meehan v Jones*)

- **Performance**: not obliged to perform unless condition is fulfilled (*Perri v Coolangatta*)
 - Cannot do anything inconsistent i.e. sell or destroy subject matter
- **Formation**: contract is not formed unless condition is fulfilled (*Masters v Cameron*)
 - “subject to the preparation of a formal contract”
 - Courts are **less inclined to interpret** as contingent to formation (*Perri v Coolangatta Investments*)

Condition subsequent: parties' obligations are immediately binding, but will come to an end should the event specified in the condition occur (*Suttor v Gundowda*)

Write as: “condition *subsequent* / *precedent* to A that qualifies *formation* / *performance*”