

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 7 - Performance and Discharge

Chapter 23 - Discharge by Frustration ¹

Section 1. - Introduction

Introduction

23-001

A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract or transforms the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract.

Frustration and mistake

23-002

Although the doctrine of frustration has some affinity with common mistake, in that both doctrines are essentially concerned with the allocation of risk of an unforeseen event which makes contractual performance more onerous or even impossible, ² it is customary to treat the two doctrines separately on the ground that common mistake is concerned with a common misapprehension which was present at the date of entry into the contract, whereas frustration is solely concerned with events which occur *after* the date of formation of the contract. ³

Narrow scope

23-003

Although the doctrine of frustration is of respectable antiquity, having been established in its present form in 1863 in *Taylor v Caldwell*, ⁴ it currently operates within rather narrow confines. This is so for two principal reasons. The first is that the courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has proved to be a bad bargain: frustration is "not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains". ⁵ The second is that parties to commercial contracts commonly make provision within their contract for the impact which various possible catastrophic events may have on their contractual obligations. Thus, force majeure clauses ⁶ and hardship and intervenor clauses ⁷ are frequently inserted into commercial contracts. The effect of these clauses is to reduce the practical significance of the doctrine of frustration because, where express provision has been made in the contract itself for the event which has actually occurred, then the contract is not frustrated. ⁸ Therefore the wider the ambit of contractual clauses, the narrower is the practical scope of the doctrine of frustration. ⁹

Historical development ¹⁰

23-004

Prior to the watershed decision of the Court of Queen's Bench in *Taylor v Caldwell* ¹¹ supervening

events were not regarded as an excuse for non-performance because the parties could have provided for such eventualities in their contract.¹² Once a contracting party assumed an obligation he was bound to fulfil it. The classic decision on this rule as to “absolute” contracts is *Paradine v Jane*,¹³ where a lessee who was sued for arrears of rent pleaded that he had been evicted and kept out of possession by an alien enemy; such an event was beyond his control, and had deprived him of the profits of the land from which he expected to receive the money to pay the rent. He was nevertheless held liable on the ground that:

“... where the law creates a duty or charge and the party is disabled to perform it and hath no remedy over, there the law will excuse him ... but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”¹⁴

Physical destruction of the subject matter

23-005

Although this rule was peculiar to English law, it continued to be enforced until 1863.¹⁵ However, in 1863, in *Taylor v Caldwell*¹⁶ the defendants had agreed to permit the plaintiffs to use a music-hall for concerts on four specified nights. After the contract was made, but before the first night arrived, the hall was destroyed by fire. Blackburn J., giving the judgment of the Court of Queen's Bench, held that the defendants were not liable in damages, since the doctrine of the sanctity of contracts applied only to a promise which was positive and absolute, and not subject to any condition express *or implied*. The court employed the concept of an implied condition to introduce the doctrine of frustration into English law, since it might appear from the nature of the contract that the parties must have known from the beginning that the fulfilment of the contract depended on the continuing existence of a particular person or thing. The court held that the particular contract in question was to be construed:

“... as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor ...¹⁷ The principle seems to us to be that, 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. In none of these cases is the promise other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel.”¹⁸

The principle of *Taylor v Caldwell* was soon applied in other cases¹⁹ and was accepted by the legislature in relation to agreements for the sale of goods.²⁰

Frustration of the adventure

23-006

Though the doctrine of frustration was first introduced into English law to cover situations where the physical subject matter of the contract had perished (as in *Taylor v Caldwell*²¹), it was quickly extended to cases where, without any such physical destruction, the commercial adventure envisaged by the parties was frustrated. “Frustration of the common venture” first appeared in 1874 in *Jackson v Union Marine Insurance Co Ltd*²² where a ship was required, under a charterparty, to

proceed from Liverpool to Newport to load a cargo for San Francisco. On the first day out from Liverpool the ship ran aground, and it took six weeks to refloat her, and another six months to complete repairs. The jury was asked whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered upon by the shipowner and the charterers. The jury answered in the affirmative, and the Court of Exchequer Chamber held that the charterparty ended upon the mishap. Bramwell B. said that the jury had found that “a voyage undertaken after the ship was sufficiently repaired would have been a different voyage ... different as a different adventure”.²³ With these decisions, the existence of the doctrine of frustration in English law was firmly established.

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 2. See, e.g. *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164; *Associated Japanese Bank (International) Ltd v Crédit du Nord* [1989] 1 W.L.R. 255, 264; *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd* [1990] 1 H.K.L.R. 317; *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] Q.B. 679 at [61]–[75].
 3. It can sometimes be difficult to decide into which category a particular case falls; see, for example, *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164 and *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226 (it has been argued that the latter case may have been too readily classified as an instance of frustration, see Carter and Tolhurst (1996) 10 J.C.L. 264, 265–266).
 4. (1863) 3 B. & S. 826.
 5. *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 752; *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [111]; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 (TCC), [2010] B.L.R. 235 at [68]. See also *Lee Chee Wei v Tan Hor Peow Victor* [2007] SGCA 22 at [48].
 6. See generally above, paras 15-152–15-159, Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995), Ch.3 and McKendrick, *Contract Terms* (2007), p.233.
 7. See generally Schmitthoff [1980] J.B.L. 82; Montague (1985) Int. Bus. Lawyer 135.
 8. *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 163.
 9. In the case of an elaborately drafted contract a court may conclude, as a matter of interpretation, that the parties preferred the “certainty” of termination pursuant to one of the terms of the contract to the uncertainty of possible discharge under the doctrine of frustration: see *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd's Rep. 209, especially 221–222.
 10. See generally Treitel, *Frustration and Force Majeure*, Ch.2 and Ibbetson, *Consensus Ad Idem* (1996), Ch.1.
 11. (1863) 3 B. & S. 826.
 12. *Paradine v Jane* (1646) Aleyn 26; *Atkinson v Ritchie* (1809) 10 East 530; *Barker v Hodgson* (1814) 3 M. & S. 267 (later held to be wrongly decided by Scrutton L.J. in *Ralli Bros v Compagnia Naviera Sota y. Aznar* [1920] 2 K.B. 287, 303); *Bute (Marquis of) v Thompson* (1844) 13 M. & W. 487; *Hills v Sughrue* (1846) 15 M. & W. 253; *Jervis v Tomkinson* (1856) 1 H.

& N. 195; *Kirk v Gibbs* (1857) 1 H. & N. 810; *Brown v Royal Insurance Society* (1859) 1 E. & E. 853; *Re Arthur* (1880) 14 Ch. D. 603. The same rule was applied in equity: *Leeds v Cheetham* (1827) 1 Sim. 146, 150.

- [13.](#) (1646) *Aleyn* 26. For fuller analysis of the case and its antecedents see Ibbetson, *Consensus Ad Idem* (1996), Ch.1.
- [14.](#) (1646) *Aleyn* 26, 27.
- [15.](#) There were some exceptions, e.g. no damages could be granted for breach of a promise to marry or of a contract for personal services if one party died (below, paras 23-037 et seq.), nor for the breach of a contractual promise when performance of that promise became illegal after the formation of the contract: *Atkinson v Ritchie* (1809) 10 East 530, 534–535. But the courts still refused to recognise any general principle that a party might be released from liability in the absence of an express condition which operated to release him in the particular events which occurred: *Hall v Wright* (1858) E.B. & E. 746, 789; *Kearon v Pearson* (1861) 2 H. & N. 386.
- [16.](#) (1863) 3 B. & S. 826.
- [17.](#) (1863) 3 B. & S. 826, 833–834.
- [18.](#) (1863) 3 B. & S. 826, 839.
- [19.](#) e.g. *Appleby v Myers* (1867) L.R. 2 C.P. 651.
- [20.](#) Sale of Goods Act 1893 s.7 (now to be found in s.7 of the Sale of Goods Act 1979). See below, para.23-047. (But the legislature did not intend to disturb the rules as to risk: see Vol.II, para.44-048.)
- [21.](#) (1863) 3 B. & S. 826.
- [22.](#) (1874) L.R. 10 C.P. 125.
- [23.](#) (1874) L.R. 10 C.P. 125, 141.

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Section 2. - The Test for Frustration ²⁴

Introduction

23-007

I Although the existence of the doctrine of frustration is now firmly established, its juristic basis remains rather uncertain. However, in *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*, ²⁵ Bingham L.J. set out the following five propositions which describe the essence of the doctrine. These propositions, he stated, were “established by the highest authority” and were “not open to question”. ²⁶ The first proposition was that the doctrine of frustration has evolved “to mitigate the rigour of the common law’s insistence on literal performance of absolute promises” ²⁷ and that its object was:

“... to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances.” ²⁸

Secondly, frustration operates to “kill the contract and discharge the parties from further liability under it” and that therefore it cannot be “lightly invoked” but must be kept within “very narrow limits and ought not to be extended”. ²⁹ Thirdly, frustration brings a contract to an end “forthwith, without more and automatically”. ³⁰ Fourthly, “the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it” ³¹ and it must be some “outside event or extraneous change of situation”. ³² Finally, a frustrating event must take place “without blame or fault on the side of the party seeking to rely on it”. ³³

No absolving power

23-008

While these propositions establish the essence of the doctrine of frustration and provide some guidance as to its limits, they do not explain precisely *why* it is that the courts intervene in these cases, except, at the broadest level, to give effect to the demands of justice. But this appeal to the demands of justice should not be taken to suggest that the court has a broad absolving power to set a contract aside whenever a change of circumstances causes hardship to one of the contracting parties. The proposition that the court has a power to impose a just and reasonable solution to the problem raised by the new circumstances ³⁴ was rejected by the House of Lords in *British Movietonews Ltd v London and District Cinemas Ltd*. ³⁵ Such a test is too wide, and gives too much discretion to the court; it ignores the limited data for the court’s decision, and suggests that attention should be concentrated on the harshness of enforcing the contract in the new situation, without any inquiry whether the original obligation was radically different. ³⁶

Basis of doctrine

23-009

Although a number of judges have considered the basis of the doctrine of frustration, it is not clear that the issue gives rise to any practical consequences. The various theories “shade into one another” and a “choice between them is a choice of what is the most appropriate to the particular contract under consideration”.³⁷ The principal theories which have been put forward are set out in the following paragraphs, before further consideration is given to the issue of whether or not any practical consequences flow from this debate.

The implied term test

23-010

The test which was originally adopted in *Taylor v Caldwell*³⁸ was the implied term test. The classic exposition of the test is to be found in the speech of Lord Loreburn in *F.A. Tamplin S.S. Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*³⁹.

“A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the court proceeded. It is, in my opinion, the true principle, for no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was a foundation on which the parties contracted ... Were the altered conditions such that, had they thought of them, the parties would have taken their chance of them, or such that as sensible men they would have said, ‘if that happens, of course, it is all over between us?’”

So it was by means of this test that the doctrine of frustration was first introduced into English law⁴⁰ and it was frequently accepted in later judgments.⁴¹

Objections to the implied term test

23-011

The implied term test has, however, been the subject of considerable criticism and it was finally laid to rest by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*.⁴² The test is artificial and often fictitious in its operation, since there would seldom be a genuine common intention to terminate the contract upon the occurrence of the particular event in question.⁴³ The parties in the normal case have not foreseen the event, and even if they had, they would probably have “sought to introduce reservations, or qualifications or compensations”.⁴⁴ As Lord Watson observed in *Dahl v Nelson, Donkin & Co*⁴⁵:

“... the meaning of the contract must be taken to be, not what the parties did intend (for they had neither thought nor intention regarding it), but that which the parties, as fair and reasonable men, would presumably have agreed upon if, having such possibility in view, they had made express provision as to their several rights and liabilities in the event of its occurrence.”

In *Davis Contractors v Fareham U.D.C.* Lord Radcliffe said that:

“... the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.” ⁴⁶

The implied term approach is also difficult to accept where the parties have actually foreseen the possibility of the event in question, or even inserted in their contract some express provision (short of termination of the contract) for the event which occurred, but the court nevertheless holds that the contract was frustrated by that event. ⁴⁷

Test of a radical change in the obligation

23-012

The test which found favour with the House of Lords in *Davis Contractors Ltd v Fareham U.D.C.* ⁴⁸ and in later cases ⁴⁹ may be formulated as follows: If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken? ⁵⁰ Thus, Lord Radcliffe said:

“... 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. Non haec in foedera veni. It was not this that I promised to do ... There must be ... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.” ⁵¹

Lord Reid put the test for frustration in a similar way:

“The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.” ⁵²

Later in his speech, ⁵³ he approved the words of Asquith L.J. that the question is whether the events alleged to frustrate the contract were:

“... fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply.” ⁵⁴

It is submitted that the test put forward by Lord Reid is substantially the same as that of Lord Radcliffe.

Confirmation of the test

23-013

In subsequent cases the House of Lords has expressly upheld the *Davis Contractors* formulation of the test for frustration. ⁵⁵ In *National Carriers Ltd v Panalpina (Northern) Ltd* ⁵⁶ Lord Simon restated the test as follows:

“Frustration of a contract takes place when there supervenes an event (without default of

either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.”⁵⁷

Yet, at the same time it was said that the doctrine should be flexible and capable of new applications as new circumstances arise.⁵⁸

Construction of the contract

23-014

Both Lords Reid and Radcliffe in *Davis Contractors* emphasised that the first step was to construe:

“... the terms which are in the contract read in the light of the nature of the contract, and of the relevant surrounding circumstances when the contract was made.”⁵⁹

From this construction the court should reach an impression of the scope of the original obligation, that is, the court should ascertain what the parties would be required to do in order to fulfil their literal promises in the original circumstances. This impression will depend on the court's estimate of what performance would have required in time, labour, money and materials, if there had been no change in the circumstances existing at the time the contract was made. The court should then examine the situation existing after the occurrence of the event alleged to have frustrated the contract, and ascertain what would be the obligation of the parties if the words of the contract were enforced in the new circumstances. Having discovered what was the original “obligation” and what would be the new “obligation” if the contract were still binding in the new circumstances, the last step in the process is for the court to compare the two obligations in order to decide whether the new obligation is a “radical” or “fundamental” change from the original obligation.⁶⁰ It is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the “obligation” or the actual effect of the promises of the parties construed in the light of the new circumstances. Was “performance ... fundamentally different in a commercial sense”?⁶¹

Application of the test

23-015

⚠ Their Lordships also agreed in *Davis Contractors* that it is a matter of law⁶² ⚠ for the court to construe the contract in the light of the facts existing at its formation and then “to determine whether the ultimate situation ... is or is not within the scope of the contract so construed”.⁶³ It has several times been emphasised in the House of Lords that “that conclusion is almost completely determined by what is ascertained as to mercantile usage and the understanding of mercantile men”.⁶⁴ Hence, the court should seldom interfere with an arbitrator's application of the test to particular facts:

“... when it is shown on the face of a reasoned award that the appointed tribunal has applied the right legal test, the court should in my view only interfere if on the facts found as applied to that right legal test, no reasonable person could have reached that conclusion. It ought not to interfere merely because the court thinks that upon those facts and applying that test, it would not or might not itself have reached the same conclusion, for to do that would be for the court to usurp what is the sole function of the tribunal of fact.”⁶⁵

Objective test

23-016

The House of Lords has accepted the view that the test for frustration is objective.⁶⁶ It is not a subjective inquiry into the actual or presumed intentions of the parties, as was suggested by the older criterion of the implied term, since the discharge of a contract on the ground of frustration occurs automatically upon the happening of the frustrating event, and does not depend upon any repudiation or other act of volition on the part of either party.⁶⁷ The fact that the parties, at the time of contracting, actually foresaw the possibility of the event or new circumstances in question does not necessarily prevent the doctrine of frustration from applying.⁶⁸

Other tests

23-017

Various other theories have been put forward in an attempt to provide a coherent basis for the doctrine of frustration. As we have noted,⁶⁹ some judges have maintained that the doctrine seeks to give effect to the demands of justice, but these statements cannot be invoked to justify the conferral upon the courts of a wide-ranging discretion to re-write the parties' bargain in the name of "fairness and reasonableness". Another theory which has been invoked is that both parties have been discharged from further performance of their contractual obligations because of a total failure of consideration; but this rationalisation has been rejected by the House of Lords.⁷⁰ The final theory put forward by Lord Haldane in *Tamplin S.S. Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*⁷¹ and Goddard J. in *Tatem Ltd v Gamboa*⁷² is that the doctrine is based on "the disappearance of the foundation of the contract". The difficulty with this theory lies in ascertaining the "foundation" of the contract⁷³; the inquiry would appear to be one based on the construction of the contract and, if this is so, it is not easy to see how it differs from the construction theory.

Practical differences between the tests

23-018

⚠ It is therefore difficult to discern any practical consequence which flows from the different tests because, as Lord Wilberforce has stated, they appear to shade into each other.⁷⁴ The courts have regard to the construction of the contract, the effect of the changed circumstances on the parties' contractual obligations, the intentions of the parties (objectively construed) and the demands of justice in deciding whether or not a contract has been frustrated. No one factor is conclusive: the court will balance these different factors in determining whether a contract has been frustrated. On the other hand, it must be conceded that the basis of the doctrine is not unimportant in jurisprudential terms. A test based on a fictitious or artificial assumption (such as the implied term approach) may prevent a proper understanding of the function of the doctrine and of the role of the court in applying it. And the literal application of one theory might lead to results which are incompatible with the rules which presently make up the doctrine of frustration. For example, the implied term theory, literally applied, may suggest that the question whether a contract is frustrated is one of fact, based on the intention of the parties, but it is clear law that the question whether a contract has been frustrated is one of law.⁷⁵ It is, however, unlikely that a modern court would apply a theory where it led to a result which was incompatible with the present rules and so it is submitted that no practical consequences flow from the debate as to the correct conceptual basis of the doctrine of frustration.⁷⁶ ⚠

A "multi-factorial" approach

23-019

Rather than seek to identify a single, definitive test that can be applied in all cases, more recent

authority supports a broader approach which seeks to take account of all of the facts and circumstances of the case when deciding whether or not a contract has been frustrated. This “multifactorial”⁷⁷ approach has regard, among other factors, to the following:

“... the terms of the contract itself, its matrix or context, the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, as at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties’ reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.”⁷⁸

The terms of the contract, its matrix or context and the parties’ knowledge, expectations, assumptions and contemplations, in particular as to risk, have been described as “ex ante factors”,⁷⁹ whereas the remaining factors “are postcontractual”.⁸⁰

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 24. See Treitel, *Frustration and Force Majeure*, 3rd edn (2010), paras 16–006—16–0176; Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19–114—19–123; J. Beatson, A. Burrows and J. Cartwright, *Anson’s Law of Contract*, 30th edn (2016), pp.509–514; Cheshire, Fifoot and Furmston, *Law of Contract*, 17th edn (2017), pp.711—716; Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), Ch.16; Webber, *Effect of War on Contracts*, 2nd edn, pp.404–478; McNair and Watts, *The Legal Effects of War*, 4th edn, pp.166 et seq., based on (1919) 35 L.Q.R. 84 and (1940) 56 L.Q.R. 173; Wade (1940) 56 L.Q.R. 519. For a comparison of different legal systems see E. Hondius and H.C. Grigoleit, *Unexpected Circumstances in European Contract Law* (2011).
 25. [1990] 1 Lloyd’s Rep. 1.
 26. [1990] 1 Lloyd’s Rep. 1, 8.
 27. Citing *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 510; *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 275; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 171.
 28. Citing *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 510; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 183, 193; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 701.
 29. Citing *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 459; *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 715, 727; *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] A.C. 724, 752. See also *Edwinton Commercial Corp v Tsaviris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep. 517 at [111].
 30. Citing *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 505; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524, 527; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 163, 170, 171, 187, 200; *Denny Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 274. See also *GF Sharp & Co Ltd v McMillan* [1998] I.R.L.R. 632.

31. Citing *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 510; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524, 530; *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 274; *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 729.
32. Citing *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, 909.
33. Citing *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 452; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 171; *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 729; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, 882, 909.
34. *British Movietonews Ltd v London & District Cinemas Ltd* [1951] 1 K.B. 190, 202; cf. Lord Denning's modified formulations in *Ocean Tramp Tankers v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 238 and in *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387, 1395; (pet. dis.) [1979] 1 W.L.R. 203 HL. For a recent example of an unsuccessful attempt to introduce the idea of an "equitable adjustment" into Scots law see *Lloyds TSB Foundation for Scotland v Lloyds Banking Group Plc* [2013] UKSC 3, [2013] 1 W.L.R. 366.
35. [1952] A.C. 166.
36. In *Notcutt v Universal Equipment Co (London) Ltd* [1986] 1 W.L.R. 641, 646–647 (below, para.23-038) the Court of Appeal rejected the suggestion that injustice was an *additional* factor to be considered after the factors which established a radical change in the obligation. In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [113], [132], the Court of Appeal affirmed that the dictates of justice is not an additional factor, but is a "relevant factor which underlies all and provides the ultimate rationale of the doctrine. If one uses this factor as a reality check, its answer should conform with a proper assessment of the issue of frustration".
37. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 693, per Lord Wilberforce.
38. (1863) 3 B. & S. 826.
39. [1916] 2 A.C. 397, 403–404.
40. *Taylor v Caldwell* (1863) 3 B. & S. 826.
41. e.g. *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 455 (Lord Sumner); *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 163 (Viscount Simon L.C.); *British Movietonews Ltd v London & District Cinemas Ltd* [1952] A.C. 166, 183 (Viscount Simon) and 187 (Lord Simonds); see also the references collected in McNair and Watts at pp.167–171.
42. [1981] A.C. 675, 687, 702, 717 (cf. at 693, 694).
43. *James Scott & Sons Ltd v Del Sel*, 1922 S.C. 592, 597; *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 728; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 687. See also *Horlock v Beal* [1916] 1 A.C. 486 (below, para.23-039).
44. *Denny, Mott and Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 275 (Lord Wright).
45. (1881) 6 App. Cas. 38, 59.
46. [1956] A.C. 696, 728.
47. See below, para.23-059.
48. [1956] A.C. 696 (for the facts, see below, para.23-050).

49. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675; *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] A.C. 724.
50. This formulation does not cover the special case of supervening illegality (see below, para. 23-024). With this formulation, compare that in *Williston on Contracts*, 3rd edn (1978), Vol.18, para.1931, at 8: “The important question is whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”
51. [1956] A.C. 696, 729. This statement was explicitly approved by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 688, 700, 702, 707, 717 and in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 744, 751–752. Earlier approval was given in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93. It has also been cited with approval by the Court of Appeal in *William Sindall Plc v Cambridgeshire CC* [1994] 1 W.L.R. 1016, 1039 and in *Globe Master Management Ltd v Boulus-Gad Ltd* [2002] EWCA Civ 313.
52. [1956] A.C. 696, 721. (Lord Somervell agreed with Lord Reid on this issue, 733.)
53. [1956] A.C. 696, 723.
54. *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 K.B. 632, 667. See also the words of Lord Sumner in *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 460: “I am of opinion that the requisitioning of the [ship] destroyed the identity of the chartered service and made the charter as a matter of business a *totally different thing*”; also the statement of Lord Simon in *British Movietonews Ltd v London & District Cinemas Ltd* [1952] A.C. 166, 185: “[I]f ... a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound *in a fundamentally different situation* which has now unexpectedly emerged, the contract ceases to bind at that point—not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but *because on its true construction it does not apply in that situation*”; and that of Lord Dunedin in *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119, 128: “An interruption may be so long as *to destroy the identity of the work or service*, when resumed, with the work or service interrupted” (italics supplied).
55. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675; *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724 (three of their Lordships in the former case referred to it as “the construction test”: 688, 702, 717); *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, 909, 918–919.
56. [1981] A.C. 675.
57. [1981] A.C. 675, 700. (On the use of the word “unjust”, see the use of “injustice”, 701, and below, para.23-017.)
58. [1981] A.C. 675, 692, 694, 701, 712.
59. [1956] A.C. 696, 720–721, per Lord Reid; cf. 729, per Lord Radcliffe.
60. “I turn then to consider the position after the Canal was closed, and to compare the rights and obligations of the parties thereafter, if the contract still bound them, with what their rights and obligations would have been if the Canal had remained open”. Per Lord Reid, in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 118. “Whether a supervening event is a frustrating event or not, is, in a wide variety of cases, a question of degree ...”, per Lord Hailsham, in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 688.
61. *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 119. See to the same effect *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 752; *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd’s Rep. 526 at [14].

62. **!**[1956] A.C. 696, 723; cf. 729; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93; *Armchair Answercall Ltd v People in Mind Ltd* [2016] EWCA Civ 1039 at [51] (“Frustration if it occurs, is a definite event. Whether any given event is a frustrating event is, once the facts said to constitute the event have been determined, a question of law. If it was, the fact that the parties did not immediately treat it as such does not alter the position. What the parties did or did not do after the event may, however, be a pointer to whether the event was in truth a frustrating one”).
63. [1956] A.C. 696, 721.
64. *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, 124, per Lord Radcliffe (cited with approval in *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 752; see also 738).
65. [1982] A.C. 724, 752–753 (per Lord Roskill, in a speech concurred in by all their Lordships). It is not “open to the court to impose its own view rather than adopt that of the arbitral tribunal” simply because “questions of frustration are ultimately questions of law” (at 753). cf. *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (The Wenjiang)* [1982] 2 All E.R. 437; and below, para.23-035 n.151; and para.23-097, especially n.418. But in cases where the issue before the court calls for the “application of established principles to a clearly defined event rendering performance impossible”, a court may be more willing to intervene because, in such a case, there is a “clear-cut issue of law” for the court: *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd’s Rep. 526 at [11]. In such a case, while the court must accept “loyally the findings of fact made by the arbitrators” it need not be “unduly inhibited by the arbitrators’ conclusion that the facts they have found are sufficient to satisfy the legal test for frustration”: *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd’s Rep. 526 at [11].
66. *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 728 (per Lord Radcliffe: “... the true action of the court ... consists in applying an objective rule of the law of contract”).
67. See the statement of Lord Sumner in *Hirji Mulji v Cheong Yue S.S. Co* [1926] A.C. 497, 510: “its legal effect [i.e. of frustration] does not depend on their intention, or their opinions or even knowledge as to the event which has brought this about ... [Frustration] is irrespective of the individuals concerned, their temperaments and failings, their interests and circumstances”. See also *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 274; *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd’s Rep. 1, 8. cf. the arguments of Goldberg (1972) 88 L.Q.R. 464. cf. also the principles on proving that a frustrating event was “self-induced”: below, para.23-063; *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301, 321–323 .
68. See below, para.23-059.
69. Above, para.23-007.
70. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 687, 702.
71. [1916] 2 A.C. 397, 406–407.
72. [1939] 1 K.B. 132.
73. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 687–688, 703.
74. [1981] A.C. 675, 693.
75. Above, para.23-015.
76. **!**Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-114—19-123. Treitel, *Frustration and Force Majeure*, 3rd edn (2014), paras 16-013—16-017.

- [77.](#) *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [111].
- [78.](#) *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [111]; *Melli Bank Plc v Holbud Ltd* [2013] EWHC 1506 (Comm), [2013] All E.R. (D) 165 (May) at [15]; *Bunge SA v Kyla Shipping Co Ltd* [2013] EWCA Civ 734, [2013] 2 Lloyd's Rep. 463 (affirming [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep. 565), where Longmore L.J. stated (at [7]) that the "tendency in the modern application of the law of frustration has been to move away from inflexible rules, such as cost versus value, to a multi-factorial approach". The multi-factorial approach has also been approved by the Supreme Court of New Zealand in *Planet Kids Ltd v Auckland Council* [2013] NZSC 147, [2014] 1 N.Z.L.R. 149 at [62].
- [79.](#) *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep. 195 at [105].
- [80.](#) *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep. 195 at [105].

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Part 7 - Performance and Discharge

Chapter 23 - Discharge by Frustration ¹

Section 3. - Illustrations of the Doctrine

(a) - General

Methods of classifying the cases on frustration

23-020

Since the doctrine of frustration depends on the construction of the “obligation” created by the particular contract in the light of its own circumstances, reported decisions can be only a rough guide to the future application of the doctrine. ⁸¹ Nevertheless, the scope of the doctrine in practice must be gleaned from a study of the decisions in the law reports. The cases may be classified by reference either to the different types of frustrating events (such as a change in the law or subsequent illegality, ⁸² outbreak of war, ⁸³ cancellation of an expected event ⁸⁴ or delay ⁸⁵), or by reference to particular categories of contracts where frustration has been invoked (such as personal contracts, ⁸⁶ charterparties, ⁸⁷ sale and carriage of goods, ⁸⁸ building contracts, ⁸⁹ leases, ⁹⁰ and contracts for the sale of land ⁹¹). The doctrine of executive necessity, according to which the Crown is unable to fetter by contractual undertakings the exercise in the future of its executive discretion, is discussed elsewhere in this Volume ⁹²; the discharge of contracts by the winding up of a company, ⁹³ or by bankruptcy, ⁹⁴ is also discussed elsewhere.

Illustrations of frustrating events

23-021

In addition to the frustrating events mentioned in the preceding paragraph, the following events may be taken as illustrations of the kind of events which have been held, in the circumstances of particular contracts, to bring the doctrine of frustration into operation: destruction by fire or other cause of the subject matter of the contract, ⁹⁵ an explosion or stranding disabling a ship, ⁹⁶ requisitioning of the subject matter of the contract by the government, ⁹⁷ seizure of a ship ⁹⁸ or expropriation of an oil concession ⁹⁹ by a foreign government, incapacity or death of a person obliged to perform personal services, ¹⁰⁰ and delay sufficiently long to frustrate the commercial adventure of the parties. ¹⁰¹ On the other hand, mere inconvenience, or hardship, or financial loss involved in performing the contract, ¹⁰² or delay which is within the commercial risk undertaken by the parties, ¹⁰³ has been held insufficient to frustrate particular contracts.

^{1.} Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.

^{81.} See above, para.23-014 n.60.

- [82.](#) Below, paras 23-022 et seq.
- [83.](#) Below, para.23-030.
- [84.](#) Below, paras 23-033—23-034.
- [85.](#) Below, para.23-035.
- [86.](#) Below, paras 23-037—23-040.
- [87.](#) Below, paras 23-041—23-046.
- [88.](#) Below, paras 23-047—23-048.
- [89.](#) Below, paras 23-049—23-051.
- [90.](#) Below, paras 23-052—23-056.
- [91.](#) Below, para.23-057.
- [92.](#) See above, paras 11-007—11-009.
- [93.](#) See above, paras 10-047—10-051.
- [94.](#) See above, paras 20-032 et seq.
- [95.](#) *Taylor v Caldwell* (1863) 3 B. & S. 826 (above, para.23-005) (distinguished in *New System Private Telephones (London) Ltd v Edward Hughes & Co* [1939] 2 All E.R. 844); *Appleby v Myers* (1867) L.R. 2 C.P. 651. cf. *Turner v Goldsmith* [1891] 1 Q.B. 544. cf. also *The Maira* (No.2) [1985] 1 Lloyd's Rep. 300 (contract for management of ship not frustrated by loss of the ship); affirmed on other grounds [1986] 2 Lloyd's Rep. 46.
- [96.](#) *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154; *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125 (above, para.23-006).
- [97.](#) See the cases cited below, paras 23-024—23-026, 23-041—23-043, and below, para.23-047 n.214.
- [98.](#) *Tatem v Gamboa* [1939] 1 K.B. 132 (below, para.23-044).
- [99.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232 (appeal to HL dismissed [1983] 2 A.C. 352).
- [100.](#) See the cases cited below, paras 23-037—23-039.
- [101.](#) Below, para.23-035.
- [102.](#) *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 729 (below, para.23-050); *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 707; *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 30 T.L.R. 316; *Hangkam Kwintong Woo v Liu Lan Fong* [1951] A.C. 707; *Palmco Shipping Inc v Continental Ore Corp* [1970] 2 Lloyd's Rep. 21, 32 (a difference in expense between the expected and the actual performance is not sufficient to produce frustration); *United International Pictures v Cine Bes Filmcheck VE Yapimcilik AS* [2003] EWHC 798 (Comm), [2003] All E.R. (D) 278 (Apr) (abandonment of exchange rate mechanism held not to have frustrated a contract); *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), [2010] 2 Lloyd's Rep. 668 at [50]. See also the cases on Sale and Carriage of Goods cited below, paras 23-047—23-048. The proposition that an increase in expense is not, of itself, sufficient to produce frustration may not be absolute; see Beatson, *Consensus Ad Idem* (1996), Ch.6. On the question whether a term permitting determination upon notice may be implied into a

long-term contract, see *Staffordshire A.H.A. v South Staffordshire Waterworks Co* [1978] 1 W.L.R. 1387; (pet. dis.) [1979] 1 W.L.R. 203 HL. cf. *Kirklees MBC v Yorks Woollen District Transport Co* [1978] L.G.R. 448; *Watford BC v Watford Rural Parish Council* (1988) 86 L.G.R. 524; *Islwyn BC v Newport BC* (1994) 6 Admin. L.R. 386. On the judicial response to problems caused by a fall in the value of money, see *Downes* (1985) 101 L.Q.R. 98; also above para.21-074.

[103.](#) Below, para.23-035.

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(i) - Subsequent Legal Changes and Supervening Illegality

Subsequent legal changes

23-022

A subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration; Parliament or another authority may intervene by legislative action, or the Government may exercise the royal prerogative or administrative powers so as to affect the legal situation of the contracting parties. In the leading case of *Baily v De Crespigny* ¹⁰⁴ a lessor was held not liable for an alleged breach of his covenant that neither he nor his assigns would build on a piece of land adjoining the demised premises, when a railway company, under its powers derived from a subsequent statute, compulsorily acquired the land and erected a station on it. In delivering the judgment of the court, Hannen J. said:

“The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assign chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for the parties.” ¹⁰⁵

The court also held that it made no difference whether the company was only empowered or was obliged by the statute to build on the land.

Changes affecting employment

23-023

Contracts of service may also be frustrated by a subsequent change in the law. In *R. v Reilly*, ¹⁰⁶ the appellant was appointed a member of a statutory board in Canada with a specified term of appointment and salary. During the tenure of the appointment the office was abolished by the repeal of the statute establishing the board. By petition of right the appellant claimed damages for breach of contract, but the Judicial Committee held that the contract was discharged, because further performance had become impossible by statute. Similarly, a solicitor's retainer agreement with a gas company was held to be frustrated by the nationalisation effected by the Gas Act 1948. ¹⁰⁷

Supervening illegality ¹⁰⁸

23-024

It is now customary to treat supervening illegality as an instance of frustration,¹⁰⁹ in that it is similar to frustration by a subsequent change in the law. Apart from the effect of an outbreak of war upon a contract, e.g. with a person who thereby becomes an alien enemy,¹¹⁰ many wartime cases illustrate the power of the Government under statutory authority to forbid, whether temporarily or permanently, the performance of a contract, and so frustrate it. In *Metropolitan Water Board v Dick, Kerr & Co Ltd*,¹¹¹ under a contract made in July 1914, a reservoir was to be constructed and to be completed in six years from 1914, subject to a proviso that if the contractors should be impeded or obstructed by any cause the engineer should have power to grant an extension of time. Under the powers conferred by the Defence of the Realm Acts and Regulations, the contractors were obliged to cease work on the reservoir by order of the Ministry of Munitions in 1916. The House of Lords held that the contract was frustrated by supervening impossibility, and that the provision for extending the time did not apply to the prohibition by the Ministry. The interruption was of such a character, and likely to last so long, that if the work was to be resumed after the war, it would be a different undertaking altogether. Lord Finlay L.C. said that the interruption was:

“... of such a character and duration that it vitally and fundamentally changed the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.”¹¹²

An express provision in the contract cannot exclude frustration by supervening illegality where this would be against public policy.¹¹³

Other war-time restrictions

23-025

In *Denny, Mott and Dickson Ltd v James B. Fraser & Co Ltd*¹¹⁴ a contract for the sale and purchase of timber contained an option for the appellants to purchase a timber-yard (which was meanwhile let to them) if the contract was terminated on notice given by either party. By the Control of Timber (No.4) Order 1939 further trading transactions under the contract became illegal, but in 1941 the appellants gave notice to terminate the contract, and also to exercise their option to purchase the timber-yard. The House of Lords held that the option to purchase was dependent on the trading agreement, that the 1939 Order had operated to frustrate the contract, and that, consequently, the option to purchase lapsed upon the frustration since it arose only if the contract was terminated by notice. Temporary, war-time restrictions may not frustrate a long-term lease, which will continue in force for many years after the restrictions are lifted; so long as it exists, the restriction will, however, provide an excuse for not complying with a covenant in the lease.¹¹⁵

Exercise of statutory power

23-026

The same principle of supervening illegality operates where a statutory power in existence at the time of making the contract is subsequently exercised to render illegal the performance of the contract. Thus in *Re Shipton Anderson & Co and Harrison Bros & Co*¹¹⁶ wheat was sold upon terms that payment in cash was to be made within seven days against a delivery order. But before delivery and before the property passed to the buyer the government requisitioned the wheat under an Act passed before the date of the contract; the contract was held to be frustrated so that the sellers were excused from performance.

Supervening illegality under a foreign law

23-027

Where a contract governed by English law as its applicable law is to be performed abroad, and that

performance becomes illegal by the law of the place of performance (lex loci solutionis), the contract will not, according to common law rules, be enforced in England.¹¹⁷ The principle of frustration by supervening illegality operates where the change in the lex loci solutionis occurs after the formation of the contract but before its performance. For the principle to apply, performance must include the doing in a foreign country of something which the laws of that country make it illegal to do. Thus an English court declined to enforce a contract governed by English law for the payment in Spain of freight under a charterparty exceeding the maximum amount fixed, after the making of the contract, by Spanish law.¹¹⁸ A party relying on frustration by the lex loci solutionis must show that the illegality covered the whole of the period within which performance was due; thus where a foreign export control regulation prohibited performance of a contract during only part of the contract period, the exporters were held liable for failure to perform during the time no prohibition existed.¹¹⁹ But a contract governed by English law is not frustrated where the lex loci solutionis, without making performance illegal, merely excuses a party from performance in full.¹²⁰ Equally a contract governed by English law is not frustrated because the party liable to perform would, by his performance, contravene the law of the place of his residence, or of which he is a national (if that law is neither the applicable law nor the lex loci solutionis)¹²¹ nor does it suffice that the act of performance is unlawful by the law of the country in which the act happens to be done.¹²²

Rome I Regulation

23-028

Assuming that the rule which precludes enforcement of a contract which has become illegal by the lex loci solutionis is a rule of English domestic law, it will continue to apply in cases falling within the scope of the Rome I Regulation on the Law Applicable to Contractual Obligations where, pursuant to the Regulation, English law is the law applicable to the contract.¹²³

Applicable law is a foreign law

23-029

It is uncertain, as a matter of common law, whether illegality by the lex loci solutionis as such has any effect in an English court if the law applicable to the contract is not English but a foreign law, and the place of performance is outside England.¹²⁴ In such cases, the effect of illegality by the lex loci solutionis would seem to be a matter for the applicable law, subject to the rules of English public policy.¹²⁵ However, art.9(3) of the Rome I Regulation now provides that effect may be given to the overriding mandatory provisions¹²⁶ of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. The word “may” is important in this context. A court is not required to give effect to the lex loci solutionis; it is given a discretion to do so. In exercising that discretion the court is directed to have regard to the “nature and purpose” of the provisions which render performance unlawful and to consider “the consequences of their application or non-application”.

Outbreak of war

23-030

The outbreak of war renders illegal all intercourse between British subjects (or other persons owing temporary allegiance to the Crown) and alien enemies.¹²⁷ Consequently, any contract which involves such intercourse is automatically dissolved by the outbreak of war, or by the party thereto becoming an alien enemy,¹²⁸ even though it contains a clause suspending its operation during the continuance of a state of war, for this would be void as against public policy.¹²⁹ Any contract which, though not actually made with a party who becomes an alien enemy, necessarily involves intercourse with or advantage to the enemy, is within the rule.¹³⁰ In other cases, where the outbreak of war does not itself render one party to the contract an alien enemy, the question whether the contract has been frustrated depends on the effect upon the contract of the acts done in furtherance of the war.¹³¹

Accrued rights

23-031

Accrued rights under a contract which has been frustrated (e.g. for a liquidated sum of money already due) are not destroyed,¹³² though the right to sue in respect of such rights may be suspended for the duration of the war or so long as the claimant remains an alien enemy.¹³³ Thus, where a partnership agreement is dissolved by one partner becoming an alien enemy the enemy partner is nevertheless entitled to a share in the profits made thereafter by the English partner with the aid of the enemy partner's share of the capital.¹³⁴

Exceptions

23-032

Some executory contracts, whose continuance in force is not against public policy, are not abrogated by one party becoming an alien enemy; for instance, a separation agreement by which a husband agrees to pay regular maintenance to his wife remains in force when she becomes an alien enemy, though during the war payments should be made to the Custodian of Enemy Property.¹³⁵

1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.

104. (1869) L.R. 4 Q.B. 180. See also *Islwyn BC v Newport BC* (1994) 6 Admin. L.R. 386 and *Hildron Finance Ltd v Sunley Holdings Ltd* [2010] EWHC 1681 (Ch.), [2010] 3 E.G.L.R. 1.

105. (1869) L.R. 4 Q.B. 180, 186–187.

106. [1934] A.C. 176.

107. *Studholme v South Western Gas Board* [1954] 1 W.L.R. 313. See also *Marshall v Glanvill* [1917] 2 K.B. 87.

108. Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.8.

109. McNair (1944) 60 L.Q.R. 160, 162–163; *Twentieth Century Fox Film Corporation v British Telecommunications Plc (No.2)* [2011] EWHC 2714 (Ch) at [47]. Supervening illegality is probably included in the term “frustration” in the Law Reform (Frustrated Contracts) Act 1943 (below, paras 23-074 et seq.). Cases of supervening illegality may, however, raise issues which do not arise in other cases of frustration, in particular, the public interest in ensuring that the law is observed: see *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep. 195 at [100].

110. See below, para.23-030.

111. [1918] A.C. 119. cf. *White & Carter Ltd v Carbis Bay Garage Ltd* [1941] 2 All E.R. 633.

112. [1918] A.C. 119, 126.

113. *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260 (below, para.23-030). The concern to uphold the public interest was also reflected in the judgment of Beatson J. in *Islamic Republic of*

- Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep. 195 at [100].
114. [1944] A.C. 265.
115. *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] A.C. 221 (below, para.23-052). cf. *Eyre v Johnson* [1946] K.B. 481 (below, para.23-066 n.322); *DVB Bank SE v Shere Shipping Co Ltd* [2013] EWHC 2321 (Comm) at [56]–[60].
116. [1915] 3 K.B. 676. Contrast *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch. 274.
117. *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 K.B. 287. For an illustration, see *The Nile Co for the Export of Agricultural Crops v H. & J.M. Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep. 555, 581–582 and see also *Lilly Icos LLC v 8PM Chemists Ltd* [2009] EWHC 1905 (Ch).
118. *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 K.B. 287; cf. *AV Pound & Co Ltd v MW Hardy & Co Inc* [1956] A.C. 588 (refusal by foreign authorities to grant export licence for performance of an English contract). On a partial prohibition by the *lex loci solutionis*, see Benjamin's *Sale of Goods*, 9th edn (2014), paras 18–396–18–403.
119. *Ross T Smyth & Co (Liverpool) Ltd v WN Lindsay (Leith) Ltd* [1953] 1 W.L.R. 1280. cf. *Walton (Grain and Shipping) Ltd v British Italian Trading Co Ltd* [1959] 1 Lloyd's Rep. 223.
120. *Jacobs v Credit Lyonnais* (1884) 12 Q.B.D. 589 (the headnote of this case is misleading: see *Ralli Bros v Compania Naviera Sota y Aznar*, above, at 292, 297, 301); *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 2 K.B. 467.
121. Dicey, Morris and Collins on the Conflict of Laws, 15th edn (2012), para.32–098; *Kleinwort Sons & Co v Ungarische Baumwolle Industrie Aktien-Gesellschaft* [1939] 2 K.B. 678 (the principle of this case is clearly approved by three members of the House of Lords in *Kahler v Midland Bank* [1950] A.C. 24); *Fox v Henderson Investment Fund Ltd* [1999] 2 Lloyd's Rep. 303, 306.
122. *Tamil Nadu Electricity Board v ST-CMA Electric Co Private Ltd* [2007] EWHC 1713 (Comm), [2008] 1 Lloyd's Rep. 93 at [47].
123. Regulation 593/2008 of June 17, 2008 art.10, on which see further para.30-305.
124. Dicey, Morris and Collins at paras 32–099–32–100. cf. A Briggs, *Private International Law in English Courts* (2014), para.7.251. The mere fact that performance has become illegal under the law of a foreign country does not of itself amount to frustration unless the contract expressly or impliedly requires performance in that country: *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep. 1, 5, 6.
125. For a discussion of the common law rules, see Mann (1937) 18 B.Y.B.I.L. 107. But see dicta to the contrary: *Zivnostenka Banka v Frankman* [1950] A.C. 57, 78; *Mackender v Feldia A.G.* [1967] 2 Q.B. 590, 601.
126. As defined in art.9(1), see further para.30-179 below.
127. *Robson v Premier Oil and Pipe Line Co Ltd* [1915] 2 Ch. 124. See above, para.16-035; McNair and Watts, *Legal Effects of War*, 4th edn, especially Ch.3; Webber, *Effect of War on Contracts*, 2nd edn; Rogers, *Effect of War on Contracts* (1940); Trotter, *Law of Contract during and after War*, 4th edn. As to who is an alien enemy, see above, paras 12-024, 16-172; Trading with the Enemy Act 1939 s.2 (as amended); Howard, *Trading with the Enemy* (1943).
128. *Esposito v Bowden* (1857) 7 E. & B. 763; *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260; *Naylor Benzon & Co Ltd v Krainische Industrie Gesellschaft* [1918] 2 K.B. 486. On the effect of war on a contract of agency, see Vol.II, para.31-166(iv).

- [129.](#) *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260.
- [130.](#) *Re Badische Co Ltd* [1921] 2 Ch. 331, 373–378. See also the *Fibrosa* case [1943] A.C. 32 (below, para.23-072).
- [131.](#) *Akties, Nord-Osterso Rederiet v E.A. Casper, Edgar & Co* (1923) 14 L.I.L. Rep. 203, 206; *Finelvet A.G. v Vinava Shipping Co Ltd* [1983] 1 W.L.R. 1469; *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (The Wenjiang (No.2))* [1983] 1 Lloyd's Rep. 400, 405–406. On delay, see below, para.23-035.
- [132.](#) McNair and Watts at pp.135–144; *Schering Ltd v Stockholms Enskilda Bank Aktiebolag* [1946] A.C. 219; *Arab Bank Ltd v Barclays Bank* [1954] A.C. 495; *Re Claim by Helbert Wagg & Co Ltd* [1956] Ch. 323, 354.
- [133.](#) See above, paras 12-024—12-032.
- [134.](#) *Hugh Stevenson and Sons Ltd v Aktiengesellschaft für Cartonnagen-Industrie* [1918] A.C. 239.
- [135.](#) *Bevan v Bevan* [1955] 2 Q.B. 227.

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The “coronation cases”: *Krell v Henry*

23-033

The cancellation of an expected event can, in exceptional circumstances, operate to frustrate a contract. That this is so can be demonstrated by reference to the “coronation cases”, so-called because they arose out of actions brought in consequence of the postponement of the coronation processions in June 1902, owing to the illness of King Edward VII. These cases are important both because they show that the event which is alleged to have frustrated the contract need not result in the physical destruction of the subject matter of the contract, but may frustrate the “commercial purpose” of the contract and because they also illustrate the narrow confines within which the doctrine of frustration currently operates. The most prominent of these cases is *Krell v Henry*, ¹³⁶ where the defendant agreed in writing to hire rooms in the plaintiff’s flat in Pall Mall on June 26 and 27 in order to see the coronation processions which had been announced for those days. The written contract made no express reference to the processions, but it was clear from the circumstances that both parties regarded the viewing of the processions as the sole purpose of the hiring. When the processions were postponed, the defendant declined to pay the balance of the agreed rent, and the Court of Appeal upheld his refusal, on the ground that “the Coronation procession was the foundation of this contract and that the non-happening of it prevented the performance of the contract” ¹³⁷ within the principle of *Taylor v Caldwell*. ¹³⁸ The court also held that parol evidence was admissible to prove what was the subject matter of the contract. ¹³⁹ Similarly, in *Chandler v Webster* ¹⁴⁰ another contract to let rooms “to view the first Coronation procession” was held to be frustrated by the postponement; the same result occurred with contracts to take seats on a stand built in order to view the procession. ¹⁴¹

Herne Bay Steamboat Co v Hutton


23-034


⚠ A different result was reached, however, in *Herne Bay Steamboat Co v Hutton* ¹⁴² where the plaintiffs’ steamboat was engaged by the defendant to take passengers from Herne Bay on June 28 and 29, 1902, “for the purpose of viewing the Naval Review at Spithead and for a day’s cruise round the fleet”. The hire was £250, of which £50 was paid in advance, the balance to be paid before the vessel left Herne Bay. On June 25 the review was cancelled. The plaintiffs asked the defendant for instructions and for the balance of hire. As the defendant did not reply the plaintiffs used the vessel for their own purposes. In an action for the balance of the £250 the Court of Appeal held that it was payable, as:

“... the purpose of Mr. Hutton, whether of seeing the naval review or of going round the

fleet with a party of paying guests, does not lay the foundation of the contract within the authorities,”¹⁴³

such as *Taylor v Caldwell*. The case may also be explicable on another ground, namely, that as the fleet remained anchored in Spithead, it was still possible to use the vessel “for a day’s cruise round the fleet”, so that there had not been a complete failure of the fundamental purpose of the contract.

Krell v Henry and *Herne Bay Steamboat Co v Hutton* are not entirely easy to reconcile.¹⁴⁴  But it is clear that it is *Krell* which is the exceptional case: it has been subject to much criticism¹⁴⁵ and as an authority it “is certainly not one to be extended”.¹⁴⁶ The vital factor in *Krell* was probably that the flat was hired for the days but not the nights and so the only conceivable purpose of the contract was to view the coronation procession. Thus the case has been kept within very narrow confines so that it cannot be invoked by a party whose aim is simply to escape from what has proved to be a bad bargain.¹⁴⁷

1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
- ^{136.} [1903] 2 K.B. 740. See Treitel, *Frustration and Force Majeure*, 3rd edn (2014), paras 7–006—7–014; McElroy & Williams (1941) 4 M.L.R. 241 and 5 M.L.R. 1.
- ^{137.} [1903] 2 K.B. 740, 751.
- ^{138.} (1863) 3 B. & S. 826 (above, para.23-005).
- ^{139.} [1903] 2 K.B. 740, 754.
- ^{140.} [1904] 1 K.B. 493. (That part of the case dealing with the legal consequences of frustration is no longer good law: see below, paras 23-072 et seq.)
- ^{141.} *Blakeley v Muller* [1903] 2 K.B. 760n. cf. *Clark v Lindsay* (1903) 88 L.T. 198; *Griffith v Brymer* (1903) 19 T.L.R. 434 (although this is a case of common mistake because the “impossibility” was antecedent).
- ^{142.} [1903] 2 K.B. 683. See Gottschalk, *Impossibility of Performance in Contract* (1945), pp.16–18. cf. *Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 K.B. 756.
- ^{143.} [1903] 2 K.B. 683, 689.
- ^{144.}  See the discussion of these cases in Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-041—19-043; Cheshire, Fifoot and Furmston, *Law of Contract*, 17th edn (2017), pp.717—718; McElroy & Williams (references in n.136, above).
- ^{145.} See, for example, *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 39 T.L.R. 316, 318.
- ^{146.} *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524, 529 (Lord Wright); *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), [2010] 2 Lloyd’s Rep. 265 at [310].
- ^{147.} *Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd* [1977] 1 W.L.R. 164; *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 752. See also

Congimex Companhia Geral SARL v Tradax Export SA [1983] 1 Lloyd's Rep. 250, 253.

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Delay ¹⁴⁸

23-035

It is often a difficult matter to decide whether a contract has been frustrated by an event or change in circumstances which causes unexpected delay in its performance. In *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)*, ¹⁴⁹ Lord Roskill, in a speech concurred in by all their Lordships, said:

“... it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations ‘radically different’ ... from that which was undertaken by the contract. But, as has often been said, business men must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. ¹⁵⁰ Often it will be a question of degree whether the effect of delay suffered, and likely to be suffered, will be such as to bring about frustration of the particular adventure in question.” ¹⁵¹

For this purpose, causes of delay should not be divided into classes: a strike may cause frustration of a commercial adventure through delay as much as any other cause:

“It is not the nature of the cause which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other.” ¹⁵²

To frustrate a contract, the delay must be abnormal, in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting. ¹⁵³ The fact that the delay was caused by “a new and unforeseeable factor or event” is a relevant matter. ¹⁵⁴ The probable length of the delay must be assessed in relation to the nature of the contract, and to the expected duration of the contract after the delay is expected to end. ¹⁵⁵ There can be no frustration if the delay in question was within the commercial risks undertaken by the parties. ¹⁵⁶

Illustrations

23-036

Many illustrations of the effect of delay on particular contracts will be found throughout this chapter: in relation to charterparties, delay caused by the stranding of the ship, ¹⁵⁷ the requisitioning of the ship by the Government, ¹⁵⁸ its seizure by insurgents, ¹⁵⁹ the blocking of the Suez Canal, ¹⁶⁰ or strikes ¹⁶¹; in relation to building contracts, delay caused by war-time restrictions, ¹⁶² or by bad weather and unforeseen shortage of labour ¹⁶³; in relation to contracts of carriage, delay caused by the blocking of the usual route ¹⁶⁴; and in relation to leases, the prohibition of building, ¹⁶⁵ or the closing of vehicular access to the property. ¹⁶⁶

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 - ^{148.} Treitel, *Frustration and Force Majeure*, 3rd edn (2014), paras 5–036–5–057; Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995) pp.122–131; Stannard (1983) 46 M.L.R. 738; J.E. Stannard, *Delay in the Performance of Contractual Obligations* (2007), paras 6.16–6.22 and Ch.12.
 - ^{149.} [1982] A.C. 724, 752.
 - ^{150.} “Commercial men must be entitled to act on reasonable commercial probabilities at the time they are called upon to make up their minds”: per Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 706 (see also at 688) (following *Embiricos v Sydney Reid & Co* [1914] 3 K.B. 45, 54). As to the point of time when prospective delay must be judged, see *Watts, Watts & Co Ltd v Mitsui & Co Ltd* [1917] A.C. 227, 245–246; *Andrew Millar & Co Ltd v Taylor & Co Ltd* [1916] 1 K.B. 402; *Total Gas Marketing Ltd v Arco British Ltd* [1998] 2 Lloyd’s Rep. 209, 222; *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep. 517 at [89]; also below, para.23-043, and McNair (1940) 56 L.Q.R. 173, 201–205.
 - ^{151.} On such a question, an appellate court should be reluctant to interfere with the conclusion of the tribunal of fact: see above, para.23-015; below, para.23-097 n.418. See *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia) (No.2)* [1983] 1 A.C. 736, 767–768; cf. *International Sea Tankers Inc v Hemisphere Shipping Co (The Wenjiang)* [1982] 2 All E.R. 437; *Adelfamar SA v Silos E. Mangimi Martini SpA* [1988] 2 Lloyd’s Rep. 466, 471. A court may, however, be more willing to intervene with the finding of an arbitrator in a case which calls for the “application of established principles to a clearly defined event rendering performance impossible”, *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd’s Rep. 526 at [11], but cases of delay are likely to involve questions of fact and degree and so are unlikely to be sufficiently clear-cut to warrant the intervention of the court.
 - ^{152.} *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724, 754 (per Lord Roskill, citing *The Penelope* [1928] P. 180); *Eridania SpA v Rudolf A. Oetker (The Fjord Wind)* [1998] C.L.C. 1187.
 - ^{153.} *Blankley v Central Manchester and Manchester Children’s University Hospitals NHS Trust* [2014] EWHC 168 (QB), [2014] 1 W.L.R. 2683 at [40] (upheld on appeal: [2015] EWCA Civ 18) and see also the quotation, below, in para.23-050.
 - ^{154.} See below, paras 23-050, 23-059.

- [155.](#) This is particularly important in leases (below, paras 23-052—23-056); charterparties (below, paras 23-041—23-046); and building contracts (below, paras 23-049—23-051).
- [156.](#) *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696; *King v Parker* (1876) 34 L.T. 887 (delay in deliveries of coal due to strike held insufficient to frustrate contract of sale); *Trade and Transport Inc v Iino Kaiun Kaisha Ltd* [1973] 1 W.L.R. 210, 221–222; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep. 509, 514, 515–516; *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [83]; approving [2006] EWHC 1713 (Comm) at [83]. (But see the comment of Lord Roskill on the court's imposing its own view on this issue, rather than adopting the view of the arbitral tribunal: *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] A.C. 724, 752–753; and n.65, above.)
- [157.](#) Above, para.23-048.
- [158.](#) Below, paras 23-041—23-043.
- [159.](#) Below, para.23-044.
- [160.](#) Below, para.23-044.
- [161.](#) Below, para.23-045.
- [162.](#) Below, para.23-024.
- [163.](#) Below, paras 23-050—23-051.
- [164.](#) Below, para.23-048.
- [165.](#) Below, para.23-054.
- [166.](#) Below, para.23-055.

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(i) - Personal Contracts ¹⁶⁷

Death

23-037

The rule is stated by Pollock C.B. in *Hall v Wright* ¹⁶⁸:

“All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.”

Thus, in *Graves v Cohen* ¹⁶⁹ the court considered the effect upon a jockey's contract for personal services of the death of his employer, a racehorse owner. The court held that death frustrated his jockey's contract with him, since the contract created a relationship involving mutual confidence. However, in *Phillips v Alhambra Palace Co Ltd* ¹⁷⁰ one partner in a firm of music-hall proprietors died after the firm had engaged a troupe of performers, but it was held that the contract was not frustrated, since it was not of such a personal character and so could be enforced against the surviving partners. Similarly, it has been held that a tenancy at a weekly rent is not determined by the death of the tenant. ¹⁷¹

Illness or incapacity

23-038

The question whether a contract of employment has been frustrated ¹⁷² by the employee's illness or incapacity depends on whether it was of such a nature or likely to continue for such a period, that future performance of his contractual duties would be either impossible or radically different from that envisaged by the contract. ¹⁷³ In applying this test, the court will treat as relevant factors the terms of the contract (including any sick pay provisions), the nature and expected duration of the employment, the period of past employment, and the prospects of recovery. ¹⁷⁴ Thus, permanent illness may frustrate an apprenticeship, ¹⁷⁵ while a short period of illness may frustrate a shorter-term contract. ¹⁷⁶ A periodic contract of employment which is determinable by the employer by short notice may nevertheless be frustrated by illness or injury which incapacitates the employee ¹⁷⁷: in *Notcutt v Universal Equipment Co (London) Ltd*, it was held that the contract was frustrated (by operation of law and thus without notice) as soon as it became clear that the employee's illness would prevent him from ever working again. ¹⁷⁸ Illness may also provide an employee with a temporary excuse for non-performance of his contractual obligations without the contract being discharged by operation of the doctrine of frustration. ¹⁷⁹

Imprisonment or compulsory service

23-039

A sentence of imprisonment (or of Borstal training) upon an employee (except possibly in the case of a very short sentence) will frustrate his contract of employment or of apprenticeship as from the date of the sentence. ¹⁸⁰ Detention during war-time may also frustrate a contract. In *Horlock v Beal* ¹⁸¹ a British ship was detained in a German port on the outbreak of the First World War and the crew imprisoned. The House of Lords held that the crew were not entitled to wages during their detention, which had rendered it impossible for them to fulfil their contract of employment. Other contracts of employment have been frustrated where a refugee, employed in England, was interned during the war, ¹⁸² and where a music-hall artiste was called up for service in the army. ¹⁸³

Other events

23-040

If an arbitration is restricted to the submission of an identified, existing dispute to a named arbitrator, the agreement is frustrated if the arbitrator turns out not to be impartial. ¹⁸⁴ But long delay in proceeding with an arbitration does not frustrate the agreement to submit the dispute to arbitration. ¹⁸⁵ A separation agreement under which the husband covenants to pay maintenance to his wife is not frustrated by a subsequent decree of divorce obtained by the wife, ¹⁸⁶ nor by a subsequent decree of nullity obtained by the husband on the ground of the wife's incapacity. ¹⁸⁷ The doctrine of frustration has been held to be inapplicable to a consent order made in ancillary relief proceedings. ¹⁸⁸ The Court of Appeal has left open the question whether the doctrine of frustration could ever apply to the status of marriage, ¹⁸⁹ but it is submitted that it should not, because to frustrate a marriage under a doctrine of the common law would amount to adding to the grounds for divorce without legislation.

1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.

¹⁶⁷. See above, para.23-023; Vol.II, paras 40-175—40-177.

¹⁶⁸. (1858) *E.B. & E.* 746, 793. (The actual decision in this case, to the effect that supervening illness of the defendant did not frustrate a contract to marry, even though the defendant could not consummate the marriage without danger to his life, might not have been followed, quite apart from the change in the law which now prevents promises to marry from giving rise to legal rights: Law Reform (Miscellaneous Provisions) Act 1970 s.1. The case is discussed in more detail by Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.2-015. For a discussion of the previous law on frustration of a promise to marry, see Powell (1961) 14 C.L.P. 100, cf. *Stubbs v Holywell Ry* (1867) *L.R.* 2 Ex. 311.)

¹⁶⁹. (1930) 46 *T.L.R.* 121. See also *Morgan v Manser* [1948] 1 *K.B.* 184.

¹⁷⁰. [1901] 1 *Q.B.* 59; for the converse case, cf. *Harvey v Tivoli (Manchester) Ltd* (1907) 23 *T.L.R.* 592.

¹⁷¹. *Youngmin v Heath* [1974] 1 *All E.R.* 461 (although the judgments do not discuss the case in terms of the doctrine of frustration).

¹⁷². Even where the contract of employment has not been frustrated, a dismissal of an employee on

the grounds of ill-health may not be “unfair” within the relevant statutory provisions: see Vol.II, para.40-223. See Mogridge (1982) 132 New L.J. 795.

173. *Storey v Fulham Steel Works* (1907) 24 T.L.R. 89; *Condor v The Barron Knights Ltd* [1966] 1 W.L.R. 87; *Marshall v Harland & Wolff Ltd* [1972] 1 W.L.R. 899; *Hebden v Forsey & Son* [1973] I.C.R. 607; *Hart v A.R. Marshall & Sons (Bulwell) Ltd* [1977] 1 W.L.R. 1067; *Notcutt v Universal Equipment Co (London) Ltd* [1986] 1 W.L.R. 641; *GF Sharp & Co Ltd v McMillan* [1998] I.R.L.R. 632. See Howarth [1987] C.L.J. 47; S. Deakin and G. Morris, *Labour Law*, 6th edn (2012), para.5.79.
174. *Marshall v Harland & Wolff Ltd* [1972] 1 W.L.R. 899, 903–905; *Blankley v Central Manchester and Manchester Children’s University Hospitals NHS Trust* [2014] EWHC 168 (QB), [2014] 1 W.L.R. 2683 at [43] (upheld on appeal [2015] EWCA Civ 18). See Freedland, *The Personal Employment Contract* (2003), pp.440–449. cf. below, para.23-043. It may be that permanent incapacity alone will not suffice to frustrate a contract of employment, on the basis that the contract itself may, exceptionally, envisage the possibility that the employee will continue to be employed notwithstanding the fact that he or she is suffering a permanent incapacity: see *R. (Verner) v Derby City Council* [2003] EWHC 2708 (Admin), [2004] I.C.R. 535 at [66]. Lindsay J. concluded (at [68]) that in such a case the contract of employment continues to exist: “[I]n an entirely shadowy form in which, by reason of the employee’s incapacity and retirement, the employer cannot require any performance and the employee cannot offer it”.
175. *Boast v Firth* (1868) L.R. 4 C.P. 1. (Temporary illness, however, may give an employee a temporary excuse for failure to work: below, paras 23-066—23-069, and Vol.II, para.40-177.)
176. *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] I.C.R. 260 (“has the time arrived when the employer can no longer reasonably be expected to keep the absent employee’s post open for him?”: 264).
177. *Notcutt v Universal Equipment Co (London) Ltd* [1986] 1 W.L.R. 641.
178. [1986] 1 W.L.R. 641.
179. This, it is submitted, is the best explanation of the difficult case of *Poussard v Spiers and Pond* (1876) 1 Q.B.D. 410. The contract there was not automatically discharged as a result of the plaintiff’s illness, rather, the defendants were given an option to terminate the contract and they chose to exercise that option. See further para.23-068 n.328.
180. *Hare v Murphy Bros Ltd* [1974] I.C.R. 603 (12 months’ imprisonment); *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301 (Borstal training, which is for an indefinite period: the sentence would be “a substantial break in the period of training” under the apprenticeship agreement (at 320) which had not yet run for half the period). But see *Chakki v United Yeast Co Ltd* [1982] 2 All E.R. 446 (imprisonment may not frustrate the contract immediately upon sentence); S. Deakin and G. Morris, *Labour Law*, 6th edn (2012), paras 5.78-5.79.
181. [1916] 1 A.C. 486 (distinguished in *Ottoman Bank v Chakarian* [1930] A.C. 277, where a temporary and limited disability did not frustrate a contract of service).
182. *Unger v Preston Corp* [1942] 1 All E.R. 200. cf. *Nordman v Rayner & Sturges* (1916) 33 T.L.R. 87.
183. *Morgan v Manser* [1948] 1 K.B. 184. See also *Marshall v Glanvill* [1917] 2 K.B. 87 (above, para.23-023). cf. *Hangkam Kwintong Woo v Liu Lan Fong* [1951] A.C. 707 (agency not frustrated by agent being in enemy-occupied territory).
184. *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd* [1981] A.C. 909, 981.
185. Delay was employed in an unsuccessful attempt to invoke the doctrine of frustration in a line of cases which arose out of agreements to arbitrate which had “gone to sleep” and then one party

later attempted to revive the arbitration (the leading example is the decision of the House of Lords in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, discussed in the 27th edition of this work at para.23-025). The problem has now been resolved by statute giving to the arbitrator the power to dismiss any claim in a dispute referred to him if it appears to him that there has been an inordinate and inexcusable delay on the part of the claimant in pursuing the claim and that the delay either will give rise or is likely to give rise to a substantial risk that it is not possible to have a fair resolution of the issues or that it has caused, or is likely to have caused, serious prejudice to the respondent (Arbitration Act 1996 s.41(3)). Regard may be had to delay which occurred before arbitrators were given this statutory power (see *L'Office Cherifien des Phosphates v Yamashita-Shinnhon S.S. Co Ltd* [1994] 1 A.C. 486). The intervention of statute has removed the need to invoke the doctrine of frustration in this fact situation.

[186.](#) *May v May* [1929] 2 K.B. 386. The result is the same if the divorce is obtained by the husband: *Charlesworth v Holt* (1873) L.R. 9 Ex. 38.

[187.](#) *Adams v Adams* [1941] 1 K.B. 536. (In this case, as well as in *May v May*, above, it was open to either party to apply to the court for a variation of the agreement: see now s.35 of the Matrimonial Causes Act 1973; *Tomkins v Tomkins* [1948] P. 170.)

[188.](#) *S v S (Ancillary Relief: Consent Order)* [2002] EWHC 223 (Fam), [2003] Fam. 1 at [30].

[189.](#) *Kenward v Kenward* [1951] P. 124.

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(ii) - Charterparties ¹⁹⁰

Requisitioning

23-041

! The doctrine of frustration has been frequently invoked in disputes concerning charterparties, and the application of the doctrine is well illustrated by such cases. A leading decision of the House of Lords is *Bank Line Ltd v Arthur Capel & Co*, ¹⁹¹ where a ship was let on a time charter of 12 months from the time she was delivered to the charterers. Before such delivery, however, the ship was requisitioned by the Government. The charterparty contained a special clause giving the charterers the option of cancelling the charter if the ship was not delivered by a fixed date or if she was commandeered by the Government during the currency of the charter, but the charterers did not exercise their option to cancel. Three months after the requisitioning the owners (who regarded the charterparty as frustrated) sold the ship to third parties subject to her release by the Government, and a month later she was released and the sale completed. The charterers brought an action for non-delivery of the ship, but the House of Lords held that the doctrine of frustration applied to time charters, and that the object of this charterparty had been frustrated by the requisitioning and detention of the ship, since the identity of the chartered service had been destroyed. The House also held that the doctrine of frustration had not been excluded by the special clauses of the charterparty. They merely gave the charterers an express option to cancel in the event of requisition, "without waiting to see or having to show that its object is thereby frustrated". ¹⁹² Their function was not to preclude resort to frustration.

The Tamplin case

23-042

Three years prior to *Bank Line* the House of Lords decided another case on frustration of a charterparty by requisitioning, namely, *F.A. Tamplin S.S. Co Ltd v Anglo-American Petroleum Products Co Ltd*. ¹⁹³ In the latter case a ship was chartered under a time charter for five years to sail between any safe ports within certain limits as the charterers should direct. After the outbreak of the First World War, when the charter had nearly three years to run, the ship was requisitioned by the Admiralty and converted by structural alterations into a troopship. The owners contended that the charter had been determined by the requisitioning, but this was denied by the charterers, who were willing to continue to pay the agreed freight. The House decided by a majority that the interruption was not sufficient to frustrate the contract. Earl Loreburn said that both parties:

"... would have been considerably surprised to be told that interruption for a few months was to release them both from a time charter that was to last five years ... I think that

they took their chance of lesser interruptions and the condition I should imply goes no further than that they should be excused if substantially the whole contract became impossible of performance, or in other words, impracticable, by some cause for which neither was responsible.” ¹⁹⁴

The fact that it was the shipowners rather than the charterers who were arguing that the contract was frustrated so that they could obtain the generous rates of compensation paid by the Government undoubtedly weighed with the majority. ¹⁹⁵

The impact of the interruption

23-043

The application of the doctrine of frustration will always depend on the particular facts of each case, but it is difficult to reconcile these two cases, except on the basis that in *Tamplin* the interruption was of a time charter for five years, while in *Bank Line* the interruption had a more serious effect, since the time charter was for the much shorter period of one year:

“... the main thing to be considered is the probable length of the total deprivation of the use of the chartered ship compared with the unexpired duration of the charterparty ... The probabilities as to the length of the deprivation and not the certainty arrived at after the event are also material. The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay, and had to decide what to do.” ¹⁹⁶

This approach to the problem of requisitioning is supported by the case of *Port Line Ltd v Ben Line Steamers Ltd*, ¹⁹⁷ where Diplock J. held that a time charterparty for 30 months (of which 17 had expired) was not frustrated by a government requisitioning which was expected to last, and did in fact last, only about three months. At the time of derequisition of the vessel there was still 10 months of the charterparty to run and in these circumstances it could not be said that the contract was frustrated. The fact that the ship was requisitioned under the prerogative of the Crown, which meant that the Crown could retain the ship only for such period as was necessary for the defence of the realm was a relevant factor because it indicated that the requisition was “necessarily a temporary taking of possession”. ¹⁹⁸

Other frustrating events

23-044

In *W.J. Tatem v Gamboa* ¹⁹⁹ a ship was chartered by an agent of the Spanish Republican Government under a time charter for 30 days during the Spanish Civil War, in order to evacuate the civil population from north Spain. The hire of £250 a day (three times the normal rate) was payable until redelivery at a French port, and it was paid in advance for 30 days from July 1, when the charterers took over the ship. On July 14, she was seized by a Nationalist cruiser and detained until September 7. The risk of capture by the insurgents was known to the parties, but there was no provision for this event in the charterparty. The owners claimed hire at £250 a day from August 1 to September 11, the date of redelivery, but Goddard J. held that performance of the charterparty had been frustrated by the seizure. ²⁰⁰ In *The Eugenia*, ²⁰¹ the Court of Appeal held that a time charterparty, starting at Genoa for a single “trip out to India via Black Sea” (for which the Suez Canal was the customary route) was not frustrated by the blocking of the canal in 1956. Although the voyage around the Cape of Good Hope was longer and more expensive, it was not a “fundamentally different” voyage, since the cargo of metal goods “would not be adversely affected by the longer voyage and there was no special reason for early arrival”. ²⁰² On the other hand it was held that charterparties were frustrated when, following the outbreak of the war between Iran and Iraq, vessels were trapped for an indefinite period in the Shatt-al-Arab waterway. ²⁰³

Examples not amounting to frustration

23-045

❗ The reports contain other examples of cases in which an unexpected event has not released a party from his obligation under a charterparty. In *Thiis v Byers* ²⁰⁴ the master of a ship was obliged, at the place of discharge, to make the cargo of timber into rafts so that the charterer's agents could tow the rafts away. Rough weather prevented this method of unloading for four days, but it was held that when a given number of days is allowed to the charterer for unloading, he must "take the risk of any ordinary vicissitudes" which may delay the operation; hence he was liable for four days' demurrage. Similarly in *Budgett & Co v Binnington & Co* ²⁰⁵ a strike of dock labour did not release the consignees from their obligation to pay demurrage where the clause of the charterparty (incorporated in the bill of lading) fixed the number of lay-days and did not contain any exception for strikes. ²⁰⁶ ❗ *Budgett* may be contrasted with *The Penelope*, ²⁰⁷ where the general coal strike of 1926 frustrated a time charter under which the ship was to carry successive cargoes of coal from South Wales over a 12-month period; although the charterparty contained strike provisions, these were held to contemplate only an interruption due to a local withdrawal of labour, and not the total impossibility of any export of coal for more than eight months.

The Sea Angel

23-046


More recently, in *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)*, ²⁰⁸ a delay of just over three months towards the end of a 20-day charterparty, resulting from detention of the vessel by port authorities as security for the costs of pollution caused by another vessel, was held not to have frustrated the contract. That general risk was foreseeable by the salvage industry, was provided for by the industry's terms, and formed part of the matrix of the charter. The Court of Appeal considered that the test of comparing the probable length of delay with the unexpired duration of the charter was only the starting point. Where the charterer assumes the general risk of delay, subject to express provision, it requires something special to frustrate the charter through mere delay. ²⁰⁹ This is particularly the case where the supervening event comes at the very end of a charter, and the effect on performance is purely a question of the financial consequences of the delay, rather than interrupting the heart of the adventure. ²¹⁰

1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.

^{190.} Scrutton on Charterparties and Bills of Lading, 23rd edn (2015), Art.21; Treitel, *Frustration and Force Majeure*, 3rd edn (2012), paras 5-052—5-055; see (in addition to the cases cited below) *Geipel v Smith* (1872) L.R. 7 Q.B. 404 (blockading of port); *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125 (stranding; above, para.23-006); *Dahl v Nelson, Donkin & Co* (1881) 6 App. Cas. 38 (dock authorities refused to admit ship because dock was full: held, charterer bound to permit unloading at alternative place mentioned in charterparty); *Lloyd Royal Belge SA v Stathatos* (1917) 34 T.L.R. 70 (ship detained by naval authorities for over two months); *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla* (1923) 39 T.L.R. 316; *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497 (requisitioning); *Court Line Ltd v Dant & Russell Inc* [1939] 3 All E.R. 314 (boom blocking river during war); *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154 (explosion); *Blane S.S. Ltd v Minister of Transport* [1951] 2 K.B. 965 (stranding); *Atlantic Maritime Co Inc v Gibbon*

- [1954] 1 Q.B. 88 (marine insurance: restraint of princes clause); cf. *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B. 26 (delays caused by breakdowns and repairs where shipowners in breach); *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd (The Nema)* [1982] A.C. 724 (long delay caused by strike at port of loading: see above, para.23-035); *Adelfamar SA v Silos E. Mangimi Martini SpA (The Adelfa)* [1988] 2 Lloyd's Rep. 466 (arrest of vessel by third party); *Bunge SA v Kyla Shipping Co Ltd* [2013] EWCA Civ 734, [2013] 2 Lloyd's Rep. 463 (affirming [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep. 565 (vessel suffered extensive damage when struck by another vessel when in port: contract held not to be frustrated). See also the cases cited above, para.23-035 n.151.
- [191.](#) [1919] A.C. 435.
- [192.](#) [1919] A.C. 435, 456.
- [193.](#) [1916] 2 A.C. 397.
- [194.](#) [1916] 2 A.C. 397, 405–406.
- [195.](#) Lord Parker of Waddington thought that the doctrine of frustration could not apply to a time charter which “does not contemplate any definite adventure or object to be performed or carried out” ([1916] 2 A.C. 397, 425) but this opinion was later rejected by the House of Lords in *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 443.
- [196.](#) *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 454; *Court Line Ltd v Dant & Russell Inc* [1939] 3 All E.R. 314, 318. See above, para.23-041 n.190; Howard in McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), pp.129–138.
- [197.](#) [1958] 2 Q.B. 146, 161–163.
- [198.](#) [1958] 2 Q.B. 146, 161.
- [199.](#) [1939] 1 K.B. 132.
- [200.](#) In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 Rix L.J. explained this conclusion on the basis that “there was no question ... of any possibility of recourse to a court to obtain a remedy against the unlawful seizure” (at [98]) with the consequence that the requisition “could not be rectified” (at [118]). On this basis *Tatem* is a case which is only applicable within narrow limits because in most cases, such as *The Sea Angel* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517, it will be possible for the party affected to seek relief through the courts.
- [201.](#) *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226.
- [202.](#) [1964] 2 Q.B. 226, 240. *The Eugenia* was followed (with reluctance) in *Palmco Shipping Inc v Continental Ore Corp* [1970] 2 Lloyd's Rep. 21. As a result of the 1956 closing of the canal, many later charterparties contained a “Suez Canal clause” which has been held to be intended to apply to a future closing of the canal: see *Achille Lauro Fu Gioacchino & Co v Total Societa Italiana Per Azioni* [1969] 2 Lloyd's Rep. 65.
- [203.](#) *Kissavos Shipping Co SA v Empresa Cubana de Fletes (The Agathon)* [1982] 2 Lloyd's Rep. 211; *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia) (No.2)* [1983] 1 A.C. 736; *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (The Wenjiang) (No.2)* [1983] 1 Lloyd's Rep. 400; *Vinava Shipping Co Ltd v Fineluet A.G. (The Chrysalis)* [1983] 1 Lloyd's Rep. 503; McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995) pp.129–138. In *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 Rix L.J. explained this conclusion on the basis that “one cannot negotiate or litigate one's way out of such consequences of war” (at [98]). Thus the ability to negotiate or to litigate may deny to a party the ability to invoke the doctrine of frustration: see n.200 above.
- [204.](#) (1876) 1 Q.B.D. 244.

[205.](#) [1891] 1 Q.B. 35.

[206.](#)  Charterparties contain many express exceptions known as “excepted perils”. See Scrutton on Charterparties and Bills of Lading, 23rd edn (2015) at Arts 122–135. For a case on the construction of an exceptions clause, see *Reardon Smith Line Ltd v Ministry of Agriculture* [1963] A.C. 691.

[207.](#) [1928] P. 180.

[208.](#) [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep. 517.

[209.](#) [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep. 517 at [131].

[210.](#) [2007] EWCA Civ 547, [2007] 2 Lloyd’s Rep. 517 at [118], [131].

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Sale and carriage of goods

23-047

Section 7 of the Sale of Goods Act 1979 provides a statutory rule for one instance of frustration:

“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, ²¹¹ the agreement is avoided.” ²¹²

Where only part of the goods have perished, the court may imply into the contract a term which deals with the resulting situation. ²¹³ Apart from s.7, the normal principles of the common law apply where it is alleged that an agreement to sell goods has been frustrated. ²¹⁴ Thus, an agreement to sell goods is not frustrated merely because performance of the contract would be commercially unprofitable, ²¹⁵ at least where performance is still physically and legally possible. On this ground it was once doubted whether a contract for the sale of unascertained goods could ever be frustrated, ²¹⁶ but it has been held that it can, at all events where the importation of the goods from a particular country was the basis of the contract and where such importation has become impossible. ²¹⁷ If a government does not place an absolute embargo on dealings in a certain commodity, but permits dealings subject to a licence being obtained, the seller cannot rely on frustration to excuse him from performance unless he actually applies for a licence and is refused. ²¹⁸ Similarly, a seller of goods who makes an unqualified promise to sell goods bears the risk of a failure of the contemplated source of supply and so cannot invoke frustration where that source is not the specified source or the goods are not specific goods and it remains physically and legally possible for the supplier to make the delivery. ²¹⁹

Suez Canal cases

23-048

The closure of the Suez Canal in November 1956 led to a number of cases in which it was argued that CIF contracts for the sale of goods had been frustrated. In *Tsakiroglou & Co Ltd v Noble Thorl GmbH*, ²²⁰ the House of Lords heard an appeal concerning a contract whereby the sellers agreed in October 1956 to sell Sudanese groundnuts for shipment during November-December 1956 from Port Sudan CIF Hamburg. On November 2 the Suez Canal was closed to navigation but the goods could have been shipped from Port Sudan round the Cape of Good Hope; this alternative route was three times longer than the route through the canal, and freightage was far more costly. The sellers claimed that the contract had been frustrated by the closure of the canal, but the House of Lords held that although the route via the Cape involved a change in the anticipated ²²¹ method of performance of the

contract, it was not such a fundamental change from the obligations undertaken in the contract as to frustrate it. It should be noted that a date had not been fixed for delivery in Europe, and that there was evidence that sufficient shipping was available to carry the goods via the Cape. If the goods had been perishable, or if a definite date for delivery (rather than shipment) had been fixed, or if there had been a shortage of shipping to carry goods from Port Sudan to Europe via the longer route, the contract might well have been frustrated. ²²²

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 211. Once the risk has passed to the buyer, he must still pay the price, but the seller is discharged from his obligation to deliver: Vol.II, paras 44-187 et seq.
 212. See Vol.II, paras 44-047—44-050; Benjamin's *Sale of Goods*, 9th edn (2014), paras 6-036 et seq.; John N Adams and Hector Macqueen, *Atiyah's Sale of Goods*, 12th edn (2010), pp.349–352; McKendrick, *Sale of Goods* (2000), paras 4-003—4-015; Chalmers, *Sale of Goods*, 18th edn, pp.100–101; *Horn v Minister of Food* [1948] 2 All E.R. 1036. cf. *Elphick v Barnes* (1880) 5 C.P.D. 321; *Howell v Coupland* (1876) 1 Q.B.D. 258; *H.R. and S. Sainsbury Ltd v Street* [1972] 1 W.L.R. 834, 837 (below, para.23-068).
 213. See the discussion of *H.R. and S. Sainsbury Ltd v Street* [1972] 1 W.L.R. 834 below, in para.23-068.
 214. e.g. (in addition to the cases cited below) *Nickoll & Knight v Ashton, Edridge & Co* [1901] 2 K.B. 126 (agreement to sell goods to be shipped by specified ship which was stranded before shipment); *Re Shipton, Anderson & Co and Harrison Bros & Co* [1915] 3 K.B. 676 (above, para.23-026; requisition); *Dale S.S. Co Ltd v Northern S.S. Co Ltd* (1918) 34 T.L.R. 271 (requisition of ship while being built); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32 (below, para.23-072; place of delivery becoming enemy territory); *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265 (above, para.23-025; wartime prohibition). cf. *King v Parker* (1876) 34 L.T. 887; *Ross T. Smyth & Co (Liverpool) Ltd v W.N. Lindsay (Leith) Ltd* [1953] 1 W.L.R. 1280 (above, para.23-027).
 215. *Blackburn Bobbin Co v Allen & Sons* [1918] 2 K.B. 467; *Re Comptoir Commercial Anversois & Power, Son & Co* [1920] 1 K.B. 868; *Beves and Co Ltd v Farkas* [1953] 1 Lloyd's Rep. 103. See also *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 729 (below, para.23-050); *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] A.C. 93 (below, para.23-048).
 216. *Blackburn Bobbin Co v Allen & Sons* [1918] 1 K.B. 540, 550; *Re Thornett and Fehr and Yuills Ltd* [1921] 1 K.B. 219.
 217. *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526 at [23]; *Re Badische Co Ltd* [1921] 2 Ch. 331, 381–383. (This case concerned frustration from supervening illegality—the outbreak of the war made it illegal to import the goods from Germany: see above, para.23-030.)
 218. *J.W. Taylor & Co v Landauer & Co* [1940] 4 All E.R. 335; see above, para.14-016; Vol.II, para.44-237 (export licences). cf. *Société Co-opérative Suisse des Cereales v La Plata Cereal Co SA* (1947) 80 L.I.L. Rep. 530 (an effective de facto prohibition against export frustrated the contract); *K.C. Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All E.R. 51, [1951] 2 All E.R. 352; *Pound & Co Ltd v Hardy & Co Inc* [1956] A.C. 588; *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep. 223, 253; affirmed on different grounds; *C. Czarnikow Ltd v Centrala Handlu Zagranicznego Rolimpex* [1979] A.C. 351. cf. *The Playa Larga* [1983] 2 Lloyd's Rep. 171 (complete breakdown of commercial relations between seller's

and buyer's respective countries: contract held frustrated). See Benjamin's Sale of Goods, 9th edn (2014), paras 18-365—18-389 (where a distinction is drawn between cases of supervening imposition of licensing requirements, where the contract may be frustrated, and cases where the contract is stated to be "subject to licence" and one party fails to obtain a licence under a licensing system which was in existence at the moment of formation of the contract. The latter example, it is argued, is not a case of frustration but rather is a case in which a condition is "introduced" into the contract under which neither party is liable to perform unless a licence is obtained; Schmitthoff, *Export Trade*, 12th edn (2012), para.6-012).

[219.](#) *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526 at [23].

[220.](#) [1962] A.C. 93. cf. *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226 (above, para.23-044).

[221.](#) The contract may not have been frustrated even if it had *specified* the Suez Canal route: *Tsakiroglou* [1962] A.C. 93, 112; see also *Palmco Shipping Co v Continental Ore Corp* [1970] 2 Lloyd's Rep. 21.

[222.](#) *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 240, 243.

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Building contracts ²²³

23-049

If a builder contracts to do work on an existing building which is destroyed during the progress of the work the contract is frustrated. In *Appleby v Myers*, ²²⁴ the plaintiff contracted to erect certain machinery upon the defendant's premises for a fixed sum, but when the machinery was only partly erected an accidental fire destroyed the whole of the buildings and the machinery thereon. It was held that since the premises were entirely destroyed without the fault of either party, the contract was frustrated and both parties were excused. Again, government prohibition of, or restrictions on, building operations during wartime have often caused the frustration of building contracts. ²²⁵

The Davis Contractors case

23-050

It is in building contracts that the best illustration may be found of the principle that "it is not hardship or inconvenience or material loss which calls the principle of frustration into play", ²²⁶ unless there is a radical change in the obligation. In *Davis Contractors Ltd v Fareham U.D.C.* ²²⁷ the plaintiffs agreed to build 78 houses for the defendants at a fixed price, the work to be completed in eight months. Due partly to bad weather, but also to an unforeseen shortage of labour caused by the unexpected lag in the demobilisation of troops after the war, the work took 22 months to complete, and cost the builders some £17,000 more than they anticipated. The builders claimed that the shortage of labour and the delay had frustrated the contract, so that they were entitled to sue for the £17,000 on a quantum meruit. The House of Lords unanimously held that the contract had not been frustrated. Viscount Simonds denied that:

"... where, without the default of either party, there has been an unexpected turn of events, which renders the contract more onerous than the parties contemplated, that is by itself a ground for relieving a party of the obligation he has undertaken." ²²⁸

Lord Reid said:

"... the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract." ²²⁹

A builder who undertook to perform such work for a definite lump sum undertook the commercial risk that delay would increase his costs.

Abnormal delay

23-051

In another case of delay in completing a building contract, Asquith L.J. laid down the following principles:

“A contract often provides that in the event of ‘delay’ through specified causes, the contract is not to be dissolved, but merely suspended, yet such a provision has been held not to apply where the delay was so abnormal, so pre-emptive, as to fall outside what the parties could possibly have contemplated in the suspension clause. In other words ‘delay’ though literally describing what has occurred, has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind.”
[230](#)

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 - [223.](#) McInnis, *Force Majeure and Frustration of Contract*, 2nd edn (1995), Ch.10; Keating on Construction Contracts, 9th edn (2012), paras 6-036—6-046.
 - [224.](#) (1867) L.R. 2 C.P. 651; in 16 L.T. 669 the contract is set out in extenso.
 - [225.](#) *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119 (above, para.23-024); *Federal Steam Navigation Co Ltd v Dixon & Co Ltd* (1919) 64 S.J. 67, HL; cf. *Innholders' Co v Wainwright* (1917) 33 T.L.R. 356 (suspension of contract).
 - [226.](#) *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 729.
 - [227.](#) [1956] A.C. 696. See also *Wates Ltd v Greater London Council* (1983) 25 Build. L.R. 1; *Dryden Construction Co Ltd v Hydro-Electric Power Commission of Ontario* (1957) 10 D.L.R. (2d) 124.
 - [228.](#) [1956] A.C. 696, 716.
 - [229.](#) [1956] A.C. 696, 724. See above, paras 23-012—23-016.
 - [230.](#) *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 K.B. 632, 665, citing *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] A.C. 119 (above, para.23-024) as “a good illustration of this”.

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(v) - Leases and Tenancies ²³¹

Leases and tenancies

23-052

For many years, there was uncertainty as to whether the doctrine of frustration could ever apply to a lease. ²³² In 1945, in *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* ²³³ the House of Lords decided unanimously that on the facts there had been no frustration of a long-term building lease by the imposition of building restrictions following the outbreak of war. On the question of principle, the House of Lords was evenly divided. ²³⁴ Viscount Simon ²³⁵ and Lord Wright ²³⁶ thought that on rare occasions a lease may be frustrated, as, for instance, if some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. Lord Russell ²³⁷ and Lord Goddard, ²³⁸ however, thought that a lease is more than a contract in that it creates an estate in the land vested in the lessee, and that this estate in the land could never be frustrated, even though some contractual obligations under the lease might be suspended by wartime regulations. In 1980 in *National Carriers Ltd v Panalpina (Northern) Ltd*, ²³⁹ the majority in the House of Lords agreed with the reasoning of Viscount Simon and Lord Wright in the Cricklewood case, and thus held that the doctrine of frustration is, in principle, applicable to leases; but several of their Lordships considered that the doctrine would “hardly ever” ²⁴⁰ be applied to a lease.

Illustrations of events frustrating leases

23-053

Although there is no reported case in England in which a lease has been held to be frustrated, the reports do contain opinions on the types of situations in which the courts might so hold. The physical disappearance of the demised premises is the most obvious case: a convulsion of nature might “swallow up” the property, or bury it permanently under the sea ²⁴¹; or an upper floor flat might be totally destroyed by fire or earthquake. ²⁴² Frustrating events not involving the physical disappearance of the land would include in the case of a building lease, subsequent legislation which permanently prohibited private building on the site ²⁴³; or a fire which destroyed or seriously damaged the buildings on the demised premises. ²⁴⁴ More recently, in *Graves v Graves*, ²⁴⁵ although the Court of Appeal did not find it necessary to decide whether the agreement was frustrated, the same result was reached through the use of an implied term. A housing benefit office incorrectly told Mrs Graves that she could continue to receive housing benefit if she moved into a property owned by her ex-husband, despite the fact their daughter would be living with her. Receipt of this benefit was crucial to the agreement of both parties. The error was discovered several months after Mrs Graves had commenced a 12-month tenancy. It was held that, when it was clear that the housing benefit would not be received, the agreement was different in kind from that originally contemplated. A term was thus implied that, if housing benefit was not payable, the tenancy would come to an end. ²⁴⁶

Prohibition on intended use

23-054

A clause in the lease restricting the use of the demised premises may be an important factor in deciding whether the lease has been frustrated by circumstances affecting that use. In the United States, leases which restricted the use of the premises to the conduct of a liquor saloon were held to have been frustrated by the enactment of provisions prohibiting that use.²⁴⁷ The following passage in Corbin, *Contracts*²⁴⁸ was cited with approval in the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*²⁴⁹:

“If there was one principal use contemplated by the lessee, known to the lessor, and one that played a large part in fixing rental value, a governmental prohibition or prevention of that use has been held to discharge the lessee from his duty to pay the rent. It is otherwise if other substantial uses, permitted by the lease and in the contemplation of the parties, remain possible to the lessee.”

Events not frustrating leases

23-055

An event which causes an interruption in the expected use of the premises by the lessee will not frustrate the lease unless the interruption is expected to last for the unexpired term of the lease, or, at least, for a long period of that unexpired term. The lease at issue in *National Carriers Ltd v Panalpina (Northern) Ltd* was a 10-year lease of a warehouse. By a temporary order, the City Council closed the street which gave the only access to the warehouse. The House of Lords held that the lease was not frustrated since the closure was expected to last only for a year or a little longer, which would still allow the lease to run for three more years after the street re-opened. The length of the unexpired term was “a potent factor”²⁵⁰:

“... the likely continuance of the term after the interruption makes it impossible for the lessee to contend that the lease has been brought to an end.”²⁵¹

In *Cricklewood*,²⁵² the lessee under a 99-year building lease claimed that wartime building restrictions had frustrated the lease. The House of Lords held that there had been no frustration, since the lease had over 90 years to run when the war broke out, and it was unlikely that the war would last for more than a small fraction of the whole term.²⁵³ There are also a number of earlier decisions in which the courts, without basing their decisions solely on the then-current doctrine that a lease could never be frustrated, held that specific leases were not frustrated in the particular events which occurred.²⁵⁴

The consequences of frustration of a lease

23-056

In *National Carriers Ltd v Panalpina (Northern) Ltd*, it was said that a lease would be “automatically discharged on the happening of a frustrating event”.²⁵⁵ The legal operation of this automatic determination of the lease should be the same as where a lease is prematurely determined by other events, either as specified in the terms of the lease, or by operation of law (e.g. forfeiture by denial of title).²⁵⁶ There is, however, little indication in the cases as to the consequential legal arrangements. If a lease were frustrated, the legal estate would presumably remain vested in the lessee (unless the land itself disappeared), but the lessee could be treated as a trustee for the lessor.²⁵⁷ Difficulties may arise in relation to land registration. However, these difficulties may not be insuperable because a

trust does not appear on the register and the court has power, in certain circumstances, to make an order for the alteration of the register, as does the registrar.²⁵⁸ Thus it may be that the register could be altered in order to record the premature determination of a registered lease as a result of the frustration of that lease.²⁵⁹ Some legal consequences may be governed by the Law Reform (Frustrated Contracts) Act 1943,²⁶⁰ which will apply when a lease has been frustrated,²⁶¹ but it is clear that the draftsman did not specifically provide for the situation. There should be an obligation on the lessee to pay rent pro rata up to the date of the frustration, and for so long thereafter as he retains possession.²⁶²

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 - ^{231.} Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.11.
 - ^{232.} But a licence to occupy land could be frustrated: *Krell v Henry* [1903] 2 K.B. 740 (above, para.23-033); *Taylor v Caldwell* (1863) 3 B. & S. 826 (above, para.23-005); and a hire-purchase agreement (a lease of chattels) could be frustrated. cf. *British Bena Motor Lorries Ltd v Inter-Transport Co Ltd* (1915) 31 T.L.R. 200.
 - ^{233.} [1945] A.C. 221; cf. Walford (1941) 57 L.Q.R. 339.
 - ^{234.} The fifth member of the House expressed no opinion on the point.
 - ^{235.} [1945] A.C. 221, 229.
 - ^{236.} [1945] A.C. 221, 241.
 - ^{237.} [1945] A.C. 221, 233–234.
 - ^{238.} [1945] A.C. 221, 243–245.
 - ^{239.} [1981] A.C. 675.
 - ^{240.} [1981] A.C. 675, 692, 709. (The circumstances in which a lease might be frustrated would be “exceedingly rare”: 692, 697, 715.) cf. Lord Wright in *Cricklewood Property and Investment Trusts Ltd v Leightons and Investment Trust Ltd* [1945] A.C. 221, 241. The proposition that the doctrine of frustration applies to leases has also been accepted in Scotland: *Robert Purvis Plant Hire Ltd v Brewster* [2009] CSOH 28.
 - ^{241.} *Cricklewood Property and Investment Trusts Ltd v Leightons and Investment Trust Ltd* [1945] A.C. 221, 229; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 691, 700–701, 709. These examples were cited in *Holbeck Hall Hotel Ltd v Scarborough BC* (1998) 57 Con. L.R. 113, 152–153 where the judge was prepared to assume, without deciding the point, that an event of this nature would have operated to discharge the lease by frustration.
 - ^{242.} *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 690. See Megarry & Wade, *The Law of Real Property*, 8th edn (2012), paras 18-102–18-103; Woodfall’s *Law of Landlord and Tenant*, paras 11-041–11-042.
 - ^{243.} *Cricklewood Property and Investment Trusts Ltd v Leightons and Investment Trust Ltd* [1945] A.C. 221, 229, 241. In *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 E.G. 427, an agreement for a lease was frustrated by refusal of planning permission: see *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 690, 694, 705 (where Lord Simon says that this was a case of frustration, although the judge dealt with it by implying a term), and 715. cf. the

- relevant American authorities: Corbin, *Contracts* (2001), Vol.14, paras 77.4-77.7; Williston, *Contracts*, 3rd edn (1978), Vol.18, para.1955. (In *Robertson v Wilson* (1958) 75 W.N. (N.S.W.) 503, a weekly tenancy was held to have been frustrated by the local authority's "closing order".)
- [244.](#) *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 701, 713. (The consequences of fire would normally be covered by an express term in the lease.) On the earlier law dealing with the lessee's obligation to pay the rent even when the premises are destroyed, see *McElroy and Williams* (1941) 4 M.L.R. 241, 256–260. cf. *Taylor v Caldwell* (1863) 3 B. & S. 826 (a licence to use a hall: above para.23-005).
- [245.](#) [2007] EWCA Civ 660, [2007] 3 F.S.R. 26.
- [246.](#) [2007] EWCA Civ 660, [2007] 3 F.S.R. 26 at [40]–[42].
- [247.](#) *Doherty v Monroe Eckstein Brewing Co* (1921) 191 N.Y.S. 59; *Industrial Development and Land Co v Goldschmidt* 206 P. 134 (1922). These cases are discussed by Treitel, *Frustration and Force Majeure*, 3rd edn (2014), paras 7-023–7-024 and 11-022; Corbin, *Contracts* (2001), Vol.14, para.77.4; Williston, *Contracts*, 3rd edn (1978), Vol.18, para.1955.
- [248.](#) (1962), Vol.6, pp.475–476 (Lord Simon quoted the identical passage in (1951) Vol.6, p.391).
- [249.](#) [1981] A.C. 675, 702, per Lord Simon. (Another similar passage from Corbin was also cited with approval by Lord Wilberforce, 695.)
- [250.](#) [1981] A.C. 675, 706, per Lord Simon.
- [251.](#) [1981] A.C. 675, 698, per Lord Wilberforce.
- [252.](#) [1945] A.C. 221. (It was said in this case, however, that frustration might apply to a covenant in the lease: see below, para.23-066 n.321.)
- [253.](#) See also *Elizabeth Jones v Christos Emmanuel Cleanthi* [2006] EWCA Civ 1712, [2007] 1 W.L.R. 1604 at [84].
- [254.](#) *London and Northern Estates Co v Schlesinger* [1916] 1 K.B. 20 (the actual result in the case was approved by several of their Lordships in [1981] A.C. 675, 689, 694, 696, 715); *Whitehall Court Ltd v Ettlinger* [1920] 1 K.B. 680 (the actual result in this case was also approved by several of their Lordships in *National Carriers Ltd v Panalpina (Northern) Ltd*); *Redmond v Dainton* [1920] 2 K.B. 256; *Matthey v Curling* [1922] 2 A.C. 180 (Lord Roskill has said that the result in this case depended on its particular facts: [1981] A.C. 675, 696, 715); *Swift v Macbean* [1942] 1 K.B. 375; *Eyre v Johnson* [1946] K.B. 481; *Simper v Coombs* [1948] 1 All E.R. 306; *Denman v Brise* [1949] 1 K.B. 22; *Yougmin v Heath* [1974] 1 W.L.R. 135.
- [255.](#) [1981] A.C. 675, 702.
- [256.](#) [1981] A.C. 675, 702.
- [257.](#) Interference with property rights has been accepted by the legislature in an analogous field, the rescission of a contract for innocent misrepresentation: the Misrepresentation Act 1967 permits such rescission after a contract has been performed (s.1), and as performance may involve a conveyance or lease of land, rescission of the contract would affect the property rights of the parties. (The Act does not exclude contracts for the sale or lease of an interest in land: above, para.7-142. But the court has a discretion under s.2(2) to award damages in lieu of rescission: above, para.7-104.)
- [258.](#) The power of the court and the registrar to make an order for the alteration of the register or to alter the register is set out in s.65 and Sch.4 to the Land Registration Act 2002. The power of the registrar to alter the register is slightly more extensive than the power of the court to make an order for alteration. There may be a difficulty in accommodating a power to alter the register to record the frustration of a registered lease with the express wording of Sch.4 but it may be

that it will fall within the power to alter the register for the purpose of “bringing the register up to date” (Sch.4 paras 2(1)(a) and 5(1)(a)).

[259.](#) The law relating to the registration of leases has undergone significant change as a result of the enactment of the Land Registration Act 2002: see generally Harpum and Bignell, *Registered Land: The New Law* (2002).

[260.](#) See below, paras 23-074 et seq.

[261.](#) This is recognised by Lord Wilberforce in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 697, and by Lord Simon, 707, who said: “The Act of 1943 seems unlikely to vouchsafe justice in all cases. As often as not there will be an all-or-nothing situation, the entire loss caused by the frustrating event falling exclusively on one party, whereas justice might require the burden to be shared”.

[262.](#) For US cases on the point, see Farnsworth on Contracts, 3rd edn (2004), Williston, *Contracts*, 3rd edn (1978), Vol.18, para.1955, n.11.

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Contracts for the sale of land

23-057

The doctrine of frustration does not apply where a compulsory purchase order has been made relating to land which is the subject of a contract of sale but has not yet been formally conveyed to the purchaser. ²⁶³ Similarly, a contract for sale is not frustrated by the subsequent listing of the building as one of architectural or historical interest under planning legislation. ²⁶⁴ Upon the making of the contract, the purchaser is regarded in equity as the owner of the land (subject to payment of the purchase money); hence the purchaser is bound to complete, but will be entitled to the whole of the compensation money payable under the compulsory purchase order. It is doubtful whether the doctrine of frustration could ever apply to a contract for the sale of land, ²⁶⁵ though it has been suggested that it might if the frustrating event prevented the vendor from transferring any estate whatever to the purchaser. ²⁶⁶

^{1.} Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.

^{263.} *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch. 627; *E. Johnson & Co (Barbados) Ltd v N.S.R. Ltd* [1997] A.C. 400, 406–407. cf. (on frustration of contracts for leases) *Lobb v Vasey Housing Auxiliary (War Widows Guild)* [1963] V.R. 239 and *Rom Securities Ltd v Rogers (Holdings) Ltd* (1967) 205 E.G. 427 (above, para.23-053 n.243); *Denny, Mott and Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265. (A trading contract held frustrated despite the fact that it contained ancillary provisions creating an option to purchase land and an agreement for a lease: see above, para.23-025 and *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 704.)

^{264.} *Amalgamated Investment & Property Co v John Walker & Sons* [1977] 1 W.L.R. 164. (The listing greatly restricted the owner's freedom to develop the property.)

^{265.} cf. above, paras 23-052 et seq. (But *delay* in building a block of flats, caused by a landslip, may frustrate a contract for sale of a flat: *Wong Lai Ying v Chinachem Investment Co* (1979) 13 Build. L.R. 81.)

^{266.} The latter suggestion is probably an instance of supervening illegality: see above, para.23-024.

If, however, the contract entitled the purchaser to vacant possession, the vendor cannot enforce the contract if he is prevented from giving possession (e.g. by requisitioning): *Cook v Taylor* [1942] Ch. 349 (see below, para.27-007 n.34).

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Section 4. - The Limits of Frustration

Express provision ²⁶⁷

23-058

A clause in the contract which is intended to deal with the event which has occurred will normally preclude the application of the doctrine of frustration. ²⁶⁸ Frustration is concerned with unforeseen, supervening events, not events which have been anticipated and provided for in the contract itself. ²⁶⁹ Thus the effect of a force majeure clause or a hardship clause may be to shut out the doctrine of frustration because the contract, on its proper construction, will be held to have covered the event which has occurred. ²⁷⁰ Similarly, the presence of a price-escalation clause in a contract may make a court more reluctant to conclude that a sudden increase in prices has frustrated the contract. ²⁷¹ But the courts are likely to construe such clauses narrowly and insist that the provision for the event be "full and complete" ²⁷² before the conclusion is reached that frustration is excluded. The more catastrophic the event, the less likely it is that a clause will be held to cover the event which has occurred, unless particularly clear words are used. ²⁷³ Similarly, the fact that a force majeure clause makes provision for an extension of time on the occurrence of one of the stipulated events may indicate to the court that the clause was confined in its application to events which are capable of resolution within that particular timeframe: an event which renders further performance of the contract "unthinkable" may therefore not fall within the scope of the clause. ²⁷⁴ Further, the clause may not make complete provision for all the legal issues arising from the event. ²⁷⁵ For example, a clause may excuse *one* party from the consequences of delay, in the sense that it prevents the delay from constituting a breach of contract, but this does not necessarily exclude the operation of the doctrine of frustration so as to enable that party to hold the other party to the contract when delay occurs. ²⁷⁶ An express provision in the contract cannot, however, exclude frustration by supervening illegality where this would be against public policy. ²⁷⁷

Significance of a foreseen event. ²⁷⁸

23-059

⚠ The parties to the contract may not have made express provision for the event which has occurred but they may have foreseen it happening. In such a case, the fact that the parties have foreseen the event but not made any provision for it in their contract will usually, ²⁷⁹ ⚠ but not necessarily, ²⁸⁰ prevent the doctrine of frustration from applying when the event occurs. While an unforeseen event will not necessarily lead to the frustration of a contract, ²⁸¹ a foreseen event will generally exclude the operation of the doctrine. The inference that a foreseen event is not a frustrating event is only a *prima facie* one and so can be excluded by evidence of contrary intention. ²⁸² Thus, it is a question of construction of the contract whether the parties intended their silence to mean that the contract should continue to bind in that event, ²⁸³ or whether they intended the effect of the event, if it occurs, to be determined by any relevant legal rules. ²⁸⁴ If one party foresaw the risk, but the other did not, it will be difficult for the former to claim that the occurrence of the risk frustrates the contract. ²⁸⁵ ⚠ On the other hand, a contract may be frustrated by supervening illegality, notwithstanding the fact that the war which has brought about the supervening illegality was foreseen. ²⁸⁶

Event foreseeable but not foreseen

23-060

⚠ When the event was foreseeable but not actually foreseen by the parties, it is less likely that the doctrine of frustration will be held to be inapplicable. ²⁸⁷ ⚠ Much turns on the extent to which the event was foreseeable. ²⁸⁸ The issue which the court must consider is whether or not one or other party has assumed the risk of the occurrence of the event. ²⁸⁹ The degree of foreseeability required to exclude the doctrine of frustration is, however, a high one:

“... ‘foreseeability’ will support the inference of risk-assumption only where the supervening event is one which any person of ordinary intelligence would regard as likely to occur, or ... the contingency must be ‘one which the parties could reasonably be thought to have foreseen as a real possibility.’” ²⁹⁰

Self-induced frustration ²⁹¹

23-061

“The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it.” ²⁹²

Thus, a contracting party cannot rely on “self-induced frustration, that is, on frustration due to his own conduct or to the conduct of those for whom he is responsible”. ²⁹³ Although the concept of self-induced frustration is clearly established as a matter of general principle, the precise limits of the doctrine have not been clearly established. It is merely a “label” which has been used to describe:

“... those situations where one party has been held by the Courts not to be entitled to treat himself as discharged from his contractual obligations.” ²⁹⁴

Thus frustration has been held to be “self-induced” where the alleged frustrating event was caused by a breach ²⁹⁵ or anticipatory breach of contract ²⁹⁶ by the party claiming that the contract has been frustrated, where an act of the party claiming that the contract has been frustrated broke the chain of causation between the alleged frustrating event and the event which made performance of the contract impossible, ²⁹⁷ and where the alleged frustrating event was not a supervening event or “something altogether outside the control of the parties”. ²⁹⁸ A party who has been at fault or whose act was deliberate will generally be unable to invoke frustration because of the difficulty which such a party will inevitably face in showing the existence of a supervening event which is outside his control. ²⁹⁹

Allocation of available supplies

23-062

Two leading cases which illustrate the scope of self-induced frustration are *Maritime National Fish Ltd v Ocean Trawlers Ltd* ³⁰⁰ and *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*. ³⁰¹ In the former case the appellants chartered a trawler, the *St Cuthbert*, from the respondents. It was fitted with an otter trawl, and both parties knew that under the Canadian Fisheries Act it was forbidden to

use an otter trawl without a licence from the Minister of Fisheries. The appellants were operating four otter trawlers besides the *St Cuthbert*, but in reply to their application for five licences, the Minister stated that he would grant only three, leaving it to the appellants to choose three trawlers. They did not include the *St Cuthbert* in the three trawlers they named, but later claimed that the charterparty had been frustrated by the Minister's refusal of a licence. The Privy Council held that they could not rely on frustration, since they had by their own voluntary election prevented the *St Cuthbert* from being used as an otter trawl. The case is capable of two interpretations. The first is that the critical factor was not that the appellants had a choice as to the allocation of the licences, but that they chose to allocate the licences to their own vessels. The second is that the mere existence of a choice was sufficient to preclude the invocation of frustration.

The Super Servant Two

23-063

❗ In the second case, *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*, ³⁰² ❗ the defendants agreed to transport the plaintiffs' rig using one or other of two barges, *Super Servant One* or *Super Servant Two*. The defendants later made an internal decision to allocate the *Super Servant Two* to the performance of the contract with the plaintiffs but, before the time for performance of the contract, the *Super Servant Two* sank while transporting another rig in the Zaire River. The *Super Servant One* having been allocated to the performance of other concluded contracts, the defendants sought to argue that the sinking of the *Super Servant Two* had frustrated the contract between the parties. The Court of Appeal held that, whether or not the *Super Servant Two* sank as a result of negligence on the part of the defendants or their employees, the contract was not frustrated. If it sank as a result of negligence then, the court held, the contract was not frustrated because negligence did not constitute a supervening event. ³⁰³ Although the House of Lords in *Joseph Constantine S.S. Co v Imperial Smelting Corp Ltd* ³⁰⁴ left open the question whether "mere negligence" would justify a finding that frustration was self-induced, ³⁰⁵ subsequent cases have concluded that negligence does exclude a finding of self-induced frustration by asserting that a frustrating event must arise "without blame or fault on the side of the party seeking to rely on it". ³⁰⁶ "Fault" in this context is not confined to a breach of a duty of care owed to the plaintiffs: such an interpretation would have confined the law within "a legalistic strait-jacket" and distracted attention from the real question, which is:

"... whether the frustrating event relied upon is truly an outside event or extraneous change of situation or whether it is an event which the party seeking to rely on it had the means and opportunity to prevent but nevertheless caused or permitted to come about."

³⁰⁷

23-064

If, on the other hand, the *Super Servant Two* sank without negligence on the part of the defendants, the contract was still not frustrated because, it was held, the cause of the non-performance of the contract was not the sinking of the *Super Servant Two* but the decision of the defendants not to use the *Super Servant One* in the performance of the contract with the plaintiffs. Yet to have allocated the *Super Servant One* to the contract with the plaintiffs would, doubtless, have exposed the defendants to liability to someone else to whom they had promised to supply either the *Super Servant One* or the *Super Servant Two*. On this analysis, it was the mere fact that the appellants in *Maritime National Fish* ³⁰⁸ had a choice which prevented them from invoking the doctrine of frustration. The effect of the decision of the Court of Appeal is to place a supplier whose source of supply partially fails in a very difficult position. There was some authority, prior to *Super Servant Two*, which appeared to suggest that a supplier in such a case could "prorate", that is to say the supplier would be discharged from further liability if he proportionately rationed the limited supply among his buyers and his regular customers. ³⁰⁹ But in *Super Servant Two* it was held that these cases turned upon the proper interpretation of a force majeure clause and were not illustrative of a general common law power to prorate. ³¹⁰ In the light of the decision in *Super Servant Two*, a supplier would be well advised to

include within his contract a force majeure clause which allows him to prorate in the event of a partial failure of supply. The contract in *Super Servant Two* did in fact contain a force majeure clause and this was held to be effective to excuse the defendants provided that the *Super Servant Two* sank without negligence on the part of themselves or their employees. ³¹¹

Onus of proof

23-065

The House of Lords in *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* ³¹² held that the onus of proving self-induced frustration lies on the party who asserts that this is the case. If A (the party relying on frustration) proves events which prima facie would frustrate the contract, the onus of proving that the frustration was self-induced is on the other party (B) who denies that the contract has been frustrated. B must then prove some default by A which caused the allegedly frustrating event. When A proves and relies on frustration, B cannot prevent its operation by proving that it had been induced by his own (B's) fault. ³¹³ So the fact that it was an employee's (or apprentice's) criminal conduct which led to a sentence of imprisonment ³¹⁴ or of Borstal training ³¹⁵ being imposed on him does not amount to "self-induced" conduct so as to prevent frustration of his contract of employment (or apprenticeship) as alleged by his employer ³¹⁶.

"What matters, however, in the case of self-induced frustration is that the party who is the 'self' cannot treat himself as being discharged." ³¹⁷

Partial "frustration"

23-066

English law has great difficulty in dealing with the case where part of the contract has become impossible of performance. To use the expression partial "frustration" to encompass this situation is not strictly accurate because the effect of frustration is to "kill the contract and discharge the parties from further liability under it". ³¹⁸ Yet in these cases it is clear that the contract as a whole is not discharged: the argument is the more limited one that the occurrence of some new circumstance may excuse (perhaps temporarily) the performance of a particular contractual obligation without frustrating the whole contract. ³¹⁹ Thus temporary illness may excuse an employee for his failure to attend for work, ³²⁰ while building restrictions imposed during war-time or as a result of the listing of a building may temporarily excuse non-performance of a covenant to build. ³²¹ In some cases supervening illegality may excuse performance of a minor contractual obligation without the whole contract becoming frustrated. ³²² These cases can be divided into two distinct categories.

Force majeure clauses

23-067

The first group concern the construction of clauses, such as force majeure clauses, which purport to relieve a party from the consequences of a failure to comply with a particular obligation. Thus in *Egham & Staines Electricity Co Ltd v Egham U.D.C.* ³²³ the council had made a contract with the electricity company for the supply of current for street lighting. If the supply failed due to "unavoidable cause over which the company had no control" payments for current were to abate in proportion. Public street lighting was forbidden by the Lighting (Restrictions) Order on the outbreak of war in 1939. The company sued to recover the full payments provided for by the contract, but it was held that the clause providing for abatement of payments had come into operation; the company was unable to fulfil its contract because it had become illegal to do so, and this illegality amounted to an "unavoidable cause" within the meaning of the clause. But this case tells us nothing about any common law doctrine of "partial frustration"; the court's task was simply to interpret the clause of the

contract which was in issue.

Partial excuse at common law

23-068

⚠ The second group of cases do not turn on the construction of a clause in a contract but rather are based on a general common law doctrine. An example in this category is provided by the difficult case of *H.R. & S. Sainsbury Ltd v Street*.³²⁴ The parties entered into a contract under which the defendant agreed to sell to the plaintiffs 275 tons of barley from a crop growing on a farm. Without any fault on the part of the defendant, the yield turned out to be only 140 tons. The defendant refused to supply the plaintiff with the 140 tons harvested and so the plaintiff buyers brought a claim for damages. The defendant claimed that, as a result of the partial failure of the harvest, he was excused from delivering any of the barley. This argument was rejected by the court. The plaintiffs did not claim damages for failure to deliver the other 135 tons, conceding that:


“... it was an implied condition of the contract that if the defendant, through no fault of his, failed to produce the stipulated tonnage of his growing crop, he should not be required to pay damages.”³²⁵

But MacKenna J. held that the defendant remained bound to deliver the 140 tons of barley produced.³²⁶ The case could be explained as one of “partial frustration”: the obligation to deliver 135 tons of barley was frustrated by the failure of the crop, while the obligation to deliver the 140 tons remained valid and enforceable. But nowhere in the judgment of MacKenna J. is the word frustration used: the focus of his judgment is upon the implication of terms into a contract. This is not an altogether satisfactory basis for the decision because it does not explain *why* the court saw fit to refuse to imply a term into the contract relieving the defendant from his obligation to deliver the 140 tons. It is suggested that this case is not illustrative of a wider doctrine of “partial frustration” in English law³²⁷ but rather it suggests that English law, in certain circumstances, recognises that a contracting party may have a partial excuse for non-performance of a contractual obligation.³²⁸ ⚠ It is on this ground that a seller is excused for his failure to deliver 135 tons of barley or an employee who is absent from work through temporary illness is excused for his failure to attend for work. There is no need to invoke “frustration” to explain this rule and it has not been so explained in a number of cases.³²⁹ The use of the word “frustration” is positively misleading in so far as it suggests that the contract as a whole has been terminated when this is clearly not the case.




Limits of partial excuse

23-069


⚠ Once the basis of these decisions is recognised, the limits of this “partial excuse for non-performance” must be ascertained. In this respect *Sainsbury Ltd v Street*³³⁰ presents an odd contrast with *Super Servant Two*.³³¹ In both cases there was a partial failure of supply: in the former the defendant was excused, in the latter, had it not been for the force majeure clause, the defendants would not have been excused. One point of distinction which does emerge is that in *Sainsbury* the defendant had entered into a contract with one buyer, while in *Super Servant Two* the defendants had entered into a number of different contracts with different parties. Yet it is difficult to see why this should be a relevant point of distinction. Rather, *Super Servant Two* illustrates a particularly robust approach on the part of the court, according to which a contracting party who has entered into more contracts than he has supplies, and who later wishes to be excused in the event of a partial failure of supply, “must bargain for the inclusion of a suitable *force majeure* clause in the contract”.³³² But on this approach, *Sainsbury v Street* must be wrong because there the defendant could equally have protected himself by incorporating a carefully drafted force majeure clause into the contract. Such an approach would confine the doctrine of frustration within very narrow limits and, taken to its extreme, it could even be applied to cases of total failure of supply. This approach has the potential to

“undermine the whole basis of the doctrine of frustration” ³³³  and it is suggested that, while there is much to be said for recognising that frustration operates within narrow confines, ³³⁴ this should not prevent the courts from recognising that a contracting party who, without fault on his part has been disabled from performing part of his contractual obligations, may be able to rely on the supervening event as an excuse for that non-performance.

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1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.
 - ²⁶⁷. Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.12.
 - ²⁶⁸. *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 163; *Kuwait Supply Co v Oyster Marine Management (The Safeer)* [1994] 1 Lloyd's Rep. 637; *Bangladesh Export Import Co Ltd v Succden Kerry SA* [1995] 2 Lloyd's Rep. 1: cf. *R. (Verner) v Derby City Council* [2003] EWHC 2708 (Admin), [2004] I.C.R. 535 at [66].
 - ²⁶⁹. The courts may, exceptionally, be able to imply that the contract has made provision for the alleged frustrating event where it is clear from the contract that one party was intended to assume the risk of the alleged frustrating event: *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Médulla, Paris* (1923) 39 T.L.R. 316.
 - ²⁷⁰. On force majeure clauses, see above, paras 15-152—15-169, Benjamin's Sale of Goods, 9th edn (2014), paras 8-088—8-091, 18-385—18-401, 19-140—19-144; Schmitthoff's Export Trade: The Law and Practice of International Trade, 12th edn (2012), 6-017—6-022; Cartoon [1978] J.B.L. 230 and A Burrows and E Peel, *Contract Terms* (2007), p.233. See also *RDC Concrete PTE Ltd v Sato Kogyo (S) PTE Ltd* [2007] SGCA 39, (2008) 115 Con. L.R. 154 at [53]–[65].
 - ²⁷¹. *Wates Ltd v G.L.C.* (1983) 25 Build. L.R. 1.
 - ²⁷². *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 455; *Select Commodities Ltd v Valdo SA (The "Florida")* [2006] EWHC 1137 (Comm), [2007] 1 Lloyd's Rep. 1; *Bunge SA v Kyla Shipping Co Ltd* [2012] EWHC 3522 (Comm), [2013] 1 Lloyd's Rep. 565 at [80] (a continuing warranty that the vessel would be insured throughout the currency of the charterparty was held to allocate to the owner the risk of the occurrence of a casualty, at least where the cost of repair was within the insured value).
 - ²⁷³. *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] A.C. 119 (above, para.23-024). See also *Pacific Phosphate Co Ltd v Empire Transport Co Ltd* (1920) 36 T.L.R. 750; *The Penelope* [1928] P. 180 (above, para.23-045); *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32; *Denny, Mott & Dickson Ltd v James B. Fraser & Co Ltd* [1944] A.C. 265, 284; *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No.2) [1983] 1 A.C. 736; *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [83], approving [2006] EWHC 1713 (Comm), [2007] 1 Lloyd's Rep. 335 at [84]; also above, para.23-051.
 - ²⁷⁴. *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep. 171, 189.
 - ²⁷⁵. *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 455–456 (above, para.23-041).
 - ²⁷⁶. *Jackson v Union Marine Insurance Co Ltd* (1874) L.R. 10 C.P. 125, 144 (above, para.23-006).

- [277.](#) *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260 (above, para.23-024). In other cases of supervening illegality (such as export or import restrictions) express provision may exclude the operation of frustration: *Johnson Matthey Bankers Ltd v State Trading Corp of India* [1984] 1 Lloyd's Rep. 427.
- [278.](#) Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.13; Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-076—19-081; Hall (1984) 4 L.S. 300.
- [279.](#)  *Tamplin S.S. Co Ltd v Anglo-Mexican Petroleum Co* [1916] 2 A.C. 397, 426; *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 455, 462; *Gulnes (D/S A/S) v Imperial Chemical Industries Ltd* [1938] 1 All E.R. 24; *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696, 731; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, 909; *McAlpine Humeroak Ltd v McDermott International Inc* (1992) 58 Build. L.R. 1, 18; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 (TCC), [2010] B.L.R. 235 at [71]; Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-076—19-081.
- [280.](#) *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524, 529; *Tatem Ltd v Gamboa* [1939] 1 K.B. 132 (above, para.23-044); *Jennings and Chapman Ltd v Woodman, Matthews & Co* [1952] 2 T.L.R. 409, 412; *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 239; *Nile Co for the Export of Agricultural Crops v H. & J.M. Bennett (Commodities) Ltd* [1986] 1 Lloyd's Rep. 555, 582; *Adelfamar SA v Silos E. Mangimi Martini SpA (The Adelfa)* [1988] 2 Lloyd's Rep. 466, 471.
- [281.](#) *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696; *British Movietonews Ltd v London and District Cinemas Ltd* [1952] A.C. 166.
- [282.](#) *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [103] (but cf. [127]).
- [283.](#) See, e.g. *Chandler Bros Ltd v Boswell* [1936] 3 All E.R. 179.
- [284.](#) For example, an intention that if the event were to happen, the parties would “leave the lawyers to sort it out”: *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 239.
- [285.](#)  *Walton Harvey Ltd v Walter and Homfrays Ltd* [1931] 1 Ch. 274; *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [83], approving [2006] EWHC 1713 (Comm), [2007] 1 Lloyd's Rep. 335 at [84]; Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.19-076.
- [286.](#) *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] A.C. 260 (above, para.23-024).
- [287.](#)  *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [104]; *Armchair Answercall Ltd v People in Mind Ltd* [2016] EWCA Civ 1039 at [30].
- [288.](#) The question is one of degree and so depends to a large extent on the facts and circumstances of the individual case. The courts have warned against the “over-refinement” of submissions on this issue and one can probably go no further than conclude that “the less that an event, in its type and its impact, is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead on to frustration”: *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [127].
- [289.](#) *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [104]; *Blue Sky One Ltd v Mahan Air* [2010] EWHC 631 (Comm), [2010] All E.R. (D) 02 (Jun) at [299]. Many events are foreseeable but neither party assumes the risk of their occurrence. Death is the classic example. The death of an employee during the currency of his employment contract is a foreseeable event but it


operates to discharge the contract of employment because neither party assumes the risk of its occurrence.

- [290.](#) Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.13-012. The quote at the end of the citation is taken from the case of *Mishara Construction Company Inc v Transit-Mixed Concrete Corp* 310 N.E. 2d 363, 367 (1974).
- [291.](#) Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.14. Swanton (1990) 2 J.C.L. 206.
- [292.](#) *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8. See also *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 452; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524, 530; *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 170; *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 237; *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 725, 736–737; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700; *Edwinton Commercial Corp v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [83], approving [2006] EWHC 1713 (Comm), [2007] 1 Lloyd's Rep. 335 at [85].
- [293.](#) *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435, 452.
- [294.](#) *J. Lauritzen A.S. v Wijsmuller BV (The Super Servant Two)* [1989] 1 Lloyd's Rep. 148, 154.
- [295.](#) *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226, 237; *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854; *Cheall v Assn. of Professional Executive and Computer Staff* [1983] 2 A.C. 180, 189.
- [296.](#) *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] A.C. 1, 6.
- [297.](#) *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] A.C. 524 (where the fact that the party claiming frustration had a choice as to how to allocate the scarce resources (licences) was held to be sufficient to break the causal link between the alleged frustrating event and the event which made performance impossible, below, para.23-062).
- [298.](#) *Denmark Productions Ltd v Boscobel Productions Ltd* [1969] 1 Q.B. 699, 736.
- [299.](#) *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 10; cf. *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 166–167; *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), [2010] 2 Lloyd's Rep. 265 at [316].
- [300.](#) [1935] A.C. 524.
- [301.](#) [1990] 1 Lloyd's Rep. 1.
- [302.](#)  [1990] 1 Lloyd's Rep. 1. See Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-086–19-088; McKendrick [1990] L.M.C.L.Q. 153.
- [303.](#) [1990] 1 Lloyd's Rep. 1, 10.
- [304.](#) [1942] A.C. 154.
- [305.](#) [1942] A.C. 154, 166–167, 179, 195, 202.
- [306.](#) *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8.
- [307.](#) [1990] 1 Lloyd's Rep. 1, 10.
- [308.](#) [1935] A.C. 524.

- [309.](#) *Tennants (Lancashire) Ltd v C.S. Wilson & Co Ltd* [1917] A.C. 495; *Intertradex SA v Lesieur Torteaux SARL* [1978] 2 Lloyd's Rep. 509; *Bremer Handelsgesellschaft mbH v C. Mackprang Jr* [1979] 1 Lloyd's Rep. 221; *Continental Grain Export Corp v S.T.M. Grain Ltd* [1979] 2 Lloyd's Rep. 460, 473 and *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep. 269. See generally on this line of cases, Hudson (1968) 31 M.L.R. 535 and (1979) 123 S.J. 137.
- [310.](#) *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 9; Benjamin's Sale of Goods, 9th edn (2014), paras 18–401–18–402.
- [311.](#) [1990] 1 Lloyd's Rep. 1, 6–8; see above, para.23-063.
- [312.](#) [1942] A.C. 154.
- [313.](#) *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301; *Edwinton Commercial Corp v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep. 517 at [83], approving [2006] EWHC 1713 (Comm), [2007] 1 Lloyd's Rep. 335 at [85]. (It is submitted that the dictum at 319C–D in *F.C. Shepherd v Jerrom* is contrary to *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154.)
- [314.](#) *Hare v Murphy Bros Ltd* [1974] I.C.R. 603.
- [315.](#) *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301.
- [316.](#) See above, para.23-039.
- [317.](#) *F.C. Shepherd & Co Ltd v Jerrom* [1987] Q.B. 301, 327. A similar statement is that “a party who has been in fault cannot rely on frustration due to his own wrongful act” (per Lord Porter in *Joseph Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd* [1942] A.C. 154, 200).
- [318.](#) *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8; *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), [2010] 2 Lloyd's Rep. 265 at [311].
- [319.](#) cf. on the US law, Williston, *Contracts*, 3rd edn (1978), Vol.18, paras 1956, 1957; Patterson (1961) 47 Virginia L. Rev. 798; and on South African law, Ramsden (1977) 94 S.A.L.J. 162.
- [320.](#) See Vol.II, para.40-177.
- [321.](#) *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] A.C. 221, 233–234; *John Lewis Properties Plc v Viscount Chelsea* [1993] 2 E.G.L.R. 77, 82. See above, para.23-052.
- [322.](#) *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] A.C. 221, 233–234 (see above, para.23-052); *Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep. 195 at [123]–[125]. cf. *Matthey v Curling* [1922] 2 A.C. 180; *Eyre v Johnson* [1946] K.B. 481, 484; *Innholders Co v Wainwright* (1917) 33 T.L.R. 356.
- [323.](#) [1944] 1 All E.R. 107; cf. *Williams v Mercer* [1940] 3 All E.R. 292.
- [324.](#) [1972] 1 W.L.R. 834, noted (1972) 88 L.Q.R. 464.
- [325.](#) [1972] 1 W.L.R. 834, 835. The basis for this concession would appear to be *Howell v Coupland* (1874) L.R. 9 Q.B. 462; affirmed (1876) 1 Q.B.D. 258; *Barrow, Lane and Ballard Ltd v Phillips and Co Ltd* [1929] 1 K.B. 574.
- [326.](#) Although the plaintiffs were not bound to accept delivery, given that the amount of barley produced was less than what was contracted for: Sale of Goods Act 1979 s.30(1). The buyer's right to reject is, however, limited by s.30(2A) of the Sale of Goods Act 1979 in the case where

the shortfall is so slight that it would be unreasonable for the buyer to reject the goods. This restriction does not apply to a consumer buyer who is given the right under s.25(1) of the Consumer Rights Act 2015 to reject the goods in the case where the trader delivers to the consumer a quantity of goods less than the trader contracted to supply. The 2015 Act applies to contracts made on or after October 1, 2015; see below, Vol.II, para.38-011.

[327.](#) There are dicta which are hostile to the existence of “partial frustration”: see *Kawasaki Steel Corp v Sardoil SpA (The Zuiho Maru)* [1977] 2 Lloyd’s Rep. 552, 555; cf. Schmitthoff’s Export Trade: The Law and Practice of International Trade, 12th edn (2012), para.6–013.

[328.](#)  See Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 17-059 and 19-049—19-050; Benjamin’s Sale of Goods, 9th edn (2014), paras 18–401—18–402. See also *Poussard v Spiers and Pond* (1876) 1 Q.B.D. 410 where illness gave the plaintiff opera singer a temporary excuse for her non-performance of her contract with the defendants. The case has sometimes been viewed as an example of the operation of the doctrine of frustration but this explanation encounters the difficulty of explaining why the defendants had an option whether or not to rescind the contract. If the contract had indeed been frustrated it would have been discharged automatically, whereas, if the defendants had wished to hold the plaintiff to the terms of her contract, it seems clear that they could have done so: see further Treitel, *Frustration and Force Majeure*, 3rd edn (2014), para.5–061.

[329.](#) See, e.g. *Sainsbury Ltd v Street* [1972] 1 W.L.R. 834; *Cricklewood Property and Development Trust Ltd v Leightons Investment Trust Ltd* [1945] A.C. 221, 233–234; *Libyan Arab Foreign Bank v Bankers Trust Co* [1989] Q.B. 728, 772; *John Lewis Properties Plc v Viscount Chelsea* [1993] 2 E.G.L.R. 77, 82. In *Cricklewood* Lord Russell clearly could not have been relying upon the doctrine of frustration because he had just strenuously denied that a lease could be frustrated (233); cf. *Sturke v S.W. Edwards Ltd* (1971) 23 P. & C.R. 185, 190.

[330.](#) [1972] 1 W.L.R. 834.

[331.](#) [1990] 1 Lloyd’s Rep. 1.

[332.](#) [1989] 1 Lloyd’s Rep. 148, 158. The Court of Appeal (above) did not dissent from the reasoning of Hobhouse J.

[333.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.19-088.

[334.](#) Above, para.23-007.

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 7 - Performance and Discharge
Chapter 23 - Discharge by Frustration ¹
Section 5. - The Legal Consequences of Frustration ³³⁵

Common law

23-070

Although the Law Reform (Frustrated Contracts) Act 1943 now provides for most of the legal consequences of frustration, it is still necessary to examine the common law on the subject, since some contracts fall outside the scope of the Act, and the interpretation of the Act itself demands a knowledge of the common law.

Contract discharged automatically

23-071

⚠ At common law frustration does not rescind the contract ab initio: it brings the contract to an end forthwith, without more and automatically, ³³⁶ ⚠ in the sense that it releases both ³³⁷ parties from any further performance of the contract. ³³⁸ A court does not have the power at common law to allow the contract to continue and to adjust its terms to the new circumstances.

Recovery of money paid

23-072

Having set aside the contract, the initial response of the courts at common law was to let the loss lie where it fell. The origins of this rule can be found in the decision of the Court of Appeal in *Chandler v Webster* ³³⁹ where it was held that, while the effect of frustration was to release both parties from their obligations to perform in the future, frustration did not affect the obligations which had accrued prior to the date of frustration. Thus, on the facts of the case, not only was the plaintiff unable to recover the pre-payment which he had made before the frustrating event, but it was held that he remained liable to pay the balance of the sum which he had contracted to pay before that time. Although the Court of Appeal held that money paid was recoverable upon a total failure of consideration, it was held that such a total failure could only arise when the contract was set aside ab initio. The harshness of the rule laid down in *Chandler* was often acknowledged but it stood until 1943 when it was overruled by the House of Lords in the case of *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* ³⁴⁰ in which English sellers agreed to sell certain machinery to Polish buyers, and to deliver it CIF Gdynia. The contract was made in July 1939, and in that month £1,000 was paid on account of the price. However before the sellers were able to complete the manufacture of the machines the contract was frustrated when Gdynia was occupied by the German army. The buyers sued to recover the £1,000 they had paid on the signing of the agreement. The House of Lords held that they were entitled to recover the money because there had been a total failure of consideration. They overruled *Chandler v Webster* and rejected the proposition that a total failure of consideration could arise only when a contract was set aside ab initio; it arose whenever money ³⁴¹ was paid on a basis which wholly failed.

Defects in the common law

23-073

Although the result in *Fibrosa* represented an improvement upon the rule established in *Chandler*, the common law remained in a less than satisfactory state. ³⁴² Three principal defects were apparent. The first was that the payer could only recover money paid upon a total failure of consideration; a partial failure of consideration did not give rise to a right of recovery. ³⁴³ The second was that the House of Lords was of the opinion that the payee could not set off against the money to be repaid any expenditure which had been incurred in the performance of the contract. ³⁴⁴ The third defect arose in relation to a claim by a provider of services. Where the frustrating event destroyed the work which had been done and payment was due only on the completion of the work, then the service provider was not entitled to bring a restitutionary claim to recover payment in respect of the work which he had done prior to the frustration of the contract. ³⁴⁵

Law Reform (Frustrated Contracts) Act 1943 ³⁴⁶

23-074

These remaining defects in the common law compelled Parliament to intervene in the form of the enactment of the Law Reform (Frustrated Contracts) Act 1943. The Act applies only to a contract which is “governed by English law” ³⁴⁷; that is to say, the crucial question is whether the law applicable to the contract is English law. ³⁴⁸ A further limiting factor is that the Act only applies to contracts which have become “impossible of performance or been otherwise frustrated”. The Act does not specify when a contract is frustrated: it simply alters the legal consequences once the contract is held to have been frustrated under the rules of the common law. The generic expression “frustration” in s.1(1) probably includes cases where a contract is discharged by supervening illegality. ³⁴⁹ The Act does not apply to contracts which are discharged by subsequent agreement or breach. ³⁵⁰ Nor does it apply to contracts which are initially impossible of performance or to the discharge of a contract under an express provision of the contract, which provides for automatic cancellation of a contract on the occurrence of a specified event. ³⁵¹

Principle underlying Act

23-075

When seeking to interpret the Act it is important to have regard to the purpose which it seeks to achieve. In *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* ³⁵² Robert Goff J. stated that the “fundamental principle underlying the Act itself is prevention of the unjust enrichment of either party to the contract at the other’s expense” ³⁵³ and that its aim was not to “apportion the loss between the parties”. ³⁵⁴ But the Court of Appeal dismissed this view, stating that the court got “no help from the use of words which are not in the statute”. ³⁵⁵ The purpose behind the Act therefore remains a matter of some doubt, although it is suggested that the better view is that the Act does indeed seek to prevent unjust enrichment and can be analysed in restitutionary terms. ³⁵⁶

Recovery of advance payments

23-076

Section 1(2) of the Act provides that:

“All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as ‘the time of discharge’) shall, in the case of sums so paid, be recoverable from him as money received by him

for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.”

The principal effect of this subsection is to entitle a contracting party to recover money paid to the other contracting party prior to the frustrating event and it also relieves such a party of the obligation to pay any monies which were payable prior to the frustrating event but which had remained unpaid. The court has no discretion over the question whether a sum already paid is recoverable: the only discretion concerns the allowance for expenses.

Changes from common law

23-077

Section 1(2) goes beyond the common law rule laid down in *Fibrosa* in two respects. The first is that money paid is recoverable even upon a partial failure of consideration; the common law requirement that the failure be total has therefore been abolished in the case of frustration. One effect of this change may be to rescue a payer from his bad bargain because the prepayment is recoverable irrespective of the consideration which would have been received had the contract been performed.³⁵⁷ The second respect in which s.1(2) goes beyond the rule in *Fibrosa* is that the payee may be entitled to set off against a claim by the payer “the amount of any expenses incurred before the time of discharge ... in, or for the purpose of, the performance of the contract”. The subsection gives rise to a number of interpretative difficulties.

Paid or payable

23-078

Subject to one exception, s.1(2) gives a cause of action to the payer and not to the payee. The one exception arises in the case where money payable by the “payer” to the payee before the time of discharge remains unpaid; in such a case the payee can rely upon s.1(2) to recover so much of his expenses, not exceeding the amount of the prepayment due, as is just.³⁵⁸ Where no money is either paid³⁵⁹ or is payable to the payee prior to the frustrating event but the payee nevertheless incurs expenditure in, or for the purpose of, the performance of the contract, the payee cannot recover under s.1(2).³⁶⁰ Such sums are deemed by s.1(2) to be spent at the risk of the payee. No provision is made in the subsection for any increase in the sum recoverable by the claimant, or in the amount of the expenses to be allowed to the defendant, to take account of the time value of money,³⁶¹ although interest³⁶² may be awarded on a sum in respect of which judgment is given under the Act.³⁶³

Breaches before discharge

23-079

❗ Nor does the subsection expressly release a promisor who has failed to perform his promise to do something (other than to pay money) before the time of discharge.³⁶⁴ ❗ In such a case the promisor will be liable to pay damages for his breach of contract but he will not be able to bring the sum so paid into account under s.1(3) of the Act because it is not a benefit which was obtained “before the time of

discharge". Where the claimant has, prior to the frustrating event, broken the contract between the parties, the defendant may have an accrued right to damages which may, in turn, be the subject of a set-off or counterclaim. But a prior breach by the claimant has no other impact upon the operation of either s.1(2) or s.1(3).³⁶⁵

The time of discharge

23-080

Since s.1(2) refers to money paid or payable before "the time of discharge" it may be important to fix the exact time of discharge. This will usually be the actual happening of the frustrating event but, if the frustration is caused by the non-occurrence of an expected event, the frustration may take effect when it first becomes generally known that the event will not happen. For instance, where a contract to hire rooms to view a procession is frustrated by the cancellation of the procession two days before it is due to take place, the time of discharge, according to *Krell v Henry*,³⁶⁶ is the time of the official announcement of the cancellation.³⁶⁷ Where money is paid after the time of discharge the recoverability of the payment will be governed by common law rules.³⁶⁸ Thus where the payment was made after the time of discharge because the payor was unaware of the occurrence of the frustrating event, then the payment may be recoverable on the ground that it was made under a mistake of fact.³⁶⁹ Where the payment was made because the payor, although aware of the occurrence of the event, was unaware that it amounted in law to a frustrating event, the payment may now be recoverable as a payment made under a mistake of law.³⁷⁰

The basis of the proviso

23-081

Although the payee may now be entitled to set off against a claim by the payer "the amount of any expenses incurred before the time of discharge ... in, or for the purpose of the performance of the contract", it is difficult to establish the basis upon which the payee is entitled to seek to bring his expenditure into account. The consequence of this is that it is difficult, if not impossible, to ascertain with any confidence the amount which the payee will be entitled to retain. Various views have been put forward. First, it has been argued that the loss caused by the frustrating event should be divided equally between the parties on the ground that the:

"... situation with which the Act is concerned is the familiar one in which one of two parties has to suffer loss for which neither is responsible,"

and that in the "normal case" the just course "would be to order the retention or repayment of half the loss incurred".³⁷¹ Secondly, it has been argued that the payee should be entitled to retain the full amount of the expenditure incurred in the performance of the contract; a view supported by the English Law Revision Committee³⁷² and which also seems to receive some support from the judgment of Robert Goff J. in *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* who argued that the proviso constituted a "statutory recognition of the defence of change of position"³⁷³ although this rationalisation is controversial.³⁷⁴ The third view is that the court in deciding what is "just" is exercising a broad discretion, which discretion is not confined to the entitlement to bring expenditure into account but extends to the proportion of the repayment which the payee can retain or recover³⁷⁵ and that therefore this discretion would be unduly circumscribed by the adoption of either of the other two views. These three views were considered by Garland J. in *Gamerco SA v I.C.M./Fair Warning (Agency) Ltd*³⁷⁶ who concluded that he could see:

"... no indication in the Act, the authorities or the relevant literature that the court is obliged to incline towards either total retention or equal division. Its task is to do justice in a situation which the parties had neither contemplated nor provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen."³⁷⁷

The emphasis is thus placed on the “broad nature” of the discretion which the court enjoys and the imperative to do justice on the facts of the case. ³⁷⁸

Burden of proof

23-082

❗ The onus of proof is upon the payee to demonstrate that the requirements of the proviso have been satisfied. ³⁷⁹ An illustration of the importance of the location of the onus of proof is provided by *Lobb v Vasey Housing Auxiliary*, ³⁸⁰ a case decided under the Victorian Frustrated Contracts Act 1959. ³⁸¹ The defendants were paid £1,250 by Mrs Smith for an exclusive licence to occupy a flat in a block of flats which they were building. Mrs Smith died before her flat was completed. Her death was held to have frustrated the contract between the parties. Her executrix sued to recover the £1,250. The onus of proof was on the defendants to show that it was just in all the circumstances of the case for them to retain any part of the £1,250 and Hudson J. pointed out that, in the normal case they would sell the right to occupy the flat to someone else and so recover their expenses in that way. After an adjournment judgment was entered for the plaintiff for £1,175. ³⁸² On this approach a payee whose expenditure results in a product which he can use in the performance of another contract may find it difficult to discharge the onus of proof. ³⁸³ ❗ A further consequence of the adoption of this approach may be that, where the payee fails to satisfy the onus, any loss lies on him but that, where he does satisfy the onus, he is entitled to retain or recover all the expenditure incurred in or for the purpose of the performance of the contract.

Allowance for expenses

23-083

In identifying the relevant “expenses” to be taken into account, it must be noted that expenses includes a reasonable sum for overhead expenses and for work or services personally performed. ³⁸⁴ These expenses must have been incurred “in, or for the purpose of, the performance of the contract”. Pre-contract expenditure may not be recoverable on the ground that, at the time of the expenditure, there was no contract for the expenses to be incurred in “the performance of”, although it can be argued that such expenditure was incurred “for the purpose of” the performance of the contract and so should be brought into account. ³⁸⁵

Obligations other than to pay money

23-084

Section 1(3) states that:

“Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular—

(a)

the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the

contract and retained or recoverable by that party under the last foregoing subsection, and

(b)

the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.”

This is the most controversial and difficult provision in the Act, caused in large part by the failure of the draftsman to provide a definition of what constitutes a “benefit” and to identify with sufficient precision the time at which the benefit is to be valued. In *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* ³⁸⁶ Robert Goff J. held that the proper approach to the construction of the subsection is a threestage one. At the first stage the valuable benefit must be identified; at the second stage the benefit must be valued; and at the third stage the court must consider the award of a just sum.

(1) Identification of the benefit

23-085

The “benefit”, which must of course be non-monetary, could consist of either the “end product” of the services or the services themselves. Robert Goff J. concluded, as a matter of construction rather than one of principle, ³⁸⁷ that “in an appropriate case” it was the end product which was to be regarded as the benefit. It is not clear when it would not be “appropriate” to regard the end product as the benefit but there are a number of situations in which it has been argued that the benefit should be identified with the service itself. The general rule is therefore that regard must be had to the end product of the services when identifying the benefit. But there are at least two situations in which it is appropriate to have regard to the services themselves when identifying the benefit. The first case arises where the service, by its very nature, does not result in an end product, for example, “where the services consist of doing such work as surveying, or transporting goods”. ³⁸⁸ Where there is no end product the court must simply ascertain the benefit which the defendant has obtained by virtue of the claimant’s contractual performance, which benefit can only be measured by reference to the value of the services performed by the claimant under the contract. ³⁸⁹ The second case arises where the services performed result in an end product which has no objective value, ³⁹⁰ in which case the benefit must also be measured by reference to the value of the services provided under the contract.

Destruction of the end product

23-086

⚠ There is a third situation in which it has been argued that a court should have regard to the value of the service performed, namely where the frustrating event results in the destruction of the end product itself. But in *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)*, Robert Goff J. rejected this argument on two principal grounds. ³⁹¹ The first was that a distinction is drawn in s.1(3) between the claimant’s performance and the defendant’s benefit, thus indicating that the defendant’s benefit cannot be regarded as the value of the claimant’s performance. The second was that “benefit” in s.1(3)(b) clearly refers to the end product of the services rather than the services themselves. ³⁹² This view has not, however, commanded universal assent, largely on the basis that s.1(3) applies where a valuable benefit has been obtained *before* the time of discharge and on the ground that the words immediately preceding paragraphs (a) and (b) (“having regard to all the circumstances of the case, and in particular”) appear to be directed to the assessment of the just sum and not to the identification of the valuable benefit. ³⁹³ ⚠

(2) Valuing the benefit

23-087

Once the benefit has been identified, the court must then value it. The conclusion that it is the end product and not the services themselves which are to be regarded as the benefit gives rise to considerable difficulties in valuing the benefit because there is no necessary relationship between the services and the end product. A small service may result in an end product of great value, while a service of great value may result in an end product of no or minimal value. If the benefit is only partly attributable to the claimant's performance, the court should apportion the value of the benefit accordingly. ³⁹⁴ The wording of the subsection does not permit the court to take account of the time value of money so that the benefit is valued at the date of the frustrating event without regard to the money which the defendant may have obtained by selling the benefit before the date of the frustrating event, ³⁹⁵ although interest ³⁹⁶ may be awarded on a sum in respect of which judgment is given under the Act. ³⁹⁷

Date of valuation

23-088

In *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* Robert Goff J. held that the benefit must be valued as at the date of the frustrating event. The difficulty with this proposition is that s.1(3) applies where "a valuable benefit has been obtained *before* the time of discharge". This suggests that the date of the valuation should be before the time of discharge and the point may yet be open for further argument.

Deduction of expenses

23-089

A further problem arises in relation to the role of s.1(3)(a), namely whether the expenses should be deducted from the benefit or from the just sum. Robert Goff J. held that the expenses were to be deducted from the value of the benefit and not from the just sum. ³⁹⁸ But, as we have already noted, the words immediately preceding paragraph (a) suggest that the expenses should be deducted from the just sum and not from the valuable benefit and, once again, the point may yet be open for further argument. ³⁹⁹

(3) The just sum

23-090

The final step is for the court to assess the "just" sum to be awarded to the claimant. Robert Goff J. held that the aim of the court in assessing the just sum ought to be the "prevention of the unjust enrichment of the defendant at the plaintiff's expense" ⁴⁰⁰ but the Court of Appeal preferred a broader, discretionary approach, stating that "[w]hat is just is what the trial judge thinks is just" and that an appellate court is not entitled to interfere with the assessment of the just sum by the trial judge "unless it is so plainly wrong that it cannot be just". ⁴⁰¹ This appears to leave the assessment of the just sum at the complete discretion of the trial judge. There are, however, certain factors which are clearly of relevance in the assessment of the just sum. The first is that the value of the benefit acts as a ceiling on the sum which the court can award so that the "just sum" cannot be greater than the value of the benefit obtained. The second is that the contractual allocation of risk is likely to be an important factor in the assessment of the just sum. It is "likely" that in most cases the claimant's claim will be limited to a rateable proportion of the contract price so that s.1(3) cannot be used to escape the consequences of a bad bargain. ⁴⁰² The third point is that the process of assessing the just sum may bear some resemblance to the inquiry conducted by the court in an action for a quantum meruit or a quantum valebat. ⁴⁰³

Severability

23-091

Section 2(4) of the Act provides:

“Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.”

Thus, where a contract can be divided into severable and distinct obligations (as opposed to being an “entire contract” ⁴⁰⁴) the Act has no application to any obligation which has been completely performed. The Act does, however, apply to those several obligations which have not been completely performed, thus departing from the common law rule which was that no recovery was possible in respect of money paid or benefits conferred in the performance of a severable obligation which had not been completely performed. ⁴⁰⁵

Contrary intention

23-092

Section 2(3) provides:

“Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.” ⁴⁰⁶

Although it has been stated that, in deciding whether the parties have contracted out of the Act, a court will apply “ordinary principles of construction” ⁴⁰⁷ it has also been said that:

“... where there is no clear indication that the parties did intend the clause to be applicable in the event of frustration, the court has to be very careful before it draws the inference that the clause was intended to be applicable in such radically changed circumstances.” ⁴⁰⁸

It is for the party who is seeking to rely upon s.2(3) to demonstrate that the clause was intended to operate in the circumstances which have actually happened; where the circumstances which have occurred are so devastating and unusual as to fall outside the ambit of the clause in question, then the Act may not have been excluded.

Implicit provision

23-093

A court will be particularly reluctant to imply a term that the parties have made provision for the consequences of a frustrating event. But a clause which provides that one contracting party is under an obligation to maintain insurance against the consequences of the frustrating event would appear to be effective to exclude the operation of the Act so that the party upon whom the obligation to insure is imposed cannot bring a claim under the Act. ⁴⁰⁹ However the fact that a contract is entire and that the contract provides that payment is not due until the work is complete or until a date which is after the date of the frustrating event does not “automatically preclude an award of damages under s.1(3)” ⁴¹⁰ and it is only:

“... if upon a true construction of the contract the plaintiff has contracted on the terms that he is to receive no payment in the event which has occurred, will the fact that the contract is ‘entire’ have the effect of precluding an award under the Act.” ⁴¹¹

Effect of contracting out

23-094

It is not, however, enough to contract out of the Act without making alternative provision for the consequences of frustration, because the effect of simply contracting out of the Act would appear to be to re-instate the common law as laid down in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd.* ⁴¹² Contracting parties who wish to provide a different regime for the remedial consequences of frustration should make express provision to that effect in their contract.

Supplementary provisions of the Act

23-095

Section 1(6) of the Act states that the court may allow an action given by subs.(3) to be brought against one party to the contract, though the benefit was conferred on another party to it, or upon a stranger to the contract altogether. Section 2(2) of the Act provides that the Act binds the Crown.

Contracts excluded from the Act

23-096

⚠ Section 2(5) provides that the Act does not apply to four types of contract: (a) “any charterparty, except a time charterparty or a charterparty by way of demise”; (b) “any contract ... for the carriage of goods by sea” (since commercial practice has developed well-known rules for insurance against the risks of these contracts ⁴¹³); (c) “any contract of insurance” (since there is a well-established principle that no part of a premium is legally recoverable where the subject matter of the risk ceases to exist before the period of the insurance expires ⁴¹⁴); (d) any contract for the sale of specific goods which perish, whether or not the risk passed to the buyer before the date of perishing. ⁴¹⁵ ⚠ (Any other contract for the sale of goods will be governed by the Act, ⁴¹⁶ as will a contract for the sale of specific goods which is frustrated otherwise than by the “perishing” of the goods.)

Arbitration

23-097

The paucity of reported decisions on the operation of the Act is possibly due to the fact that the issues arising under the Act are particularly suitable for arbitration. ⁴¹⁷ The questions whether a contract has

been frustrated ⁴¹⁸ and, if so, whether a claim under the Act arises ⁴¹⁹ are within the scope of a wide arbitration clause in a contract, e.g. one providing for arbitration:

“... if any dispute or difference shall arise or occur between the parties hereto in relation to any thing or matter arising out of or under this agreement” ⁴²⁰;

the arbitration clause survives the frustration for the purpose of the assessment of any consequential claim under the Act or for the purposes of an independent restitutionary claim. ⁴²¹


Services rendered or payments made after frustration

23-098

The Law Reform (Frustrated Contracts) Act 1943 has no application to benefits conferred after the date of the frustrating event. Where the parties enter into a fresh contract relating to the post-frustration performance, then that contract will obviously govern the relationship between the parties. Where no such contract is concluded the party who has conferred the benefit on the other party may be able to bring an independent restitutionary claim if he can show that the defendant has freely accepted the benefit of the post-frustration performance, in the sense that the recipient knew that the performance was being rendered non-gratuitously and elected to accept the performance, having had the opportunity to reject it. ⁴²² In such a case the plaintiff may be able to recover the reasonable value of the services performed. ⁴²³ The only other ground upon which a restitutionary claim could be brought is mistake. Where the benefit has been conferred because the plaintiff was unaware of the occurrence of the frustrating event, then it may be possible to recover the value of the benefit conferred on the ground that it was given under a mistake of fact. ⁴²⁴ Where the benefit was conferred because the plaintiff was unaware that the event, as a matter of law, constituted a frustrating event, then the value of the benefit conferred may now be recovered on the ground that it was given under a mistake of law. ⁴²⁵

1. Treitel, *Frustration and Force Majeure*, 3rd edn (2014); Howard, *Force Majeure and Frustration of Contract*, 2nd edn (1995). See also McElroy and Williams, *Impossibility of Performance* (1941); Gottschalk, *Impossibility of Performance in Contract* (1945); McNair and Watts, *The Legal Effects of War*, 4th edn, Ch.5; Webber, *Effect of War on Contracts*, 2nd edn, especially Pts III and IV. For an economic analysis of the doctrine of frustration, see Posner and Rosenfield (1977) 6 J. Leg. Stud. 83.


335. See Treitel, *Frustration and Force Majeure*, 3rd edn (2014), Ch.15; McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), Ch.11; Burrows, *Essays on the Law of Restitution* (1991), Ch.6; Stewart and Carter [1992] C.L.J. 66; Burrows, *The Law of Restitution*, 3rd edn (2011), pp.361–371.

336.  *Hirji Mulji v Cheong Yue S.S. Co Ltd* [1926] A.C. 497, 505; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 712; *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1981] 1 W.L.R. 232, 241 (the House of Lords upheld the appeal, but without advertent to this point: [1983] 2 A.C. 352); *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8. See further McKendrick, *Defences in Contract* (2017), Ch.8.


337. The theory that one party is discharged by frustration and the other party for failure of consideration resulting from that frustration (see Williams, *Law Reform (Frustrated Contracts) Act 1943*, pp.21–28; McElroy & Williams, *Impossibility of Performance*, pp.88–89, 99–100) is not accepted by the Act (“the parties thereto have for that reason been discharged”: s.1(1) (*italics supplied*)) nor in various judicial statements (e.g. “[W]hen ‘frustration’ occurs ... it does not merely provide one party with a defence in an action brought by the other. It kills the contract itself and discharges both parties automatically”, per Viscount Simon in *Joseph*


Constantine S.S. Line Ltd v Imperial Smelting Corp Ltd [1942] A.C. 154, 163; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 700).

338. Some clauses in the contract may, however, be intended by the parties to survive frustration of the contract (e.g. an arbitration clause: see below, para.23-097): *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1983] 2 A.C. 352, 372 (see also the judgments below: [1981] 1 W.L.R. 232, 240–241, [1979] 1 W.L.R. 783, 829). And see s.2(3) of the 1943 Act (below, para.23-092).
339. [1904] 1 K.B. 493; see also *Blakeley v Muller & Co* [1903] 2 K.B. 760n; *Civil Service Co-operative Society v General Steam Navigation Co* [1903] 2 K.B. 756 and *French Marine v Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* [1921] 2 A.C. 494, 523.
340. [1943] A.C. 32. Although it should be noted that the House of Lords expressly stated that their decision did not affect the law in relation to advance freight. Thus advance freight continues to be governed by a rule “analogous to what we all know as the rule in *Chandler v Webster*” (per Robert Goff J. in *The Lorna I* [1981] 2 Lloyd’s Rep. 559, 560; affirmed [1983] 1 Lloyd’s Rep. 373; and see also *The Karin Vatis* [1988] 2 Lloyd’s Rep. 330). On advance freight see more generally Howard in McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), pp.123–129.
341. It should apply in the case of goods or services because total failure of consideration is logically applicable both to money claims and to non-money claims; see Birks, *An Introduction to the Law of Restitution* (1989), pp.230–231.
342. For a fuller analysis of the decision of the House of Lords in *Fibrosa* [1943] A.C. 32 its implications for the common law rules and an assessment of the relevant common law principles, see Burrows, *Essays on the Law of Restitution* (1991), Ch.6.
343. *Whincup v Hughes* (1871) L.R. 6 C.P. 78.
344. Although it can be argued that the common law position was not as bleak as their Lordships in *Fibrosa* [1943] A.C. 32 made it appear; see Burrows at pp.154–165.
345. *Appleby v Myers* (1867) L.R. 2 C.P. 651. The same result is, however, likely to be reached under s.1(3) of the Law Reform (Frustrated Contracts) Act 1943 (below, para.23-084). The problem in a case such as *Appleby* lies in showing that the recipient of partial performance has been enriched. If the contract states that he is only required to pay on complete performance, why should the law say that he must pay on receipt of partial performance?
346. Based on the “Seventh Interim Report (Rule in *Chandler v Webster*)” of the Law Revision Committee, 1939, Cmnd.6009. Although the Act is based upon the recommendations of the Law Revision Committee, it is, in fact, wider in its scope than their recommendations and so in *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 798, Robert Goff J. held that the Committee’s report should not be used as an aid to the interpretation of the Act. See generally on the Act, Williams, *Law Reform (Frustrated Contracts) Act 1943*; McNair (1944) 60 L.Q.R. 160; Haycroft and Waksman [1984] J.B.L. 207; McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), Ch.11; Treitel, *Frustration and Force Majeure*, 3rd edn (2014), paras 15–053–15–058, 15–064–15–071, 15–074–15–100, Andrews, Clarke, Tettenborn and Virgo, *Contractual Duties: Performance, Breach, Termination and Remedies* (2012), paras 18–025–18–035.
347. Law Reform (Frustrated Contracts) Act 1943 s.1(1).
348. See below, Ch.30. See also *B.P. Exploration Co (Libya) Ltd v Hunt* [1976] 1 W.L.R. 788 where there was an argument before Kerr J. as to whether or not the proper law of the contract was English law. It does, however, seem rather strange that the draftsman has elected to use the proper law of the contract as the decisive factor when we are here concerned with an independent restitutionary claim which is, of course, distinct from an action on the contract.
349. McNair (1944) L.Q.R. 160, 162–163.

- [350.](#) It would not therefore apply to the situation in *Sumpter v Hedges* [1898] 1 Q.B. 673, where the plaintiff, who abandoned his performance of a lump-sum contract, was unable to recover anything for his work up to that time. See above, para.21-034.
- [351.](#) See McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995) at pp.291–297.
- [352.](#) [1979] 1 W.L.R. 783.
- [353.](#) [1979] 1 W.L.R. 783, 799.
- [354.](#) [1979] 1 W.L.R. 783. The basic structure of the Act is, first, to identify the benefit which has been obtained by the defendant at the expense of the claimant and then, broadly speaking, to allow the claimant to recover so much (not exceeding the value of the benefit) as appears to the court to be just. Loss apportionment is not explicitly addressed within the Act except to the extent that the court has a discretion to allow the claimant to recover so much of the benefit as appears to the court to be “just”. Contrast the view of Haycroft and Waksman [1984] J.B.L. 207, 225.
- [355.](#) [1981] 1 W.L.R. 232, 243.
- [356.](#) See generally Burrows, *Essays on the Law of Restitution* (1991), Ch.6.
- [357.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 793, 800.
- [358.](#) This is because the proviso states that the payee may be able to “recover” in whole or in part any sums which were “payable” to him.
- [359.](#) “Paid” would cover a sum actually paid, whether or not there was a contractual obligation to pay before the time of discharge.
- [360.](#) Although a claim may be made under s.1(3) where the expenditure results in a valuable benefit being obtained by the other party. See below, para.23-084.
- [361.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 800: affirmed [1981] 1 W.L.R. 232, 244.
- [362.](#) See below, para.23-087.
- [363.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 835–836; affirmed [1983] 2 A.C. 352, 373.
- [364.](#)  Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.19-105.
- [365.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 808.
- [366.](#) [1903] 2 K.B. 740 (above, para.23-033).
- [367.](#) The court will not review the decision of an arbitrator who has, on reasonable grounds, found that the contract was frustrated on a particular date: see *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No.2) [1983] 1 A.C. 736, 767–768, followed in *Finelvet AG v Vinava Shipping Co Ltd* [1983] 1 W.L.R. 1469 (the arbitrator’s choice of date must be within the permissible range of dates). On arbitration, see below, para.23-097.
- [368.](#) See McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), p.230.
- [369.](#) Under the authority of *Barclays Bank Ltd v W.J. Simms Son & Cooke (Southern) Ltd* [1980] Q.B. 677, below paras 29-036 et seq.
- [370.](#) See generally *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349, below, paras

29-046 et seq.

- [371.](#) Williams, *The Law Reform (Frustrated Contracts) Act 1943*, pp.35–36. Such an approach has been expressly adopted in s.5(3) of the British Columbia Frustrated Contracts Act 1974.
- [372.](#) On the ground that it is “reasonable to assume that in stipulating for pre-payment the payee intended to protect himself against loss under the contract” (1939, Cmnd.6009, p.7). But it is doubtful whether the payee thinks of the possibility of frustration; he probably intends to protect himself against the possibility of the other party’s insolvency or default in payment.
- [373.](#) [1979] 1 W.L.R. 783, 800.
- [374.](#) See further Burrows, *Essays on the Law of Restitution* (1991), pp.156–159. One version of the change of position defence requires that the defendant show that he “had materially changed [his] circumstances as a result of the receipt of the money” (*Storthoaks v Mobil Oil of Canada Ltd* (1975) 55 D.L.R. (3d) 1). But the provision does not require that the payee change his position “as a result of the receipt of the money”. The expenditure can be incurred before the receipt of the payment and yet the payee remains entitled to invoke the proviso. The change of position rationalisation must be handled, if at all, with great care and must not be allowed to distort the meaning of the words actually used in the proviso. See further on change of position, *Lipkin Gorman v Karpnale* [1991] 2 A.C. 508 and below, paras 29-186—29-196.
- [375.](#) cf. *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675, 707 where Lord Simon of Glaisdale did not think that the court was empowered by the Act to engage in loss apportionment and that, in consequence, there would often be an “all-or-nothing” situation.
- [376.](#) [1995] 1 W.L.R. 1226.
- [377.](#) [1995] 1 W.L.R. 1226, 1235.
- [378.](#) For an attempt to provide a structure for the exercise of this discretion see Burrows, *Essays on the Law of Restitution* (1991) at Ch.6.
- [379.](#) *Gamerco SA v I.C.M./Fair Warning (Agency) Ltd* [1995] 1 W.L.R. 1226, 1235; *DVB Bank SE v Shere Shipping Co Ltd* [2013] EWHC 2321 (Comm) at [62].
- [380.](#) [1963] V.R. 239.
- [381.](#) An Act which was modelled on the Law Reform (Frustrated Contracts) Act 1943.
- [382.](#) The precise basis on which this sum was calculated does not emerge from the judgment.
- [383.](#)  As was the case in *Davis and Primrose Ltd v Clyde Shipbuilding and Engineering Co Ltd* 1917 1 S.L.T. 297. See also Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-098 and for a slightly different argument to the same end see Williams, *The Law Reform (Frustrated Contracts) Act 1943* at p.39 who argues that expenses in s.1(2) means “expenses after deduction of gains resulting from those expenses”.
- [384.](#) Law Reform (Frustrated Contracts) Act 1943 s.1(4).
- [385.](#) It can also be argued that where the expenditure is incurred in the reasonable belief that a contract will be concluded it will be recoverable.
- [386.](#) [1979] 1 W.L.R. 783.
- [387.](#) As a matter of principle he was of the view that the services themselves should be regarded as the benefit.
- [388.](#) [1979] 1 W.L.R. 783, 802.

- [389.](#) The conclusion that the existence of an end product was a necessary ingredient of a s.1(3) claim would arguably have led to ridiculous arguments as to what constitutes an “end product”: see, for example, Birks, *An Introduction to the Law of Restitution* (1989), p.252.
- [390.](#) Robert Goff J. gave the example of a claimant who commences “the redecoration, to the defendant’s execrable taste, of rooms which are in good decorative order”: [1979] 1 W.L.R. 783, 803. In such a case, the work of the claimant may even reduce the value of the defendant’s property but the services must nevertheless be regarded as a benefit because they were requested by their recipient.
- [391.](#) On this view the result of *Appleby v Myers* (1867) L.R. 2 C.P. 651 would be unaffected by s.1(3) of the Act.
- [392.](#) Further support for this view can be gleaned from the decision of the Newfoundland Supreme Court in *Parsons Bros Ltd v Shea* (1966) 53 D.L.R. (2d.) 86, a case decided under the similarly worded Newfoundland Frustrated Contracts Act 1956. See also McKendrick, *Force Majeure and Frustration of Contract*, 2nd edn (1995), pp.236–237.
- [393.](#)  See, e.g. Peel, *Treitel on The Law of Contract*, 14th edn (2015), para.19-103.
- [394.](#) *B.P. Exploration Co (Libya) Ltd v Hunt (No.2)* [1979] 1 W.L.R. 783, 802.
- [395.](#) [1979] 1 W.L.R. 783, 803–804.
- [396.](#) See below para.26-236 n.1231.
- [397.](#) [1979] 1 W.L.R. 783, 836; *affirmed* [1983] 2 A.C. 352, 373.
- [398.](#) [1979] 1 W.L.R. 783, 804.
- [399.](#) See Haycroft and Waksman [1984] J.B.L. 207, 220.
- [400.](#) [1979] 1 W.L.R. 783, 805.
- [401.](#) [1981] 1 W.L.R. 232, 238.
- [402.](#) [1979] 1 W.L.R. 783, 806.
- [403.](#) [1979] 1 W.L.R. 783, 805 and see also 825.
- [404.](#) See above, para.21-028.
- [405.](#) *Stubbs v Holywell Rly Co* (1867) L.R. 2 Ex. 311.
- [406.](#) It should be noted that we are here concerned with a clause which seeks to regulate the *consequences* of the frustration of a contract and not with a clause which seeks to make provision for an *event* which would otherwise frustrate the contract; where the parties make provision for what would otherwise be a frustrating event the effect of such a clause is to exclude the operation of the doctrine of frustration completely and the Act does not apply to a contract which has not been frustrated.
- [407.](#) [1979] 1 W.L.R. 783, 806.
- [408.](#) [1979] 1 W.L.R. 783, 829.
- [409.](#) [1979] 1 W.L.R. 783, 807A, although it should be noted that s.1(5) provides that: “[T]he court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract

or by or under any enactment.”


[410.](#) [1979] 1 W.L.R. 783, 807.

[411.](#) [1979] 1 W.L.R. 783.

[412.](#) [1943] A.C. 32.

[413.](#) Williams (1942) 6 M.L.R. 46, 54–55 and 72–74, 79. This exclusion from the Act preserves two common law rules: freight due in advance is still payable despite the fact that, after payment has fallen due, the voyage specified in the contract is frustrated; and a shipowner cannot recover part of the agreed freight pro rata itineris peracti when frustration occurs before completion of the voyage.

[414.](#) *Tyrie v Fletcher* [1777] 2 Cowp. 666, and see below, Vol.II, para.42-076.

[415.](#)  This formulation of category (d) is an attempt to state the effect of a badly drafted provision of the Act, namely, s.2(5)(c) (as amended by the Sale of Goods Act 1979 s.63 and Sch.2 para.2). The provision appears to assume that the rules as to risk adequately cover the situation: see Vol.II, paras 44-187 et seq. Detailed arguments as to the effect of this involved provision may be found elsewhere, viz Williams (1942) 6 M.L.R. 46, 81–90; Cheshire, Fifoot and Furmston, *Law of Contract*, 17th edn (2017), pp.737–738; Peel, *Treitel on The Law of Contract*, 14th edn (2015), paras 19-111–19-113; John N Adams and Hector MacQueen, *Atiyah's Sale of Goods*, 12th edn (2010), pp.354–357. Section 7 is discussed in more detail in Vol.II, paras 44-047–44-050.

[416.](#) Thus, the Act would apply where a contract for the sale of non-specific goods was frustrated, e.g. *Howell v Coupland* (1876) 1 Q.B.D. 258. cf. *H.R. and S. Sainsbury Ltd v Street* [1972] 1 W.L.R. 834 (above, para.23-068).

[417.](#) *Pioneer Shipping Ltd v B.T.P. Tioxide Ltd* [1982] A.C. 724, 743–744; *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No.2) [1983] 1 A.C. 736. On arbitration clauses, see below, para.32-030.

[418.](#) *Heyman v Darwins Ltd* [1942] A.C. 356, 366, 383, 400–401; *Kruse v Questier & Co Ltd* [1953] 1 Q.B. 669; *Government of Gibraltar v Kenney* [1956] 2 Q.B. 410; *Kodros Shipping Corp of Monrovia v Empresa Cubana de Fletes (The Evia)* (No.2) [1983] 1 A.C. 736 (the time of frustration). The House of Lords has held that the court should be reluctant to interfere with the conclusion of an arbitrator that a contract has been frustrated: it must be shown either that the arbitrator misdirected himself in law, or that the decision was such that no reasonable arbitrator could reach: *Pioneer Shipping* [1982] A.C. 724, 742–744, 752–754. (See above, para.23-015, especially n.65; and para.23-035 n.151.) To similar effect see *Kuwait Supply Co v Oyster Marine Management (The Safeer)* [1994] 1 Lloyd's Rep. 637. But in cases where the issue before the court calls for the “application of established principles to a clearly defined event rendering performance impossible”, a court may be more willing to intervene because, in such a case, there is a “clear-cut issue of law” for the court: *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526 at [11]. In such a case, while the court must accept “loyally the findings of fact made by the arbitrators” it need not be “unduly inhibited by the arbitrators’ conclusion that the facts they have found are sufficient to satisfy the legal test for frustration”: *CTI Group Inc v Transclear SA (The Mary Nour)* [2008] EWCA Civ 856, [2008] 2 Lloyd's Rep. 526 at [11].

[419.](#) *Government of Gibraltar v Kenney* [1956] 2 Q.B. 410.

[420.](#) [1956] 2 Q.B. 410.

[421.](#) [1956] 2 Q.B. 410.

[422.](#) See below, paras 29-057 et seq. and, more generally, Birks, *An Introduction to the Law of Restitution*, Ch.X.

- [423.](#) *Société Franco-Tunisienne d'Armement v Sidermar SpA* [1961] 2 Q.B. 278, 313 (overruled on another point: *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 Q.B. 226); *Furmston* (1961) 24 M.L.R. 173; *Giles* (1964) 27 M.L.R. 351; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 C.L.R. 337.
- [424.](#) See below, paras 29-034—29-044.
- [425.](#) See below, paras 29-044—29-049 and *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 A.C. 349.

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