

## 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.”

*Davis Contractors Ltd v Fareham Urban UDC* Approved by High Court in *Codelfa Construction v State Rail Authority of NSW* and *Brisbane City Council v Group Projects*

- Contractual performance disrupted by events **outside the parties control**.
- Of such catastrophic proportions going beyond what the parties could have anticipated when entering the contract.
- In this sense, the doctrine of frustration provides an excuse “**a gap filler**” – for non-performance.
- Frustration brings the contract to an end.
- Parties are absolved from *future performance*, but all *accrued obligations* remain.
- NB *total failure of consideration*
- However, the test for frustration is not easily made out; it is only given in exceptional circumstances.

### Frustration Arises When:

- An event occurs that is **not the fault of either party**; and
- This event leaves the **contract incapable of performance**; or
- Performance becomes **radically/fundamentally different** from that, which was originally undertaken.

**Comparing performance as radically different, compare:** *Codelfa Construction v State Rail Authority*

- The **situation that arose** needs to be compared
- With that which was **originally contemplated**.

### *Davis Contractors v Fareham Urban (1956)*

#### Principles:

**Frustration is a strict test. It can only be made out where:**

- The circumstances that occurred were **not the fault of either party**; and
  - The circumstances have rendered **the contract incapable of performance**; or
  - If performance was to proceed, it would be rendered in a **radically different manner** than the manner contracted for.
- × Hardship, inconvenience and material loss are not enough to frustrate a contract.
  - ✓ Where the parties have not intended for the contract to be wide enough to apply to the situation that resulted, frustration will be found.
  - × Frustration cannot be made out where the frustrating event was reasonably foreseeable, and where the parties allocated for the risk of the frustrating event by making provisions for such events.

## ILLUSTRATIONS OF FRUSTRATION

### Illustrations of Frustration 6 Scenarios

Frustration may be found in one of six ways, each rendering performance impossible or commercially unfeasible

1. **Destruction of Subject Matter;**
2. **Disappearance of the Entire Basis of the Contract/Frustration of Purpose;**
3. **State of Affairs Essential to Performance have Changed;**
4. **Performance has become Illegal;**
5. **Delay.**
6. **Death or Incapacity**

### 1. Destruction of Subject Matter

A contract is likely to be frustrated where the subject matter of the contract is destroyed.

#### *Taylor v Caldwell (1863)*

- Contract to let out Surrey Gardens Music Hall to P for a series of 4 concerts
- After the agreement was made but before the first concert the Hall accidentally burnt down
- P alleged D was in breach for failing to provide the hall

#### **Principle:**

- In contracts where performance depends on the continued existence of a person or thing,
- There is an implied condition that where performance becomes impossible due to the perishing of the person or thing, and the perishing is not the fault of either party, both parties shall be excused from performance.

#### **Held:**

- "... the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance..."
- The Music Hall having ceased to exist, without fault of either party, both parties are excused,
- P from taking the gardens and paying the money,
- D from performing their promise to give the use of the Hall and Gardens and other things."

### 2. Disappearance of the Entire Basis of the Contract/Frustration of Purpose;

Where circumstances destroy the entire basis or purpose of the contract, the contract may be deemed frustrated. Generally, frustration will not be found in these contexts, as it is a strict test for a contract's entire basis to be destroyed.

#### *Krell v Henry (1903)*

- Hired a room for 2 days to watch the Kings coronation
- When the coronation was cancelled due to the Kings illness
- D refused to pay the balance of the agreed rent

#### **Principle:**

In assessing whether frustration of purpose has occurred, three questions must be asked:

1. What was **the foundation of the contract**, having regard to all circumstances?
2. Was the **purpose of the contract destroyed**, thus preventing performance?
3. Was the event preventing performance of such a character that it **could not have reasonably been in the contemplation** of the parties when the contract was made?

If the answer to all of the questions is **yes, frustration of purpose may be found.**

#### **Held:**

- I think that the coronation procession was the foundation of this contract and that the non-happening of it prevented the performance of the contract; and
- Secondly I think that non-happening of the procession was an event of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made.

### Criticisms of *Krell*:

- **Reasonable contemplation** – it wasn't unreasonable for the parties to have implicitly contemplated that the coronation would not take place, or that the route would change.
- **Basis of the contract** – there may have been other bases to the contract, such as renting out the apartments. Disappearance of the ENTIRE basis is a strict test, and was too easily made out in this context.

### *Herne Bay Steamboat v Hutton (1903)*

- P leased a boat, "The Cynthia" to D for the purpose of viewing the Royal Naval review
- The review was canceled

#### Principle:

- Loss of the entire basis of a contract is a strict test to make out.
- Where only part of a contract's basis has been lost, frustration will not be found.

#### Held:

- The contract was not frustrated
- Mr Hutton had two objectives
  1. Taking people to see the review
  2. Taking them around the fleet
- The purpose did not become impossible, it was a very legitimate interference but both parties would have contemplated this as the basis of the foundation of contract.

### *Brisbane City Council v Group Projects (1979)*

- GP owned 19 acres of land and wanted to redevelop it
- BC agreed to rezone the land as residential to allow for this and certain work to be carried out by GP
- Before rezoning could happen the Crown compulsorily acquired the land
- GP no longer owned the land and could not proceed
- BCC argued the contract was frustrated

#### Principle:

If the situation that eventuates wholly deprives a party of its purpose in the contract, the situation may be deemed fundamentally different from that contemplated by the parties when entering into the contract, thus leading to frustration.

#### Held:

- *Yet the acquisition of the land for a school site has wholly destroyed GP's purpose in undertaking any obligations at all.*
- This contract has been frustrated:
- There has arisen, as a result of compulsory acquisition of the land by the Crown for a school site, such a *fundamentally different situation from that contemplated when the contract was entered into that it is properly to be regarded as having come to an end at the date of acquisition by the Crown.*

### 3. State of Affairs Essential to Performance have Changed

A contract may be frustrated by the disappearance of a state of affairs necessary to enable performance in the manner contemplated by the parties.

- If the **contract specifies a certain method of performance** – frustration is found if that method *becomes impossible*;
- If the **contract does not specify a certain method of performance** – frustration will only be found if the possible methods of performance are *radically different* from those intended.

#### *Codelfa Construction v State Rail Authority of NSW (1982)*

- C contracted with A to perform excavations of an underground railway
- C was required to finish work in a set time frame but because of noise and pollution complaints an injunction was bought preventing timely completion of the work
- C claimed an amount in addition to the contract price and that the contract was frustrated by the granting of the injunction making the contract radically/fundamentally different

#### **Principle:**

- Whether a particular state of affairs is essential to performance of a contract will be assessed upon the contract's true construction, in light of the contract's surrounding circumstances – did the parties intend for the state of affairs to be essential in circumstances that would arise?
- If the situation that eventuates makes the state of affairs fundamentally different from that contemplated by the parties at the time of entering into the contract, the contract may be deemed frustrated.

#### **Held:**

- The granting of the injunction produced frustration of the contract
- **Mason J:** Accepted that changed circumstances such 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 was undertaken by the contract'.
- Frustration is "the termination of the contract by operation of law on the emergence of a fundamentally different situation."
- Critical issue, was the granting of the injunction something fundamentally different
- The answer must, I think, be in the affirmative... The contract work could not be carried out as contemplated by the contract once injunctions were granted, the effect of which was to prohibit the continuous three shift a day operation six days a week. Performance by means of a two shift operation, necessitated by the grant of the injunction, was fundamentally different from that contemplated by the contract".

#### *Tsakiroglou v Noble Thorl (1962)*

- T agreed to sell NT 300 tons of Sudanese groundnuts
- No route was specified for the shipping
- Military action delayed the shipping until April when it was expected Nov or Dec the year earlier
- T could have transported via another route but did not, considering the contract cancelled

#### **Principle:**

- A change in the state of affairs affecting performance may not frustrate the contract where there is an alternative method of performance available – even if this method is more onerous.
- Hardship, difficulty and/or a more onerous method of performance are no grounds for frustration.

#### **Held:**

- The Contract was not frustrated

#### *David Contractors v Fareham*

- DC entered a contract with F to build 78 homes for the local authority in 8 months for a fixed price
- Adequate labor was not available, so the work took 22 months
- Longer time meant DC incurred higher expenses
- DC argued the contract was frustrated and work should be paid for on a quantum meruit basis:
  - a. "a twenty two month project is not an eight month project"