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Frustration

Objectives

At the end of this chapter, you should be able to:

1. understand the concept of frustration as defined by the common law;
2. understand the theoretical development of the law of frustration;
3. understand the consequences that flow from a finding that the contract is frustrated; and
4. apply the relevant principles to given fact situations in order to determine if a contract has been frustrated and the consequences that flow from the contract being frustrated.

Key cases

- *Claude Neon Ltd v Hardie* [1970] Qd R 93
- *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337
- *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696
- *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32
- *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683
- *Krell v Henry* [1903] 2 KB 740
- *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524
- *Metropolitan Water Board v Dick, Kerr & Co* [1918] AC 119
- *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169
- *Taylor v Caldwell* (1863) 3 B & S 826; 122 ER 309

Key legislation

- Sale of Goods Act 1954 (ACT)
- Frustrated Contracts Act 1978 (NSW)
- Sale of Goods Act 1923 (NSW)
- Sale of Goods Act 1972 (NT)
- Sale of Goods Act 1896 (Qld)
- Frustrated Contracts Act 1988 (SA)
- Sale of Goods Act 1895 (SA)
- Sale of Goods Act 1896 (Tas)
- Fair Trading Act 1999 (Vic)
- Goods Act 1958 (Vic)
- Sale of Goods Act 1895 (WA)

Introduction

19.1 The traditional view is that where contractual obligations are assumed voluntarily and not imposed by law, a party can always guard against unforeseen contingencies by an express stipulation. It therefore followed that a party could not escape liability for breach just because performance was rendered futile or even impossible by future events. The doctrine of frustration was developed by the courts as a device by which the above rule could be mitigated where the justice of the case demanded it.

The basis of the doctrine has changed and developed over the years. When the doctrine first developed, it was expressed as arising from an implied term that the parties, in the circumstances that arose, would have agreed to bring the contract to an end: see *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 403–4; *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169. This doctrine was criticised on several bases, including that it was difficult to imply the parties would have agreed to discharge a contract for a reason that neither party either expected or foresaw: see *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 728. It has also been suggested in the past that the doctrine of frustration could be based on two further alternative theories:

- *The just solution theory* This is where justice demands intervention against the defects in the contract: *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd* [1942] AC 154 at 184;
- *The destruction of the foundation of the contract theory* Here, the fact the foundation of the contract has disappeared means the parties should be relieved of their obligations: *Krell v Henry* [1903] 2 KB 740: see **19.12**.

The modern concept of frustration, as stated by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, is now the preferred basis for the doctrine:

Frustration occurs whenever the law recognises 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 [at 729].

Lord Radcliffe's enunciation has been accepted in *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724 at 751–2; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337.

19.2 The determination of whether a contract is frustrated is a two-step process. First, a court will construe the terms of the contract in the light of the circumstances existing at the time of the frustration. Second, the court will consider whether the events that occurred did in fact frustrate the contract. The court will place importance on the occurrence of an unexpected event that changes the face of things but it must be more than inconvenience or hardship for the doctrine of frustration to come into play. For example, in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 728–9, the lack of material and labour was not enough to frustrate the contract. However, it is ultimately a question of law as to whether the frustrating event has made performance of the contract a thing radically different from that undertaken by the contract: *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 at 738 per Lord Diplock.

Scope of the Doctrine

19.3 In order to understand the operation of frustration, it is useful to examine the types of circumstances that lead to a conclusion that the contract is frustrated. The majority of cases occur because performance of the contract is impossible or illegal. Frustration may also occur where the foundation of the contract has been removed, or there is such a substantive delay that the contract can no longer be performed according to its terms.

Impossibility

Unavailability or destruction of a specific thing

19.4 If a particular thing essential to the continued performance of the contract is either destroyed or is no longer available to the parties the contract will be frustrated. This includes the subject matter of the contract, unless one of the parties has taken the risk of the accidental destruction of the subject matter.

Taylor v Caldwell
(1863) 3 B & S 826; 122 ER 309

The defendant had granted the plaintiffs a licence to use the Surrey Gardens and Music Hall for a series of concerts. After the agreement was made but before the first concert, the hall was accidentally burnt down.

The plaintiffs alleged that the defendant was in breach of his obligation to provide the hall, and sought to recover the expenditure they had incurred by way of advertising. The court held that both parties were excused from performance under the contract. Blackburn J stated:

... where, from the nature of the contract ... the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist ... [then the contract is] subject to an implied condition that the parties shall be excused in case [where], before breach, performance becomes impossible from the perishing of the thing without default of the contractor [at 312].

19.5 The Sale of Goods Acts in each state also provide that where goods perish without the fault of either party, prior to the passing of risk, the contract may be avoided: see Sale of Goods Act 1954 (ACT) s 12; Sale of Goods Act 1923 (NSW) s 12; Sale of Goods Act 1972 (NT) s 12; Sale of Goods Act 1896 (Qld) s 10; Sale of Goods Act 1895 (SA) s 7; Sale of Goods Act 1896 (Tas) s 12; Goods Act 1958 (Vic) s 12; Sale of Goods Act 1895 (WA) s 7. This rule is applicable only to goods that are ascertained under the contract, such as where the contract provides for the seller to sell the 10,000 bales of wheat currently in the seller's warehouse. Where the goods are unascertained, the contract will not be frustrated by such an event, such as where the contract provides for the supply of 10,000 bales of wheat. Until such time as the specific bales of wheat are appropriated to the contract, the goods under the contract are unascertained: see *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 1 KB 540.

Unavailability of a thing or person essential for performance

19.6 A contract that requires the exercise of personal skill on the part of one of the parties will be frustrated if that party should die or be rendered incapable of performing the skills required of him or her. A contract of employment for a fixed term may be frustrated if the employee suffers from an illness rendering him or her permanently incapable for work: see, for example, *Simmons Ltd v Hay* (1964) 81 WN (Pt 1) (NSW) 358; and *Chapman v Taylor* [2004] NSWSCA 456, where a temporary injury was sufficient to frustrate a building contract.

Method of performance impossible

19.7 If the parties have expressly provided that the contract is to be carried out in a certain way and a supervening event renders that method of performance no longer possible, the contract will be frustrated: