Contract Law: Text Cases and Materials (11th edn)
Ewan McKendrick

p. 704

21. Frustration and Force Majeure

Ewan McKendrick

https://doi.org/10.1093/he/9780198898047.003.0021
Published in print: 17 May 2024
Published online: August 2024

Abstract

The doctrine of frustration operates to discharge a contract where, after the formation of the contract, something occurs which renders performance of the contract impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract. This chapter examines the scope of the doctrine of frustration and the relationship between the doctrine of frustration and any force majeure or hardship clause that is found in the contract. Consideration is given to the basis of the doctrine of frustration and the remedial consequences of the conclusion that a contract has been frustrated. It also explores the reasons for the narrow scope of the doctrine of frustration and contrasts it with the more liberal regimes to be found in, for example, the Principles of European Contract Law.

Keywords: English contract law, doctrine of frustration, frustration of purpose, impossibility, remedial consequences of frustration, Principles of European Contract Law, force majeure

Central Issues

1. The doctrine of frustration operates to discharge a contract where, after the formation of the contract, something occurs which renders performance of the contract impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract.

2. While the doctrine of frustration is the subject of considerable analysis in textbooks, its practical significance is limited. This is so for a number of reasons. First, the doctrine does not apply where express provision has been made in the contract for the event that is alleged to have frustrated the contract. Given that force majeure and hardship clauses seek to regulate events which may impede or hinder performance of the contract, the impact of such events is more likely to be regulated by the terms of the force majeure clause or the hardship clause than by the doctrine of frustration. Secondly, the doctrine does not apply where the event alleged to have frustrated the contract was foreseeable. Thirdly, a contracting party cannot invoke the doctrine of frustration where the alleged frustrating event was caused by his own conduct rather than a supervening event. Fourthly, the consequences of the application of the doctrine are drastic in that it brings the contract automatically to an end, irrespective of the wishes of the parties. The draconian consequences of the application of the doctrine inhibit its wider use. Finally, the courts have adopted a restrictive approach to the operation of the doctrine in order to avoid it becoming an escape route for a party who has entered into a bad bargain. As Lord Roskill once put it, the doctrine of frustration is 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains' (*The Nema* [1982] AC 724, 752).
3. This chapter has two principal aims. First, it seeks to ascertain the scope of the doctrine of frustration and to examine the relationship between the doctrine of frustration and any force majeure or hardship clause that is to be found in the contract. Secondly, it explores, albeit
p. 705 briefly, the reasons for the narrow scope of the doctrine of frustration and contrasts it with the more liberal regimes to be found in, for example, the Principles of European Contract Law. Should English law follow the model found in the Principles and confer broader powers on the courts, not only in relation to the circumstances in which they can intervene but also in terms of their remedial powers when they do intervene?

21.1 Introduction

In *J Lauritzen AS* v. *Wijsmuller BV* (*The* '*Super Servant Two*') [1990] 1 Lloyd's Rep 1 (21.4), Bingham LJ stated (at p. 8) that the doctrine of frustration has evolved to 'mitigate the rigour of the common law's insistence on literal performance of absolute promises' and that its object is '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'. There are three elements to this statement. The first is the narrow approach initially taken by the common law. Liability for breach of contract is generally strict; that is to say liability is not dependent upon proof of fault by the party alleged to be in breach. This being the case, a party who fails to perform his contractual obligations, for whatever reason, is prima facie in breach of contract. The common law was generally reluctant to absolve a contracting party from the consequences of his failure to perform his contractual obligations. The second point is that the effect of the doctrine of frustration is to provide such an absolving power in that it brings the contract to an end without imposing a liability in damages on the party who has failed to perform his contractual obligations as a result of the supervening event. The third point is

that the doctrine only applies where there has been 'a significant change in circumstances' after the making of the contract such that it would not be 'fair' to enforce the contract according to its original terms. As we shall see, the definition of a 'significant change in circumstances' has proved to be a difficult matter, but the essential point to grasp at this stage is that the doctrine of frustration operates to discharge a contract where, after the formation of the contract, something occurs which renders performance of the contract impossible, illegal, or something radically different from that which was in the contemplation of the parties at the time of entry into the contract.

The reference made by Bingham LJ to the 'common law's insistence on literal performance of absolute promises' is an important one. The original common law rule was a very strict one. As Professor Simpson has pointed out ('Innovation in Nineteenth Century Contract Law' (1975) 91 *LQR* 247, 270):

> In pre-nineteenth-century law the general rule was that a change of circumstances after a promise was made did not excuse the promisor from performance, even if it made performance impossible; this view came to be known as the rule in *Paradine* v. *Jane* (1647) or the rule as to absolute contracts. *Paradine* v. *Jane* did not however deal with Acts of God, but with an Act of the King's enemies, and there remained some scope for the development of a defence of supervening impossibility through Act of God and this was allowed where death, the most dramatic Act of God, intervened.

p. 706 ↵ In *Paradine* v. *Jane* (1647) Aleyn 26 a tenant of a farm was dispossessed for a period of two years as a result of an act of the King's enemies. He claimed that he was not liable to pay the rent for the period for which he had been dispossessed. It was held that he was liable: he had assumed an obligation to pay the rent and he was bound to make that obligation good. But, as Professor Simpson points out, the law did not take such an absolute approach in all cases. An example is provided by the case of the death of a party to a contract of apprenticeship. The courts held that the effect of the death of either party was to dissolve the contract without any liability being imposed for the consequences of a failure to perform the contract in accordance with its terms. Thus, while the common law approach was very strict, it would not be true to say that it was, in all cases, absolute.

The law has moved on from the strict approach taken in *Paradine* v. *Jane*. The decisive case is generally considered to be the decision in *Taylor* v. *Caldwell* (1863) 3 B & S 826 (extracted later). Its more liberal approach was developed in cases such as *Jackson* v. *Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 and *Krell* v. *Henry* [1903] 2 KB 740 (21.5.3). While it is true to say that the doctrine of frustration is more liberal than the common law rule to be found in *Paradine* v. *Jane*, it is important to stress that the doctrine continues to operate within very narrow limits. Twentieth-century cases such as *Davis Contractors Ltd* v. *Fareham Urban District Council* [1956] AC 696 (later in this section), *National Carriers Ltd* v. *Panalpina (Northern) Ltd* [1981] AC 675 (21.7), and *J Lauritzen AS* v. *Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1 (21.4) evince a restrictive approach to the scope of the doctrine of frustration. While it is broader than the original common law rule, it remains a very narrow doctrine.

An introduction to the scope and the basis of the doctrine of frustration can be gleaned from an examination of two cases. The first is the decision of the Court of Queen's Bench in *Taylor* v. *Caldwell* (1863) 3 B & S 826 and the second is the decision of the House of Lords in *Davis Contractors Ltd* v. *Fareham Urban District Council* [1956]

AC 696. *Taylor* has been chosen because it is regarded as the origin of the modern doctrine of frustration, while *Davis* has been selected because it sets out the test that is generally applied by the modern courts when deciding whether or not a contract has been frustrated.

Taylor v. Caldwell
(1863) 3 B & S 826, Queen's Bench

The facts are set out in the judgment of Blackburn J.

Blackburn J

[gave the judgment of the court]

In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz. the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fetes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay 100l. for each day.

p. 707

The parties inaccurately call this a 'letting', and the money to be paid a 'rent' but the whole agreement is such as to shew that the defendants were to retain the possession of the Hall ↵ and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to shew that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement, evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible. … But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was

> to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but 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.
>
> There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.
>
> Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call *obligatio de certo corpore*. ... The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated by Pothier, who in his *Traité des Obligations*, partie 3, chap. 6, art. 3, § 668 states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.
>
> p. 708 ↵ Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.
>
> There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e.g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable ... It seems that in those cases the only ground on which the parties or their executors, can be excused from the consequences of the breach of the contract is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor. ... These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price and the vendor is excused from performing his contract to deliver, which has thus become impossible. ... 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 in words 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. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance. We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants. Rule absolute.

Commentary

Taylor v. *Caldwell* is a case of enormous significance in the development of this area of the law. As Professor Peel has stated (*Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022), para 2-028):

> *Taylor* v. *Caldwell* is generally regarded as a turning point, as the case in which the law moved away from the doctrine of absolute contracts to the modern doctrine of discharge by supervening events. The change was brought about by the familiar judicial technique of deducing a general principle from a series of particular examples. In *Taylor* v. *Caldwell*, Blackburn J relies on three … mitigations of the doctrine of absolute contracts …: cases in which death or permanent incapacity prevent performance of a contract for personal services, cases in ↵ which specific goods are sold and perish after the property in them has passed to the buyer, and cases in which the subject-matter of a bailment was destroyed without any default on the part of the bailee. From these examples, he deduces the general principle which applies where 'from the nature of the contract, it appears that the parties must … have known that it could not be fulfilled unless … some particular specified thing continued to exist'. He states that the effect of the principle to be that 'the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.'

p. 709

Taylor is another example of an English court drawing upon civilian influences in the development of the common law. The process of learning from other systems is no modern phenomenon.

The general principle to be found in *Taylor* is narrowly drawn. There are a number of elements to it. First the Music Hall was 'essential' to the performance of the contract; secondly, the Music Hall 'ceased to exist'; thirdly, its destruction was not attributable to the fault of either party; finally, the consequence of the destruction of the Music Hall was to 'excuse' both parties from their obligation to perform. In confining the principle to cases in which the subject matter of the contract ceased to exist, Blackburn J was able to avoid a direct conflict with *Paradine* v. *Jane* (where the subject matter of the contract had not ceased to exist). But this ground of distinction was not to last. While cases in which the subject matter of the contract has ceased to exist may be at the core of the doctrine of frustration, the doctrine extends beyond such cases to cases in which, although the subject matter of the contract still exists, it is either not available for use during the period of the contract

or its use in the changed circumstances would be something radically different from that which was in the contemplation of the parties at the time of entry into the contract (*Jackson* v. *Union Marine Insurance Co Ltd* (1874) LR 10 CP 125).

The claim brought by the plaintiffs in *Taylor* was one to recover the expenses which they had incurred in advertising and making preparations for the concerts. Were the facts of *Taylor* to recur today the plaintiffs might attempt to recover these expenses from the defendants under the Law Reform (Frustrated Contracts) Act 1943 (see 21.6) but the claim would probably fail on the ground that the plaintiffs would not be able to establish that the defendants had obtained a 'valuable benefit' as a result of their work in advertising the concerts.

Finally, it is important to note that the technique used by the court was the implication of a condition into the contract in order to give effect to what was claimed to be the intention of the parties. As Professor Ibbetson has commented (*A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999), p. 224), the nineteenth-century judges developed 'rules of law behind a façade of party intention'. He continues:

> Thus in *Taylor* v. *Caldwell* it was held that no action would lie for the breach of an agreement to allow the plaintiffs the use of the defendants' music hall when the music hall burned to the ground before the contract fell due to be performed. The analysis of Blackburn J is revealing. Purporting to follow Roman texts to the effect that there would be no liability on a *stipulatio* to transfer property if it were accidentally destroyed before the due date of transfer, he held that no liability arose in English law either, on the grounds that there was an implied condition that the property should continue to exist; where Roman law had applied a rule, English law construed—or imposed—an intention.

p. 710 ↵ While implication of a term was the original technique used by the court to justify the setting aside of the contract, modern courts no longer rely on this technique, as the next case demonstrates:

Davis Contractors Ltd v. Fareham Urban District Council
[1956] AC 696, House of Lords

Davis Contractors Ltd was a firm of building contractors. They submitted a tender to Fareham Urban District Council in relation to a building scheme at Gudgeheath Lane, Fareham. Attached to the tender was a letter dated 18 March 1946 which stated that the tender was subject to adequate supplies of labour being available as and when required. The tender was successful and Davis and Fareham entered into a contract in July 1946 under which Davis was to build seventy-eight houses for Fareham within eight months for £94,425. Without fault on the part of Davis or Fareham, adequate supplies of labour were not available and the work took twenty-two months to complete at a cost to Davis of £115,233. Fareham paid Davis the contract price. Davis claimed that they were entitled to be paid more than the contract price. They advanced their claim on two separate grounds. First, they submitted that the contract was subject to the conditions set out in their letter of 18 March so that the contract price was subject to the overriding condition that there would be an adequate supply of labour. Secondly, they submitted that the delay attributable to the shortage of labour had frustrated the contract. The House of Lords rejected both submissions. It held that the letter of 18 March had not been incorporated into the contract made in July 1946 and that the delay had not been sufficient to frustrate the contract. The extracts that follow do not deal with the incorporation point: they only deal with the doctrine of frustration.

Lord Reid

Frustration has often been said to depend on adding a term to the contract by implication. … I find great difficulty in accepting this as the correct approach because it seems to me hard to account for certain decisions of this House in this way. … I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott & Sons Ltd* v. *Del Sel* 1922 SC 592, 597:

> ‘A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that “tiger days excepted” must be held as if written into the milk contract.’

I think that there is much force in Lord Wright’s criticism in *Denny, Mott & Dickson Ltd* v. *James B Fraser & Co Ltd* [1944] AC 265, 275:

> ‘The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: “Well, if that happens, all is over between us.” On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations.’

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made.

p. 711

Lord Radcliffe

Before I refer to the facts I must say briefly what I understand to be the legal principle of frustration. It is not always expressed in the same way, but I think that the points which are relevant to the decision of this case are really beyond dispute. The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule and, consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law.

It has often been pointed out that the descriptions vary from one case of high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an anthology of different tests directed to the factor of delay alone, and delay, though itself a frequent cause of the principle of frustration being invoked, is only one instance of the kind of circumstance to which the law attends (see *Bank Line Ltd* v. *Arthur Capel & Co* [1919] AC 435, pp. 457, 460). A full current anthology would need to be longer yet. But the variety of description is not of any importance so long as it is recognized that each is only a description and that all are intended to express the same general idea. I do not think that there has been a better expression of that general idea than the one offered by Lord Loreburn in *FA Tamplin Steamship Co Ltd* v. *Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, at pp. 403, 404. It is shorter to quote than to try to paraphrase it:

> ‘ … 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 … no court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.’

So expressed, the principle of frustration, the origin of which seems to lie in the development of commercial law, is seen to be a branch of a wider principle which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties ‘must have made’ their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how

the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticized as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd* v. *London and District Cinemas Ltd* [1952] AC 166, 184 per Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be
p. 712 given 'irrespective of the individuals concerned, their temperaments and failings, ↵ their interest and circumstances' (*Hirji Mulji* v. *Cheong Yue Steamship Co Ltd* [1926] AC 497, 510). The legal effect of frustration 'does not depend on their intention or their opinions, or even knowledge, as to the event' (ibid at p. 509). On the contrary, it seems that when the event occurs

> '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' (*Dahl* v. *Nelson* (1881) 6 App Cas 38 at p. 59, per Lord Watson).

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And 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. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.

There is, however, no uncertainty as to the materials upon which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred' (*Denny, Mott & Dickson Ltd* v. *James B Fraser & Co Ltd* [1944] AC 265, 274, 275 per Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

> I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work was begun shortly before the formal contract was executed and continued, with impediments and minor stoppages but without actual interruption, until the 78 houses contracted for had all been built. After the work had been in progress for a time the appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed; but the respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case.
>
> That is not in any obvious sense a frustrated contract. …
>
> Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion,
> p. 713 protects himself both by a penalty clause for time ↵ exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament.
>
> ***Viscount Simonds***, ***Lord Morton of Henryton***, and ***Lord Somervell of Harrow*** delivered concurring opinions.

Commentary

Davis is a case of alleged commercial impracticability rather than impossibility. It was clearly not impossible for Davis to carry out their contractual obligations. Indeed, they did carry them out and had been paid the contract price for so doing. Their submission was, in essence, that it was not fair to hold them to the contract price in these changed circumstances. Some jurisdictions in the world, such as the United States, recognize the existence of a doctrine of commercial impracticability. *Davis* can be interpreted as a case that is hostile to the existence of such a doctrine. But this may be to go too far. As Professor Peel points out (*Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022), para 6-030):

> The case may be indicative of the English attitude towards 'impracticability' but the outcome does not reveal any actual difference between the English and the American approaches; for in an almost contemporaneous similar American case the court reached the same result and did so for similar reasons. Moreover, the percentage by which costs had increased in the *Davis Contractors* case was relatively low: it amounted to less than 23% of the contract price and such an increase would not have come even close to bringing the American doctrine of discharge by impracticability into play.

Secondly, it is worth noting that the contractors in *Davis* did attempt to make provision for the consequences of a possible shortage of labour but failed to ensure that the term was incorporated into the contract. This demonstrates the importance not only of drafting an appropriate clause to deal with the impact of events which may make performance more onerous or difficult but also of ensuring that that term is incorporated into the contract (see further 9.1). The fact that labour shortages had been in the contemplation of the parties at the time of entry into the contract also made it more difficult for the contractors to argue that a shortage of labour frustrated the contract (on the significance of foreseeability, see 21.3).

Thirdly, it should be noted that this was a contract which had been performed according to its terms in that the contractors had done the work and the employers had paid the contract price. The reason for the reliance by the contractors on the doctrine of frustration was that it was necessary for them to set aside the original contract if they were to succeed in their aim of recovering a sum in excess of the contract price. But their attempt failed. Here one can see how frustration can be invoked by a party who wishes to escape from what has turned out to be a bad bargain. The House of Lords were, however, alert to this danger and they refused to invoke the doctrine of frustration for the purpose of enabling the contractors to escape from their original bargain.

p. 714 ↵ Two final points should be noted about *Davis* and they can be taken together. The first is that the judgments demonstrate a reluctance to invoke the doctrine of frustration. Thus Lord Radcliffe stated that it was not mere hardship which caused the doctrine to be applicable and that frustration was not lightly to be invoked as the dissolvent of a contract. The second point is that the House of Lords rejected the implied term theory of frustration which had found favour with the court in *Taylor* v. *Caldwell* (earlier in this section). It was, in the view of both Lord Reid and Lord Radcliffe, unrealistic to impute the existence of the doctrine to the intention of the parties. Instead, the emphasis was placed upon the construction of the contract and whether 'the thing undertaken would, if performed, be a different thing from that contracted for'. This obviously requires the court to carry out a comparative exercise. The court must first ascertain what it is that the contract requires of the parties and then it must compare the performance in the changed circumstances with that originally undertaken. It is only in the case where there is a radical difference between the original contractual obligation and performance in the changed circumstances that the doctrine of frustration comes into play.

While the test set out by Lord Radcliffe may be described as the 'overall test' which the English courts apply when deciding whether or not a contract has been frustrated, it should not be thought that there is any one factor which the courts regard as 'critical' in every case. The approach which the court adopts has been described as 'multi-factorial' (*Edwinton Commercial Corporation, Global Tradeways Ltd* v. *Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The 'Sea Angel')* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [111]).

According to this view, regard should be had to a range of factors when deciding whether or not a contract has been frustrated. Rix LJ summarized this approach in his judgment in *The Sea Angel* in the following way (at [111]):

> Among the factors which have to be considered are 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. Since the subject matter of the doctrine of frustration is contract, and contracts are about the allocation of risk, and since the allocation and assumption of risk is not simply a matter of express or implied provision but may also depend on less easily defined matters such as 'the contemplation of the parties', the application of the doctrine can often be a difficult one. In such circumstances, the test of 'radically different' is important: it tells us that the doctrine is not to be lightly invoked; that mere incidence of expense or delay or onerousness is not sufficient; and that there has to be as it were a break in identity between the contract as provided for and contemplated and its performance in the new circumstances.

In *Islamic Republic of Iran Shipping Lines* v. *Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep 195, [105] Beatson J divided these factors into two groups. The first, consisting of the terms of the contract, its matrix or context, and the parties' knowledge, expectations, assumptions, and contemplations, in particular as to risk, as at the time of entry into the contract so far as these can be ascribed mutually and objectively, he labelled '*ex ante* factors'. The others (the nature of the supervening event and the parties' reasonable and objectively ascertainable calculations as to the possibility of future performance in the new circumstances) he stated were 'post-contractual'.

One consequence of the narrow approach to the doctrine of frustration is that it has become a doctrine of
p. 715 limited practical significance. This is so for a number of reasons. First, ↵ it does not apply where express provision has been made in the contract for the event that is alleged to have frustrated the contract (see 21.2). Given that force majeure and hardship clauses seek to regulate events which may impede or hinder performance of the contract, the impact of such events is more likely to be regulated by the terms of the force majeure clause or the hardship clause than by the doctrine of frustration. Secondly, the doctrine does not apply where the event alleged to have frustrated the contract was foreseeable (21.3). Thirdly, a contracting party cannot invoke the doctrine of frustration where the alleged frustrating event was caused by his own conduct rather than a supervening event (21.4). Fourthly, the courts have adopted a restrictive approach to the operation of the doctrine in order to avoid it becoming an escape route for a party who has entered into a bad bargain (21.5). As Lord Roskill once put it, the doctrine of frustration is 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent bargains' (*The Nema* [1982] AC 724, 752). Finally, the consequences of the application of the doctrine are drastic in that it brings the contract automatically to an end, irrespective of the wishes of the parties (21.6). The draconian consequences of the application of the doctrine inhibit its wider use.

21.2 Construction of the Contract

The starting point in any case in which it is alleged that the contract has been frustrated must be the terms of the contract itself. This is so for two reasons. The first is that it is necessary to ascertain the extent of the obligations undertaken in the contract in order to decide whether performance in the changed circumstances is something radically different from the obligation initially assumed. In other words, one must ascertain the obligations that have been assumed by the contracting parties before deciding whether or not the contract has been frustrated. The second reason is a rather different one and that is to ascertain whether or not the contract makes provision for the events which have occurred. If the contract does make provision for that event then it is the contract that will regulate the impact that the event will have on the obligations contained in the contract and not the doctrine of frustration. Many modern contracts are drafted in elaborate terms and the likelihood that the contract will make provision for the events which have occurred is rather high. This is particularly so where the contract contains a force majeure clause (see 12.3.5) or a hardship clause (see 12.3.9). In *J Lauritzen AS* v. *Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1 (21.4) one of the events listed in the force majeure clause was 'the closure of the Suez or Panama Canal'. Suppose that performance of the contract became more onerous for one party as a result of the closure of the Suez Canal. Such an event could not frustrate the contract because the contract itself has made provision for the closure of the Suez Canal and, this being the case, it is the contract that regulates the consequences of the closure of the Suez Canal and not the doctrine of frustration.

Yet it is unlikely that the presence of a force majeure clause will suffice of itself to exclude any possibility of reliance upon the doctrine of frustration (although in *Bremer Handelsgesellschaft mbH* v. *Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 133, 163 Mocatta J thought that there was 'much to be said' for the submission that 'there was no room for the doctrine of frustration to apply' as a result of the elaborate force majeure clauses to be found in the contract). While a force majeure clause (or a hardship clause) does not suffice of itself to shut out the doctrine of frustration, the clause may be relied upon for the purpose of showing that the parties have made express provision for the event that has occurred. And, where the parties have made such provision, the contract cannot be frustrated (except in the case of subsequent illegality, 21.5.2, where overriding
p. 716 considerations of public policy prevent effect being given to ↵ the terms of the contract: see *Ertel Bieber and Co* v. *Rio Tinto Co Ltd* [1918] AC 260). Why does the presence of a force majeure clause not have the automatic effect of excluding the operation of the doctrine of frustration? The answer is that a force majeure clause is primarily intended to cover events which are capable of resolution within a relatively short time frame and a court is therefore likely to conclude that it does not, as a matter of construction, extend to catastrophic events which render further performance obviously impossible.

An example is provided by *Metropolitan Water Board* v. *Dick Kerr and Co* [1918] AC 119. Contractors agreed in 1914 to construct a reservoir to be completed within six years. In 1916 the contractors were required by Government Order to stop the work and sell their plant. In these circumstances the contractors claimed that the contract had been frustrated. The Water Board denied that the contract had been frustrated and, for this purpose, placed reliance on condition 32 of the contract which, after setting out the obligations of the contractors, continued:

> Provided always that if by reason of any additional works or enlargements of the works (which additions or enlargements the engineer is hereby authorised to make), or for any other just cause arising with the Board or with the engineer, or in consequence of any unusual inclemency of the weather, or general or local strikes, or combination of workmen, or for want or deficiency of any orders, drawings or directions, or by reason of any difficulties, impediments, obstructions, oppositions, doubts, disputes, or differences, whatsoever and howsoever occasioned, the contractor shall, in the opinion of the engineer (whose decision shall be final), have been unduly delayed or impeded in the completion of this contract, it shall be lawful for the engineer, if he shall so think fit, to grant from time to time, and at any time or times by writing under his hand, such extension of time either prospectively or retrospectively, and to assign such other day or days for or as for completion, as to him may seem reasonable, without thereby prejudicing or in any manner affecting the validity of the contract, or the adequacy of the contract price, or the adequacy of the sums or prices mentioned in the third schedule; and any and every such extension of time shall be deemed to be in full compensation and satisfaction for, and in respect of, any and every actual or probable loss or injury sustained or sustainable by the contractor in the premises, and shall in like manner exonerate him from any claim or demand on the part of the Board, for and in respect of the delay occasioned by the cause or causes in respect of which any and every such extension of time shall have been granted, but no further or otherwise, nor for or in respect of any delay continued beyond the time mentioned in such writing or writings respectively.

The Water Board pointed out that this condition applied to delay 'whatsoever and howsoever occasioned' and they submitted that the events which had occurred were regulated by condition 32 and not by the doctrine of frustration. The House of Lords rejected this submission and held that the contract had been frustrated. Lord Finlay LC stated (at pp. 125–126):

> It is admitted that the prosecution of the works became illegal in consequence of the action of the Minister of Munitions. It became illegal on February 21, 1916, and remains illegal at the present time. This is not a case of a short and temporary stoppage, but of a prohibition in consequence of war, which has already been in force for the greater part of two years, and will, according to all appearances, last as long as the war itself, as it was the result of the necessity of preventing the diversion to civil purposes of labour and material required for purposes immediately connected with the war. Condition 32 provides for cases in which the contractor has, in the opinion of the engineer, been unduly delayed or impeded in the completion of his ↵ contract by any of the causes therein enumerated or by any other causes, so that an extension of time was reasonable. Condition 32 does not cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made.

p. 717

Thus the magnitude of the event was such that it took it outside the scope of the clause, notwithstanding the use of the words 'whatsoever and howsoever occasioned'. On the same reasoning, a force majeure clause which includes in the list of force majeure events 'strikes' and 'wars' may be held, as a matter of interpretation, not to cover a protracted national strike, such as a general strike, or a war of the magnitude of the First or Second World War (see *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32,

40–41). Such catastrophic events are, however, comparatively rare. Most of the events that occur will fall within the scope of an appropriately drafted force majeure or hardship clause. As contracts make provision for the occurrence of a greater range of events, so the scope for the application of the doctrine of frustration diminishes. In most cases the inquiry will start and finish with the terms of the contract itself.

21.3 Foreseeable Events

A further factor which limits the operation of the doctrine of frustration is the general rule that an event which was foreseeable, and therefore within the contemplation of the parties at the time of entry into the contract, does not operate to frustrate a contract. A frustrating event is one that was not foreseen and was not foreseeable by the parties. The difficulty with this formula is the obvious one, namely identifying what is and what is not foreseeable at the moment of entry into the contract. Events such as wars and earthquakes are foreseeable in the sense that we are all aware that they may take place. But in some parts of the world they are more foreseeable than in others. Take earthquakes as an example: some parts of the world are at greater risk of earthquakes than others. How foreseeable does the event have to be before it prevents reliance being placed upon the doctrine of frustration? This is a difficult question to answer because it is a question of degree and the Court of Appeal has warned against the 'over-refinement' of the concept of foreseeability in this context (*The 'Sea Angel'* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127]). The most that can be said is that the less that an event in its type and impact is foreseeable, the more likely it is to be a factor which, depending on the facts and circumstances of the case, may lead to the frustration of a contract. A rather more robust view was, however, taken by Lord Denning in the following case:

Ocean Tramp Tankers Corporation v. V/O Sovfracht, The Eugenia
[1964] 2 QB 226, Court of Appeal

On 8 September 1956 the defendants chartered the vessel the *Eugenia* for a 'trip out to India via the Black Sea'. At the time at which they entered into the agreement both parties were aware of the possibility that the Suez Canal might be closed as a result of the build-up of military activity in the area. The parties were unable to reach agreement on a clause to deal with the possibility of the Canal
p. 718 being closed and so the contract was silent ↵ on the point. A war clause in the contract prohibited the charterers from sailing into a zone which was 'dangerous as the result of any actual or threatened act of war' etc. The vessel arrived at Port Said at a time when Egyptian anti-aircraft guns were firing and the zone was a 'dangerous' one within the meaning of the war clause. Notwithstanding this, the vessel proceeded to enter the Suez Canal on 31 October 1956 where she became trapped and was not released until January 1957. On 4 January 1957 the charterers claimed that the charterparty had been frustrated by the events which had occurred. The owners denied that the contract had been frustrated and brought a claim for damages for breach of contract against the charterers. Their claim succeeded. It was held that the defendants were in breach of the war clause in entering the Suez Canal and that the effect of the closure of the Suez Canal had not been to frustrate the contract between the parties.

Lord Denning MR

The second question is whether the charterparty was frustrated by what took place. The arbitrator has held it was not. The judge has held that it was. Which is right? One thing that is obvious is that the charterers cannot rely on the fact that the *Eugenia* was trapped in the canal; for that was their own fault. They were in breach of the war clause in entering it. They cannot rely on a self-induced frustration, see *Maritime National Fish Ltd* v. *Ocean Trawlers Ltd* [1935] AC 524. But they seek to rely on the fact that the canal itself was blocked. They assert that even if the *Eugenia* had never gone into the canal, but had stayed outside (in which case she would not have been in breach of the war clause), nevertheless she would still have had to go round by the Cape. And that, they say, brings about a frustration, for it makes the venture fundamentally different from what they contracted for. The judge has accepted this view. He has held that on November 16, 1956, the charterparty was frustrated.
...

This means that once again we have had to consider the authorities on this vexed topic of frustration. But I think the position is now reasonably clear. It is simply this: if it should happen, in the course of carrying out a contract, that a fundamentally different situation arises for which the parties made no provision—so much so that it would not be just in the new situation to hold them bound to its terms —then the contract is at an end. It was originally said that the doctrine of frustration was based on an implied term; in short, that the parties, if they had foreseen the new situation, would have said to one another: 'If that happens, of course, it is all over between us'. But the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth. The parties would not have said: 'It is all over between us'. They would have differed about what was to happen. Each would have sought to insert reservations or qualifications

of one kind or another. Take this very case. The parties realised that the canal might become impassable. They tried to agree on a clause to provide for the contingency. But they failed to agree. So there is no room for an implied term.

It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. The only thing that is essential is that the parties should have made no provision for it in their contract. The only relevance of it being 'unforeseen' is this: If the parties did not foresee anything of the kind happening, you can readily infer they have made no provision for it: whereas, if they did foresee it, you would expect them to make provision for it. But cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract. Such was the case in the Spanish Civil War when a ship was let on charter to the republican government. The purpose was to evacuate refugees. The parties foresaw that she might be seized by the nationalists. But they made no provision for it in their contract. Yet, when she was seized, the contract was frustrated, see

p. 719

↵ *WJ Tatem Ltd* v. *Gamboa* [1939] 1 KB 132. So here the parties foresaw that the canal might become impassable: it was the very thing they feared. But they made no provision for it. So there is room for the doctrine to apply if it be a proper case for it.

We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract', see *Davis Contractors Ltd* v. *Fareham Urban District Council* [1956] AC 696, 729 by Lord Radcliffe. To see if the doctrine applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration. If they have not provided for it, then you have to compare the new situation with the situation for which they did provide. Then you must see how different it is. The fact that it has become more onerous or more expensive for one party than he thought is not sufficient to bring about a frustration. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound. It is often difficult to draw the line. But it must be done. And it is for the courts to do it as a matter of law: see *Tsakiroglou & Co Ltd* v. *Noblee Thorl GmbH* [1962] AC 93, 116, 119 by Lord Simonds and by Lord Reid.

Applying these principles to this case, I have come to the conclusion that the blockage of the canal did not bring about a 'fundamentally different situation' such as to frustrate the venture. My reasons are these: (1) The venture was the whole trip from delivery at Genoa, out to the Black Sea, there load cargo, thence to India, unload cargo, and redelivery. The time for this vessel from Odessa to Vizagapatam via the Suez Canal would be 26 days, and via the Cape, 56 days. But that is not the right comparison. You have to take the whole venture from delivery at Genoa to redelivery at Madras. We were told that the time for the whole venture via the Suez Canal would be 108 days and via the Cape 138 days. The difference over the whole voyage is not so radical as to produce a frustration. (2) The cargo was iron and steel goods which would not be adversely affected by the longer voyage, and there was no special reason for early arrival. The vessel and crew were at all times fit and sufficient to proceed via the Cape. (3) The cargo was loaded on board at the time of the blockage of the canal. If the contract was frustrated, it would mean, I suppose, that the ship could throw up the charter and

> unload the cargo wherever she was, without any breach of contract. (4) The voyage round the Cape made no great difference except that it took a good deal longer and was more expensive for the charterers than a voyage through the canal.
>
> ***Donovan LJ*** delivered a concurring judgment. ***Danckwerts LJ*** concurred.

Commentary

The difficulty with this decision lies in Lord Denning's rejection of the proposition that the doctrine of frustration applies only to events which are 'unforeseen', 'unexpected', or 'uncontemplated'. In his view, the test to be applied is whether or not provision has been made for the event which has occurred, and the foreseeability of the event is merely a factor to be taken into account when deciding whether or not one would expect parties to make provision for the event which has occurred. Professor Peel (*Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022), para 13-018) has criticized this aspect of Lord Denning's judgment on the following ground:

> p. 720 [T]hese remarks are *obiter* and it is respectfully submitted that this aspect of the decision can be explained on other grounds. At the time of contracting, the risk of the Canal's being closed ↵ for a *very considerable time* was not foreseen; nor was it foreseeable on the high standard of foreseeability required to exclude frustration. To the extent that the parties did foresee the risk, they seem to have allocated it by the terms of the charterparty. This took the form of a 'time charter trip', which provided that the voyage was to be paid for by the time it took, and so indicated an intention to throw the risk of delay on the charterers. There seems to be no reason why the court should, by applying the doctrine of frustration to foreseen events, reverse such an allocation of risks deliberately made by the contracting parties. [Emphasis in the original.]

The result in *The Eugenia* seems to be correct but the reasoning is suspect. There is authority to support the proposition that a contract is not frustrated when the event which has occurred is a foreseeable one (see, for example, *Walton Harvey Ltd* v. *Walker & Homfrays Ltd* [1931] 1 Ch 274). Much is likely to turn on the meaning of 'foreseeability' in this context. Professor Peel has suggested that foreseeability is relevant to the question whether or not a party has assumed the risk of the occurrence of the event in question (see to similar effect *The 'Sea Angel'* [2007] EWCA Civ 547, [2007] 2 Lloyd's Rep 517, [127]–[128]). Thus he states (*Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022), para 13-015) that:

> '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'. The distinction is between cases in which parties can reasonably be expected to foresee the occurrence of the event as no more than a possibility, and those in which they can be so expected to foresee it as a real likelihood. The inference of risk assumption will be drawn only in cases of the latter kind; and even then it may be displaced by [other factors].

A second point worth noting about *The Eugenia* is the conclusion that the closure of the Suez Canal did not result in the frustration of the contract between the parties. Those responsible for the drafting of force majeure clauses have taken notice of this fact and it is now common practice to include the closure of the Suez Canal in the list of events that trigger the operation of a force majeure clause.

21.4 Self-Induced Frustration

The doctrine of self-induced frustration has been described in H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023, para 27-091, footnotes omitted) in the following terms:

> 'The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it'. 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'. 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
> p. 721 discharged from his contractual obligations'. ↵ Thus frustration has been held to be 'self-induced' where the alleged frustrating event was caused by a breach or anticipatory breach of contract 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, and where the alleged frustrating event was not a supervening event or 'something altogether outside the control of the parties'. 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.

The leading modern case on self-induced frustration is the decision of the Court of Appeal in *J Lauritzen AS* v. *Wijsmuller BV (The 'Super Servant Two')* [1990] 1 Lloyd's Rep 1. The case is an important one for three reasons. First, it demonstrates the width of the doctrine of self-induced frustration; secondly, the judgment of Bingham LJ contains a modern definition of the doctrine of frustration; and thirdly, it demonstrates the crucial role played by force majeure clauses in commercial contracts today.

J Lauritzen AS v. Wijsmuller BV (The 'Super Servant Two')
[1990] 1 Lloyd's Rep 1, Court of Appeal

The defendants, Wijsmuller, agreed to carry the plaintiffs' drilling rig, named the *Dan King*, from Japan to Rotterdam. The contract, dated 7 July 1980, provided that the rig would be delivered between 20 June and 20 August 1981 and that it would be carried using either *Super Servant One* or *Super Servant Two* at Wijsmuller's option. Both of these vessels were large, self-propelled, semi-submersible barges built for carrying large loads such as the rig. Clause 17 of the contract (which is set out in full in the judgment of Bingham LJ) gave Wijsmuller the right to cancel the contract in the event of force majeure or any other circumstance which reasonably prevented the performance of the contract. The defendants claimed that by November 1980 they had made an internal decision, which they admitted was not irrevocable, to schedule *Super Servant Two* to transport the plaintiffs' rig and to allocate *Super Servant One* to the performance of other concluded contracts. On 29 January 1981 *Super Servant Two* sank while transporting another rig. On 16 February 1981 Wijsmuller told Lauritzen that it could not carry the rig using either *Super Servant One* or *Super Servant Two*. It could not use *Super Servant One* because it was required for the performance of other contracts and it could not use *Super Servant Two* because it had sunk. The plaintiffs alleged that the defendants' failure to transport the rig in the agreed manner was a breach of contract so that the defendants were liable for the additional costs that had been incurred in transporting the rig by another method. The defendants pleaded that the contract had been frustrated and they also relied on clause 17 as a defence to the claim brought by the plaintiffs.

Four issues were ordered to be tried, namely:

1. whether the defendants were entitled to cancel the contract under clause 17
   (a) If the loss of the *Super Servant Two* occurred without the negligence of the Defendants, their servants or agents.
   (b) If the loss of the *Super Servant Two* was caused by the negligence of the Defendants, their servants or agents.

p. 722

2. whether the contract was frustrated
   (a) If the loss of the *Super Servant Two* occurred without the negligence of the Defendants, their servants or agents.
   (b) If the loss of the *Super Servant Two* was caused by the negligence of the Defendants, their servants or agents.

Mr Justice Hobhouse answered 'yes' to question 1(a) and 'no' to questions 1(b), 2(a), and 2(b). The defendants appealed to the Court of Appeal against the conclusion of Hobhouse J in relation to questions 1(b), 2(a), and 2(b). The Court of Appeal dismissed the appeal. Consequently the defendants were unable to invoke the doctrine of frustration and were only able to rely on clause 17 if the loss of *Super Servant Two* occurred without the negligence of the defendants.

Bingham LJ

The contract of carriage was expressly governed by English law and not many of its terms are germane to these preliminary issues. …

Clause 17 was the subject of two issues argued before the Judge, one of which remains in contention on appeal. I should recite its … terms:

17. Cancellation

17.1. Wijsmuller has the right to cancel its performance under this Contract whether the loading has been completed or not, in the event of force majeur (sic), Acts of God, perils or danger and accidents of the sea, acts of war, warlike-operations, acts of public enemies, restraint of princes, rulers or people or seizure under legal process, quarantine restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extra-ordinary periods of delay and similar events and/or circumstances, abnormal increases in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract.

[He set out the facts of the case and the four issues ordered to be tried and continued]

Question 1(b)

The learned Judge answered question 1(a) in favour of Wijsmuller because he rejected Lauritzen's argument that cl. 17 did not apply before arrival of the carrying vessel at the loading site. It was not disputed that the loss of *Super Servant Two* was capable of being a circumstance which might reasonably impede or delay the performance of the contract within the meaning of cl. 17. The question for decision is whether, on a proper construction of cl. 17 read in the context of the contract as a whole and of relevant background circumstances, Wijsmuller were entitled to cancel the contract under cl. 17 if the loss of *Super Servant Two* was caused by their (or their servants' or agents') negligence before the time for performance had arrived. It was common ground that the Court's task is to elicit the parties' intentions from the contract they made according to familiar principles of construction. …

[He concluded that the expression 'perils or dangers and accidents of the sea' could not be read alone but had to be read as part of the contract as a whole. He stated that, although clause 17 did not attempt to exclude liability for negligence, it conferred upon the defendants a 'right exercisable in a very wide range of circumstances to nullify the contractual bargain ↵ made between the parties at no cost to [the defendants] and regardless of the loss' to the plaintiffs. Therefore he concluded that the 'broad approach' adopted by the Privy Council in *Canada Steamship* v. *The King* [1952] AC 192 was applicable to the construction of clause 17. Applying the three rules of construction derived from *Canada Steamship* [on which see 13.2.1] Bingham LJ held that clause 17.1 did not expressly cover negligence on the part of the defendants. At the second stage he held that clause 17 was wide enough on its ordinary construction to cover negligence on the part of the defendants. But at the third stage

p. 723

he held that clause 17 was not 'deprived of a sensible application' if it was confined to events which were not brought about by the negligence of the defendants, their employees, or agents. Almost all of the events listed in clause 17 were events which were beyond the direct or indirect control of the defendants. This being the case, clause 17 did not provide the defendants with protection in the event that *Super Servant Two* sank as a result of the negligence of the defendants.]

Question 2: general

The argument in this case raises important issues on the English law of frustration. Before turning to the specific questions I think it helpful to summarize the established law so far as relevant to this case. ...

Certain propositions, established by the highest authority, are not open to question:

1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises ... The object of the doctrine 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 ...
2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended. ...
3. Frustration brings the contract to an end forthwith, without more and automatically. ...
4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it ... A frustrating event must be some outside event or extraneous change of situation.
5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it.

Question 2(a)

The doctrine of frustration depends on a comparison between circumstances as they are or are assumed to be when a contract is made and circumstances as they are when a contract is, or would be, due to be performed. It is trite law that disappointed expectations do not of themselves give rise to frustrated contracts. To frustrate, an event must significantly change—

> ' ... 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 [the contract's] execution ... [*National Carriers Ltd* sup., at p. 700, per Lord Simon of Glaisdale].

p. 724 ↵ Had the *Dan King* contract provided for carriage by *Super Servant Two* with no alternative, and that vessel had been lost before the time for performance, then assuming no negligence by Wijsmuller (as for purposes of this question we must), I feel sure the contract would have been frustrated. The doctrine must avail a party who contracts to perform a contract of carriage with a vessel which, through no fault of his, no longer exists. But that is not this case. The *Dan King* contract did provide an alternative. When that contract was made one of the contracts eventually performed by *Super Servant One* during the period of contractual carriage of *Dan King* had been made, the other had not, at any rate finally. Wijsmuller have not alleged that when the *Dan King* contract was made either vessel was earmarked for its performance. That, no doubt, is why an option was contracted for. Had it been foreseen when the *Dan King* contract was made that *Super Servant Two* would be unavailable for performance, whether because she had been deliberately sold or accidentally sunk, Lauritzen at least would have thought it no matter since the carriage could be performed with the other. I accordingly accept [the] submission [of counsel for the plaintiffs] that the present case does not fall within the very limited class of cases in which the law will relieve one party from an absolute promise he has chosen to make.

But I also accept [counsel for the plaintiffs'] submission that Wijsmuller's argument is subject to other fatal flaws. If, as was argued, the contract was frustrated when Wijsmuller made or communicated their decision on Feb. 16, it deprives language of all meaning to describe the contract as coming to an end automatically. It was, indeed, because the contract did not come to an end automatically on Jan. 29, that Wijsmuller needed a fortnight to review their schedules and their commercial options. I cannot, furthermore, reconcile Wijsmuller's argument with the reasoning or the decision in *Maritime National Fish Ltd*. In that case the Privy Council declined to speculate why the charterers selected three of the five vessels to be licensed but, as I understand the case, regarded the interposition of human choice after the allegedly frustrating event as fatal to the plea of frustration. If Wijsmuller are entitled to succeed here, I cannot see why the charterers lost there. The cases on frustrating delay do not, I think, help Wijsmuller since it is actual and prospective delay (whether or not recognized as frustrating by a party at the time) which frustrates the contract, not a party's election or decision to treat the delay as frustrating. I have no doubt that force majeure clauses are, where their terms permit, to be construed and applied as in the commodity cases on which Wijsmuller relied, but it is in my view inconsistent with the doctrine of frustration as previously understood on high authority that its application should depend on any decision, however reasonable and commercial, of the party seeking to rely on it.

I reach the same conclusion as the Judge for the reasons which he lucidly and persuasively gave.

Question 2(b)

The issue between the parties was short and fundamental: what is meant by saying that a frustrating event, to be relied on, must occur without the fault or default, or without blame attaching to, the party relying on it?

> [Counsel for the defendant's] answer was that a party was precluded from relying on an event only when he had acted deliberately or in breach of an actionable duty in causing it. Those conditions were not met here since it was not alleged Wijsmuller sank *Super Servant Two* deliberately and at the material time Wijsmuller owed Lauritzen no duty of care.
>
> [Counsel for the plaintiffs] argued for a less restrictive approach. ...
>
> [The defendant's] test would, in my judgment, confine the law in a legalistic strait-jacket and distract
> p. 725 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. A fine test of legal duty is inappropriate; what is needed is a pragmatic judgment whether a party seeking to rely on an event as discharging him from a contractual promise was himself responsible for the occurrence of that event.
>
> Lauritzen have pleaded in some detail the grounds on which they say that *Super Servant Two* was lost as a result of the carelessness of Wijsmuller, their servants or agents. If those allegations are made good to any significant extent Wijsmuller would (even if my answer to Question 2(a) is wrong) be precluded from relying on their plea of frustration.
>
> I would answer this question also as the Judge did and would therefore dismiss the appeal.

Dillon LJ

> Issues 2(a) and (b) are concerned with frustration. Was the contract frustrated by the sinking of *Super Servant Two* or by that event coupled with the subsequent election by the defendants to use *Super Servant One* on other voyages and not for carrying the *Dan King*? The important factor, common to both issues, is that under the contract the defendants could have satisfied their obligation by using *Super Servant One* to carry the rig, after *Super Servant Two* had sunk, but they elected not to do so.
>
> In this respect, the present case appears to be a direct parallel to that described by Lord Wright in *Maritime National Fish Ltd* v. *Ocean Trawlers Ltd* [1935] AC 524 at pp. 529–530 where he said:

> ‘ … in [their Lordships] judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the St. Cuthbert being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the St. Cuthbert as one, in which event a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected nor is it material, as between the appellants and the respondents, that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the St. Cuthbert if they had so minded. If the case be figured as one in which the St. Cuthbert was removed from the category of privileged trawlers, it was by the appellant’s hand that she was so removed because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the St. Cuthbert. The essence of “frustration” is that it should not be due to the act or election of the party.’

The parallel seems to be even closer, if, as some of the documents seem to suggest, the defendants, after the loss of the *Super Servant Two*, negotiated extra fees with the parties with whom they had other contracts of carriage before finally allocating the *Super Servant One* to perform those other contracts.

It is the view of Professor Treitel, expressed both in his own book on the Law of Contract—see the 7th edn at pp. 674–675 and 700–701—and in the current editions of well-known textbooks of which he is editor or an editor, that where a party has entered into a number of contracts with other parties and an uncontemplated supervening event has the result that he is deprived of the means of satisfying all those contracts, he can, provided he acts ‘reasonably’ in making his election, elect to use such means as remains available to him to perform some of the contracts, and claim that the others, which he does not perform, have been frustrated by the supervening event. The reasoning
p. 726 depends on the proposition that if it is ↵ known to those concerned that the party will have entered into commitments with others and if he acts ‘reasonably’ in his allocation of his remaining means to his commitments, the chain of causation between the uncontemplated supervening event and the non-performance of those of his contracts which will not have been performed will not have been broken by the election to apply his remaining means in a ‘reasonable’ way. Similar reasoning was, as my Lord has pointed out, used by Mr Justice Robert Goff in relation to an exceptions clause in the unreported case of *Westfälische Central-Genossenschaft GmbH* v. *Seabright Chemicals Ltd*.

Such an approach is however inconsistent to my mind with the view expressed by Lord Wright in that passage in *Maritime National Fish* which I have already cited, where he said:

> ‘It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected.’

> It is also, as my Lord has pointed out, inconsistent with the long accepted view that frustration brings the contract to an end forthwith, without more ado automatically. Plainly the sinking of *Super Servant Two* did not do that, since even after that sinking the defendants could have used *Super Servant One* to perform the contract.
>
> We in this Court should apply *Maritime National Fish* and the other authorities to which my Lord has referred. Accordingly I agree with my Lord and the learned Judge that issues 2(a) and (b) should be answered in the negative.

Commentary

The *Super Servant Two* is a case of considerable significance. This is so for a number of reasons. First, it demonstrates the practical significance of force majeure clauses. The defendants found some protection in clause 17 but not in the doctrine of frustration. Indeed, in many ways the narrowness of the doctrine of frustration can be explained on the basis that it is open to the parties to protect their own position by an appropriately drafted force majeure clause (see 12.3.5). Secondly, it is an important case in relation to the interpretation of force majeure clauses in that it demonstrates that the courts are unlikely to conclude, in the absence of very clear words, that a force majeure clause is apt to encompass events caused by the negligence of the party relying upon the clause. The reason for this is that the events listed in the clause are generally events that are beyond the control of the parties (such as 'acts of God', 'wars', etc.) and, this being the case, the court is likely to presume that all events listed in the clause are beyond their control.

Thirdly, the case demonstrates that a party who has been at fault will generally not be entitled to invoke the doctrine of frustration. The defendants in *Super Servant Two* argued that it was only when they had acted deliberately or were in breach of a duty of care which they owed to the plaintiffs that they would be precluded from relying upon the doctrine of frustration. Bingham LJ rejected this submission on the ground that it would 'confine the law in a legalistic strait-jacket'. The view adopted by the Court of Appeal was that a frustrating event must, by definition, take place 'without blame or fault on the side of the party seeking to rely' upon the doctrine of frustration. So, if the sinking of Super Servant Two occurred as a result of the negligence of the defendants, that of itself would have sufficed to prevent the defendants from relying upon frustration.

The final point relates to the fact that the defendants had a choice as to the allocation of Super Servant One. In
p. 727 the view of the Court of Appeal the fact that the defendants had a ↵ choice meant that the alleged frustrating event was brought about by their own act or election and not by a supervening event. Adopting a strict approach to the interpretation of the decision of the Privy Council in *Maritime National Fish Ltd* v. *Ocean Trawlers Ltd* [1935] AC 524, the Court of Appeal held that it was irrelevant that the defendants in *Super Servant Two* had no *real* choice as to the allocation of Super Servant One in that it was impossible to allocate it to the performance of all concluded contracts. Cases relied upon to support the proposition that the defendants could invoke the doctrine of frustration if they had acted reasonably in their allocation of Super Servant One were distinguished on the ground that they were concerned with the interpretation of force majeure clauses and not with the doctrine of frustration. This conclusion would appear to leave a party in the position of the defendants in this case in a very difficult position. Two practical steps can be taken to mitigate the rigours of the decision. The first is to eliminate any choice on the part of the defendants. Bingham LJ stated that, had the

contract been to perform the contract with Super Servant Two, the sinking of that vessel, without negligence on the part of the defendants, would have entitled the defendants to seek relief under the doctrine of frustration. The second step is to insert an appropriately drafted force majeure clause into the contract. This takes us back to our first point, namely the crucial role played by force majeure clauses in modern commercial contracts.

21.5 Frustrating Events

It is only in the rare case where (i) the contract does not make provision for the event that has occurred, (ii) the event was not foreseen by the parties and was not sufficiently foreseeable, and (iii) the alleged frustrating event was not 'self-induced' that a court has to decide whether or not a contract has been frustrated. Cases involving frustrated contracts can be divided into three groups.

21.5.1 Impossibility

The classic example of a frustrated contract is a contract that has become impossible to perform. *Taylor* v. *Caldwell* (21.1) falls into this category. *Taylor* was a case of partial rather than total impossibility in that it was still possible for the parties to make use of the Surrey Gardens. But use of the Gardens only would have been a very different contract from that which had originally been concluded by the parties. A contract of employment is frustrated on the death of the employee. More difficult is the case where the employee becomes incapacitated. Much depends upon the extent of the incapacity; the greater it is, both in extent and duration, the more likely it is that the contract of employment will be frustrated. A contract may also be frustrated where the subject matter of the contract is unavailable for use in the performance of the contract (*Jackson* v. *Union Marine Insurance Co Ltd* (1874) LR 10 CP 125, where the charter of a ship which subsequently ran aground was held to have been frustrated as a result of the unavailability of the vessel for the contracted voyage). Where the unavailability is partial only (that is to say it is only unavailable for a proportion of the contract period) the court must have regard to the extent of the unavailability. The greater the extent, in relation to the time-scale of the contract, the more likely it is that the contract will be frustrated (*The Nema* [1982] AC 724).

p. 728

21.5.2 Illegality

The second group of cases concerns contracts that have become illegal after the date of formation. These cases differ from cases where the illegality affected the contract from the outset. Cases that fall within this section are contracts that were valid when formed but have become illegal as a result of the occurrence of events subsequent to the making of the contract. An example is provided by the case of *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. A contract to sell machinery to buyers in Poland was frustrated when Poland was occupied by Germany in the Second World War (it being illegal to trade with the enemy in times of war). Public policy considerations operate very strongly in this area (*Islamic Republic of Iran Shipping Lines* v. *Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm), [2011] 1 Lloyd's Rep 195, [100]). In cases involving subsequent illegality, the operation of the doctrine of frustration

cannot be excluded by an express term of the contract (*Ertel Bieber and Co* v. *Rio Tinto Co Ltd* [1918] AC 260) nor can it be excluded on the ground that the supervening illegality was foreseen by the contracting parties. The reason for this is that public policy considerations will generally deny to contracting parties the entitlement to provide that the agreement is to be performed notwithstanding any illegality. In other words, public policy here trumps the autonomy of the contracting parties. A contract governed by English law is not, as a general rule, affected by the validity of the contract according to the law of another jurisdiction unless performance has become illegal by the law of the jurisdiction where performance is to take place (a rule affirmed by Marcus Smith J in *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency* [2019] EWHC 335 (Ch), 183 Con LR 167).

Difficult questions can arise where the supervening illegality affects part only of the contract. These cases involve questions of degree. The court must examine the impact of the illegality on the contract. Where the illegality affects the contract in a substantial or a fundamental way then the contract is likely to be frustrated (*Denny, Mott & Dickson* v. *James B Fraser & Co Ltd* [1944] AC 265). Conversely, where its impact is insubstantial the contract will not be frustrated (*Cricklewood Property & Investment Trust Ltd* v. *Leightons Investment Trust Ltd* [1945] AC 221).

21.5.3 Frustration of Purpose

The most difficult cases are those in which it is alleged that the purpose of the contract has been frustrated. The courts have exercised considerable caution in order to ensure that frustration does not become a convenient escape route for a party who discovers that he has entered into a bad bargain. More often than not, attempts to invoke the doctrine of frustration in this context have failed (see, for example, *Davis Contractors Ltd* v. *Fareham Urban District Council* [1956] AC 696, 21.1; *Amalgamated Investment & Property Co Ltd* v. *John Walker & Sons Ltd* [1977] 1 WLR 164; and *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency* [2019] EWHC 335 (Ch), 183 Con LR 167). The case that gives rise to difficulty is the decision of the Court of Appeal in *Krell* v. *Henry* [1903] 2 KB 740. It gives rise to difficulty on two grounds. First, why did the Court of Appeal conclude that the contract had been frustrated? Secondly, what is the difference between *Krell* (where the contract was
p. 729 frustrated) and the decision of the Court of Appeal in *Herne Bay Steam Boat Company* v. *Hutton* [1903] 2 KB
↵ 683, later in this section (where the contract was not frustrated)? It is important to examine *Krell* and *Hutton* together (alongside the example given by Vaughan Williams LJ in *Krell* of the cab driver who agrees to take a passenger to Epsom on Derby Day). The commentary will therefore follow the decision of the Court of Appeal in *Hutton.*

Krell v. Henry
[1903] 2 KB 740, Court of Appeal

Krell owned a flat on the third floor at 56A Pall Mall. As it had been announced that the King's coronation procession would pass along Pall Mall on 26 and 27 June 1902, Henry agreed to hire Krell's flat on those days. On 20 June Krell and Henry entered into a written contract which made no reference to the coronation processions or to any other purpose for which the flat was taken. The agreement stated that Henry was to have 'the entire use of these rooms during the days (but not the nights)'. Henry paid a deposit of £25 and agreed to pay the balance of £50 on 24 June. The King became seriously ill and the coronation procession did not take place. Henry refused to pay the balance and Krell brought an action to recover it. Henry counterclaimed for the return of the £25. The trial judge held that Henry was not liable to pay the £50 and that he was entitled to the return of the £25. Krell appealed to the Court of Appeal who dismissed the appeal and held that he was not entitled to demand the balance of £50 on the ground that the contract between the parties had been frustrated.

Vaughan Williams LJ

The real question in this case is the extent of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of *Taylor* v. *Caldwell* 3 B & S 826 ... English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject matter of the contract or a condition or state of things, present or anticipated, which is expressly mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or
p. 730 non-existence of some thing which is the subject matter of the contract or of ↵ some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the

contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case?

[He set out the facts and continued]

In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10l., both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, ‘Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab’, and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being

p. 731 held to be the foundation ↵ of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract.

Romer LJ

With some doubt I have also come to the conclusion that this case is governed by the principle on which *Taylor* v. *Caldwell* was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams LJ.

Stirling LJ said he had an opportunity of reading the judgment delivered by Vaughan Williams LJ, with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of *Taylor* v. *Caldwell*.

Herne Bay Steam Boat Company v. Hutton
[1903] 2 KB 683, Court of Appeal

The Herne Bay Steam Boat Company owned a steamboat called *Cynthia*. Early in 1902 it was announced that there would be a Royal naval review at Spithead on 28 June 1902. Hutton, the defendant, wanted to charter *Cynthia* to carry passengers to see the review. Herne Bay and Hutton signed an agreement on 23 May 1902, which stated that *Cynthia* would be at the disposal of Hutton on 28 June 'for the purpose of viewing the naval review and for a day's cruise round the fleet' and on 29 June 'for similar purposes'. Hutton paid a deposit of £50 and agreed to pay the balance of £200 before *Cynthia* left Herne Bay. On 25 June the naval review was cancelled. On the same day Herne Bay wired Hutton for instructions, stating that *Cynthia* was ready to start, but received no reply. On 28 and 29 June Herne Bay used *Cynthia* for its own purposes and made a profit of £90. On 29 June, Hutton called Herne Bay and stated that, as the naval review had been cancelled, he no longer required *Cynthia* and would not pay the balance of £200. Herne Bay brought an action to recover £110. Hutton counterclaimed for the return of his £50 deposit. The judge held that Herne Bay was not entitled to the £110 but that Hutton was not entitled to the £50. The Court of Appeal allowed Herne Bay's appeal. It held that the contract between the parties had not been frustrated and that Herne Bay was accordingly entitled to recover £110 from Hutton by way of damages for his breach of contract.

p. 732

Vaughan Williams LJ

Mr Hutton, in hiring this vessel, had two objects in view: first, of taking people to see the naval review, and, secondly, of taking them round the fleet. Those, no doubt, were the purposes of Mr Hutton, but it does not seem to me that because, as it is said, those purposes became impossible, it would be a very legitimate inference that the happening of the naval review was contemplated by both parties as the basis and foundation of this contract, so as to bring the case within the doctrine of *Taylor* v. *Caldwell* 3 B & S 826. On the contrary, when the contract is properly regarded, I think 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. …

I see nothing that makes this contract differ from a case where, for instance, a person has engaged a brake to take himself and a party to Epsom to see the races there, but for some reason or other, such as the spread of an infectious disease, the races are postponed. In such a case it could not be said that he could be relieved of his bargain. So in the present case it is sufficient to say that the happening of the naval review was not the foundation of the contract.

Romer LJ

This case is not one in which the subject matter of the contract is a mere licence to the defendant to use a ship for the purpose of seeing the naval review and going round the fleet. In my opinion, as my Lord has said, it is a contract for the hiring of a ship by the defendant for a certain voyage, though

having, no doubt, a special object, namely, to see the naval review and the fleet; but it appears to me that the object was a matter with which the defendant, as hirer of the ship, was alone concerned, and not the plaintiffs, the owners of the ship.

The case cannot, in my opinion, be distinguished in principle from many common cases in which, on the hiring of a ship, you find the objects of the hiring stated. Very often you find the details of the voyage stated with particularity, and also the nature and details of the cargo to be carried. If the voyage is intended to be one of pleasure, the object in view may also be stated, which is a matter that concerns the passengers. But this statement of the objects of the hirer of the ship would not, in my opinion, justify him in saying that the owner of the ship had those objects just as much in view as the hirer himself. The owner would say, 'I have an interest in the ship as a passenger or cargo carrying machine, and I enter into the contract simply in that capacity; it is for the hirer to concern himself about the objects'.

... The ship (as a ship) had nothing particular to do with the review or the fleet except as a convenient carrier of passengers to see it: any other ship suitable for carrying passengers would have done equally as well. Just as in the case of the hire of a cab or other vehicle, although the object of the hirer might be stated, that statement would not make the object any the less a matter for the hirer alone, and would not directly affect the person who was letting out the vehicle for hire. In the present case I may point out that it cannot be said that by reason of the failure to hold the naval review there was a total failure of consideration. That cannot be so. Nor is there anything like a total destruction of the subject matter of the contract. Nor can we, in my opinion, imply in this contract any condition in favour of the defendant which would enable him to escape liability. A condition ought only to be implied in order to carry out the presumed intention of the parties, and I cannot ascertain any such presumed intention here. It follows that, in my opinion, so far as the plaintiffs are concerned, the objects of the passengers on this voyage with regard to sight-seeing do not form the subject matter or essence of this contract.

p. 733

Stirling LJ

It is said that, by reason of the reference in the contract to the 'naval review', the existence of the review formed the basis of the contract, and that as the review failed to take place the parties became discharged from the further performance of the contract, in accordance with the doctrine of *Taylor* v. *Caldwell* 3 B & S 826. I am unable to arrive at that conclusion. It seems to me that the reference in the contract to the naval review is easily explained; it was inserted in order to define more exactly the nature of the voyage, and I am unable to treat it as being such a reference as to constitute the naval review the foundation of the contract so as to entitle either party to the benefit of the doctrine in *Taylor* v. *Caldwell*. I come to this conclusion the more readily because the object of the voyage is not limited to the naval review, but also extends to a cruise round the fleet. The fleet was there, and passengers might have been found willing to go round it. It is true that in the event which happened the object of the voyage became limited, but, in my opinion, that was the risk of the defendant whose

> venture the taking the passengers was. For these reasons I am unable to agree with the learned judge in holding that in the contemplation of the parties the taking place of the review was the basis for the performance of the contract, and I think that the defendant is not discharged from its performance.

Commentary

Krell is a difficult case: it has its supporters and its critics. It has never been overruled but, at the same time, the courts have been reluctant to apply it in other contexts. What is the difference between *Krell* and *Hutton?* And why is a contract to hire a room for the purpose of viewing the coronation frustrated on the cancellation of the coronation when a contract to pay a cab driver a suitably enhanced price to take a passenger to Epsom on Derby Day is not frustrated on the cancellation of the Derby? The most extensive judicial analysis of these questions as a matter of English law is to be found in the judgment of Marcus Smith J in *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency* [2019] EWHC 335 (Ch), 183 Con LR 167 in the following terms:

37 (1) The reason Vaughan Williams LJ considered [his example] of the hire of the cab to Epsom on Derby Day to be such a clear example of a non-frustrating event is because the cab driver's price was simply a reflection of an excess of demand for cabs over their supply, with the cab driver's price being correspondingly high as a result. In short, the high price was simply a reflection of market forces, with the cab driver being entirely indifferent as to the purpose of the journey and indeed its destination, whilst the passenger would be concerned not with the identity of the cab driver, but merely with the objective of securing a cab—any cab—to go to the stated destination. The high price, in other words, is nothing to do with a common purpose, but entirely a reflection of the opposing interests of cab driver and passenger, mediated through the market forces of supply and demand. In the case of this example, the market forces enabled the cab driver to charge a premium: the fact that, the premium having been agreed, the passenger's underlying purpose of the journey fell away, would be a matter of indifference to the cab driver.

(2) The point could be tested in the following way: suppose the passenger wanted to make the journey for an altogether different purpose (to visit a relative in Epsom), but was forced to pay a higher price because of the coincidence of the timing of the visit to the relative and the Epsom races. The cancellation of the race might well have an effect on market price (demand for cabs would fall), but one could surely not say that the 'purpose' of the contract had been undermined by the cancellation of the race: the relative would still be in Epsom to be visited. Conversely, if the relative became unavailable to be visited, but the races still went on, the passenger (whose purpose would have been thwarted) would still be held to the contract.

p. 734

(3) In the *Herne Bay* case … the defendant was taking advantage of the review (occasioned by the Coronation) to make a profit through his own venture. No doubt he paid more for hiring the vessel than he would have done but for the Coronation; but, equally, would have more passengers and/or be able to charge more to the passengers for the same reason. The risk of an absence of high demand for the trips he was offering was the defendant's. The cancellation of the review doubtless meant that fewer people would want to buy tickets from the defendant. But the venture was always possible: it is simply that one factor adversely affecting demand arose subsequent to the contract. As the Court of Appeal said, the venture was the defendant's alone, as was the risk of the venture failing. As in the case of the cab driver, the interests and purposes of the parties to the contract were in essence opposed: each, in his own way, was trying to make a profit out of the occasion.

(4) In *Krell v. Henry* … what the parties were buying and selling was, quite literally, a room with a view. Their common purpose was just that: whilst the parties surely would have been in opposition in bargaining on price, the thing that they were bargaining about was predicated on the procession taking place. Matters would have been very different had the room been a hotel room charging a higher rate because of the higher demand for rooms on that particular day due to the Coronation.

> 38. The coronation cases show that where the supervening event causes one party to appreciate—with the benefit of hindsight—that he or she has made a bad bargain, there will be no frustration of a common purpose. If the only effect of the supervening event is to cause the price for the bargain to appear—in hindsight—to be too high, the contract will not be frustrated. (By 'price' I should stress that I mean more than simply the consideration agreed to be paid, but all of the terms that go to define the benefit one party to the contract confers on the other.) That was the position both in the case of Vaughan Williams LJ's cab driver and in the facts of the *Herne Bay* case. In both of those cases, one party paid more due to market conditions that subsequently changed: the passenger paid more because of the high demand due to the races; the defendant in *Herne Bay* paid more because of the naval review. In each case, were the price bargained for to be adjusted in the light of the new, supervening, market conditions, neither party would be able to complain. That demonstrates that there was, in these cases, no common purpose to be frustrated: one party was simply complaining that he had made what was, in retrospect, a bad bargain. By contrast, even if the price paid by the licensee in *Krell v. Henry* were to be dramatically reduced, the purpose of the contract would still be undermined. In *Krell v. Henry*, the point of the contract was the purchase and sale of a room with a view: the view never came to pass.

One difficulty with this analysis lies in the claim that the 'price' charged is simply a reflection of the operation of market forces rather than a reflection of the importance which the parties have attached to performance taking place at the agreed time and on the agreed terms. Thus a passenger may be willing to pay an 'enhanced' price for a service not because of the operation of market forces but because he or she wishes to ensure that a particular purpose is achieved (and the acceptance of the higher price by the service provider may evidence his or her acceptance of that purpose so that it becomes the 'common' purpose of the parties).

p. 735 ↵ On the facts of *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency* the EMA claimed that the effect of Brexit would be to frustrate a twenty-five-year underlease into which it had entered with the claimant in 2014. The EMA's primary case was that, as an agency of the EU, it could no longer lawfully occupy premises outside of the EU so that the effect of Brexit would be to frustrate the underlease by supervening illegality. This claim was rejected because it was found that there was no relevant supervening illegality. The EMA's secondary case was that the effect of Brexit was to frustrate the common purpose of the underlease, which was that the EMA would occupy the premises as its permanent headquarters through to 2039. Marcus Smith J held (at [244]–[245]) that the parties had no such common purpose. The fact that the underlease contained provisions permitting assignment and sub-letting of the premises in limited circumstances was fatal to the claim that the parties' intention was that the EMA would occupy the premises for the entirety of the term of the underlease. Further, there was held to be no common purpose beyond the purpose to be derived from the terms of the underlease. Outside the terms of the underlease the purposes of the parties were held to be 'divergent' rather than common because the EMA was focused on 'bespoke premises, with the greatest flexibility as to term, and the lowest rent', while the claimant landlords were focused on 'long-term cash flow, at the highest rate' and they were prepared to allow the EMA to influence the configuration of the building, provided that this was not adverse to their own interests. This being the case, the underlease was not the outcome of the parties' common purpose but was the product of 'rival negotiations driven by *different*

objectives ([218(2)]). It was therefore an arm's length bargain where the parties were looking after their own interests, and the only common purpose was to be found in the terms of the underlease. The fact that, with the benefit of hindsight, the agreement turned out to be a poor one for the EMA (both in relation to the term of the underlease and the restrictions on its ability to assign the underlease or sub-let the premises) was held to be insufficient to amount to a case of frustration. It was thus held not to be a case which was analogous to *Krell*.

A more convincing analysis of *Krell* has been provided by Professor Peel (*Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2014), para 7-019) in the following terms:

> The contract in [*Krell*] was not simply one which granted a licence to use the rooms at an unusually high price. It was a contract to provide facilities for viewing the coronation processions or, as Lord Phillips MR has stated, one for a 'room with a view'. There was not, indeed, any undertaking in it that the processions would take place, or that they could be viewed from the rooms, but in ascertaining whether there is a 'common purpose' one does not simply 'recite the individual terms and conditions … but has regard to something much more elemental'. In this respect, the contract in *Krell* v. *Henry* differed from the contract that is made by buying a theatre or concert ticket: performance of such a contract would become impossible if supervening events led to the cancellation of the play or concert. In *Krell* v. *Henry* there was no such impossibility. … But it was the common purpose of both parties that facilities for viewing the processions should be provided: in the words of Vaughan Williams LJ, the provision of such facilities was the crucial point 'as much for the lessor as the hirer'. In the other examples, there was either no such common purpose … or the common purpose was not wholly defeated. The latter point reflects a recurrent feature of the cases on frustration of purpose, which shows that the approach of the law to partial frustration of purpose differs from that which it adopts to partial impossibility. In cases of partial impossibility, a contract can be discharged if its *main* purpose can no longer be achieved; but in cases of frustration of purpose the courts have applied the more rigorous test of asking whether *any* part of the contractual purpose (other than a part which was wholly trivial) could still be achieved: if so, they have refused to apply the doctrine
> p. 736 ↵ of discharge. … In [the *Herne Bay* case] the naval review may have formed the hirer's principal inducement to enter into the contract, but the continued presence of the fleet at Spithead also provided a considerable and unusual attraction, and it was one of the purposes of the contract to give the hirer the opportunity of taking advantage of this attraction for commercial purposes. In *Krell* v. *Henry*, by contrast, it was no part of the contractual purpose that Mr Henry should be able to look out of the window to watch the ordinary London traffic which continued to pass down Pall Mall on the two days in question. *Krell* v. *Henry* seems, with respect, to have been correctly decided on the basis that it was the common purpose of both parties that facilities for watching the processions were to be provided under the contract, and the cancellation of the processions had prevented the achievement of that common purpose (although literal performance of the contract had not become impossible). This emphasis on the requirement that the purpose of *both* parties must be frustrated is found also in other English and American cases. It means that the supervening event must prevent one party from supplying, and the other from obtaining, what the former had contracted to provide and the latter to acquire under the contract. In this sense, formulations of the doctrine in terms of the frustration of the purpose of *both* parties are preferable to those (occasionally found) which refer to the frustration of the purpose of *one* party only. The point can be illustrated by supposing that, in *Krell* v. *Henry*, the coronation had taken place as planned but Mr Henry had fallen ill and so been unable to watch the processions. In that case, his purpose might have been frustrated, but the same could not have been said of Mr Krell's purpose: that purpose, being the provision of viewing facilities, would have been accomplished. Accordingly it is submitted that on such facts, the contract should not have been discharged. [Emphasis in the original.]

On this basis *Krell* is a very narrow decision indeed. Provided that the focus is kept on the purpose of both parties to the contract the decision should be kept within limits and not become an escape route for parties looking for a way out of a bad bargain.

An alternative explanation of *Krell* has been provided by Posner CJ in *Northern Indiana Public Service Co* v. *Carbon County Coal Co*, 799 F 2d 265. He stated (at p. 277):

> The leading case on frustration remains *Krell* v. *Henry* [1903] 2 KB 740 (CA). Krell rented Henry a suite of rooms for watching the coronation of Edward VII, but Edward came down with appendicitis and the coronation had to be postponed. Henry refused to pay the balance of the rent and the court held that he was excused from doing so because his purpose in renting had been frustrated by the postponement, a contingency outside the knowledge, or power to influence, of either party. The question was, to which party did the contract (implicitly) allocate the risk? Surely Henry had not intended to insure Krell against the possibility of the coronation's being postponed, since Krell could always relet the room, at the premium rental, for the coronation's new date. So Henry was excused.

Professor Peel points out (para 7-016) that this rationalization of *Krell* is not 'wholly compelling'. The 'insurance' argument runs into the difficulty that neither party may have considered the possibility of insuring on the facts of the case. And the argument that Mr Krell could always have relet the room encounters the factual difficulty that the route of the procession which actually took place differed in some respects from the cancelled procession. Professor Peel also points out that the argument in relation to the possibility of reletting the room seems to 'involve a paradox in so far as it suggests that Mr Krell's claim for the balance of £50 would have been strengthened if (to imagine the unthinkable) the coronation had been wholly cancelled because a Republic had been declared'.

p. 737

21.6 The Effects of Frustration

The effect of frustration is to discharge the contract automatically (*Hirji Mulji* v. *Cheong Yue Steamship Co Ltd* [1926] AC 497). Both parties are then released from their obligations to perform the contract after the date of discharge without incurring any liability for breach of contract in respect of their failure to perform these obligations. Discharge is a drastic sanction. The parties may prefer to suspend the contract while they wait to see what impact the event (such as a war) will have on the contract or they may prefer to adjust the contract so that one party does not suffer undue hardship as a result of the occurrence of the unexpected event. Parties who wish to make provision for the suspension or adjustment of the contract should insert an appropriate clause in the contract to that effect (a force majeure clause if suspension is the desired remedy and a hardship clause if adjustment of the contract is the wished-for outcome).

The law of contract does not attempt to regulate the financial consequences of the discharge of the contract on the ground of frustration. In the absence of a breach of contract, there can be no action for damages for breach. Regulation of the financial consequences of the frustration of a contract is a matter for the law of restitution (or, if one prefers, the law of unjust enrichment). The law is now to be found largely in the Law Reform (Frustrated Contracts) Act 1943. The Act has generated very little case-law. There is, however, one notable exception and that is the litigation between BP Exploration Co (Libya) Ltd and Mr Hunt. Although the case was appealed all the way up to the House of Lords, the leading judicial exposition of the Act is to be found in the judgment of the judge at first instance, Robert Goff J. Before examining the Act and the case-law it is necessary to say something about the common law rules which pre-dated the Act.

The development of the common law rules can be divided into two distinct stages. The first stage was associated with the decision of the Court of Appeal in *Chandler* v. *Webster* [1904] 1 KB 493. *Chandler* was another of the coronation cases. The principal issue in *Chandler* was the financial consequences of the frustration of the contract between the parties. The Court of Appeal held that money paid under a contract prior to it being frustrated could be recovered upon a total failure of consideration. But, crucially, they held that, in order to constitute a total failure of consideration, the contract had to be set aside *ab initio*. Frustration does not have such a consequence. The contract is set aside from the moment of the occurrence of the frustrating event but the termination is not retrospective in its effect. This being the case, the party who paid the money could not recover it because he could not demonstrate that there had been a total failure of consideration. The loss therefore lay where it fell. A similar principle was applicable in the case where services were performed prior to the frustration of the contract. In *Cutter* v. *Powell* (1795) 6 TR 320 Mr Powell employed Mr Cutter as second mate on a ship that was to sail from Jamaica to Liverpool. The level of pay offered by Mr Powell was generous but the contract stated that the money was only payable after the ship arrived in Liverpool provided that Mr Cutter had done his duty as second mate on the journey. Mr Cutter died before the ship arrived in Liverpool. His death frustrated the contract between the parties. His widow brought an action to recover the wages which she alleged were due to her deceased husband in respect of the services he performed prior to his death. Her claim failed. Mr Cutter was only entitled to payment on completion of the voyage and, having failed to do so, he was not entitled to make any claim for work done prior to the termination of the contract on his death.

The second stage in the development of the common law was the decision of the House of Lords in *Fibrosa*
p. 738 *Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32. ↵ The House of Lords overruled *Chandler*. While they affirmed that money paid was recoverable upon a total failure of consideration, they rejected the proposition that it is necessary to set aside the contract *ab initio* in order to create such a total failure. In order to establish a total failure of consideration the payor simply has to show that the basis upon which he had paid the money has totally failed. An illustration of such a total failure is provided by the facts of *Fibrosa* itself. The respondents agreed to manufacture machines for the appellants and to deliver them to Gdynia in Poland but, before delivery could be effected, the contract was frustrated when Poland was occupied by the German army. The House of Lords held that the appellants were entitled to recover their prepayment of £1,000 on the ground that it had been paid for a consideration which had wholly failed. The money had been paid for machinery and they had not received any part of the machinery as a result of the outbreak of war. Not having received any part of the performance for which they had contracted, they were entitled to recover their money as on a total failure of consideration.

While *Fibrosa* was an improvement upon *Chandler* it still left the law in an unsatisfactory state. First, money paid was only recoverable upon a *total* failure of consideration. Had the appellants in *Fibrosa* received any part of the performance for which they had contracted they would not have been entitled to recover their prepayment. Secondly, the law did little to protect the interest of the recipient of the money. It is likely that the respondents in *Fibrosa* had acted to their detriment in manufacturing the machinery for the appellants but any such detrimental reliance did not give the respondents a claim against the appellants nor did it entitle them to set-off their expenditure against the appellants' claim to recover the prepayment they had made. Thirdly, *Fibrosa* did nothing to improve the position of the party who has performed services prior to the

frustration of the contract. The House of Lords was only dealing with money claims and did not purport to deal with the case where the benefit conferred on the other party took a form other than the payment of money.

Prior to *Fibrosa* a Law Revision Committee report had been produced on the rule laid down in *Chandler*. While *Fibrosa* solved some of the problems generated by *Chandler* it did not solve them all. Parliament therefore proceeded to enact legislation in the form of the Law Reform (Frustrated Contracts) Act 1943. For our purposes the principal provisions are sections 1(2) and 1(3). Section 1(2) deals with the recovery of money, while section 1(3) deals with recovery in respect of non-money benefits. The Act is a short one and it is set out in full. The Act is then followed by an extract from the judgment of Robert Goff J in *BP Exploration Co (Libya) Ltd* v. *Hunt (No 2)* [1979] 1 WLR 783. The opening part of that judgment is a very clear exposition of the central provisions of the Act.

Law Reform (Frustrated Contracts) Act 1943

Adjustment of rights and liabilities of parties to frustrated contracts

1.—(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

p. 739 (2) 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 so 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.

(3) 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.

(4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the 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.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

Provision as to application of this Act

2.—(1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) 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
p. 740 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.

(4) 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.

(5) This Act shall not apply—

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or

(b) to any contract of insurance, save as is provided by subsection (5) of the foregoing section; or

(c) to any contract to which section 7 of the Sale of Goods Act 1979 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery,

> of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

BP Exploration Co (Libya) Ltd v. Hunt (No 2)

[1979] 1 WLR 783, Queen's Bench Division

Mr Hunt was the owner of an oil concession granted by the Libyan government. He did not have the resources to develop the concession himself, so he entered into a joint venture with BP under which BP were to carry out the exploration and development of the site and they also agreed to transfer to Mr Hunt certain 'farm-in' contributions in cash and in oil. In return Mr Hunt agreed to grant BP a half share of the concession and further agreed to repay, over a period of time, 125 per cent of BP's 'farm-in' contributions and his half share of the expenditure incurred in the exploration and development of the fields. Payment was to be made in the form of three-eighths of Mr Hunt's share of the oil produced from the field until such time as the reimbursement was complete. A giant oil field was discovered and the field came on stream in 1967. Once the field came on stream it was agreed that the costs of production would be divided equally between the parties. In 1971 BP's interest in the oil field was expropriated by the Libyan government and, in 1973, Mr Hunt's interest was also expropriated. At this point BP had received approximately one-third of their reimbursement oil. BP claimed that the expropriation of the interests in the oil field had frustrated the contract between the parties and that they were entitled to the award of a 'just sum' under section 1(3) of the Law Reform (Frustrated Contracts) Act 1943. The extract that follows concentrates on the analysis of the Act itself. The application of the Act to the facts of the case will be dealt with in the commentary that follows the extract.

p. 741

Robert Goff J

(1) The principle of recovery

(a) The principle, which is common to both section 1(2) and (3), and indeed is the fundamental principle underlying the Act itself, is prevention of the unjust enrichment of either party to the contract at the other's expense. ...

(b) Although section 1 (2) and (3) is concerned with restitution in respect of different types of benefit, it is right to construe the two subsections as flowing from the same basic principle and therefore, so far as their different subject matters permit, to achieve consistency between them. Even so, it is always necessary to bear in mind the difference between awards of restitution in respect of money payments and awards where the benefit conferred by the plaintiff does not consist of a payment of money. Money has the peculiar character of a universal medium of exchange. By its receipt, the recipient is inevitably benefited; and (subject to problems arising from such matters as inflation, change of position and the time value of money) the loss suffered by the plaintiff is generally equal to the defendant's gain, so that no difficulty arises concerning the amount to be repaid. The same cannot be said of other benefits, such as goods or services. By their nature, services cannot be restored; nor in many cases can goods be restored, for example where they have been consumed or transferred to another. Furthermore the identity and value of the resulting benefit to the recipient may be debatable. From the very nature of things, therefore, the problem of restitution in respect of such benefits is more complex than in cases where the benefit takes the form of a money payment; and the solution of the problem has been made no easier by the form in which the legislature has chosen to draft section 1(3) of the Act.

(c) The Act is not designed to do certain things: (i) It is not designed to apportion the loss between the parties. There is no general power under either section 1(2) or section 1(3) to make any allowance for expenses incurred by the plaintiff (except, under the proviso to section 1(2), to enable him to enforce pro tanto payment of a sum payable but unpaid before frustration); and expenses incurred by the defendant are only relevant in so far as they go to reduce the net benefit obtained by him and thereby limit any award to the plaintiff. (ii) It is not concerned to put the parties in the position in which they would have been if the contract had been performed. (iii) It is not concerned to restore the parties to the position they were in before the contract was made. A remedy designed to prevent unjust enrichment may not achieve that result; for expenditure may be incurred by either party under the contract which confers no benefit on the other, and in respect of which no remedy is available under the Act.

(d) An award under the Act may have the effect of rescuing the plaintiff from an unprofitable bargain. This may certainly be true under section 1(2), if the plaintiff has paid the price in advance for an expected return which, if furnished, would have proved unprofitable; if the contract is frustrated before any part of that expected return is received, and before any expenditure is incurred by the defendant, the plaintiff is entitled to the return of the price he has paid, irrespective of the consideration he would have recovered had the contract been performed. Consistently with section 1(2), there is nothing in section 1(3) which necessarily

limits an award to the contract consideration. But the contract consideration may nevertheless be highly relevant to the assessment of the just sum to be awarded under section 1(3); this is a matter to which I will revert later in this judgment.

p. 742

(2) Claims under section 1(2)

Where an award is made under section 1(2), it is, generally speaking, simply an award for the repayment of money which has been paid to the defendant in pursuance of the contract, subject to an allowance in respect of expenses incurred by the defendant. It is not necessary that the consideration for the payment should have wholly failed: claims under section 1(2) are not limited to cases of total failure of consideration, and cases of partial failure of consideration can be catered for by a cross-claim by the defendant under section 1(2) or section 1(3) or both. There is no discretion in the court in respect of a claim under section 1(2), except in respect of the allowance for expenses; subject to such an allowance (and, of course, a cross-claim) the plaintiff is entitled to repayment of the money he has paid. The allowance for expenses is probably best rationalised as a statutory recognition of the defence of change of position. True, the expenses need not have been incurred by reason of the plaintiff's payment; but they must have been incurred in, or for the purpose of, the performance of the contract under which the plaintiff's payment has been made, and for that reason it is just that they should be brought into account. No provision is made in the subsection for any increase in the sum recoverable by the plaintiff, or in the amount of expenses to be allowed to the defendant, to allow for the time value of money. The money may have been paid, or the expenses incurred, many years before the date of frustration; but the cause of action accrues on that date, and the sum recoverable under the Act as at that date can be no greater than the sum actually paid, though the defendant may have had the use of the money over many years, and indeed may have profited from its use. Of course, the question whether the court may award interest from the date of the accrual of the cause of action is an entirely different matter. ...

(3) Claims under section 1(3)

(a) General. In contrast, where an award is made under section 1(3), the process is more complicated. First, it has to be shown that the defendant has, by reason of something done by the plaintiff in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money) before the time of discharge. That benefit has to be identified, and valued, and such value forms the upper limit of the award. Secondly, the court may award to the plaintiff such sum, not greater than the value of such benefit, as it considers just having regard to all the circumstances of the case, including in particular the matters specified in section 1(3)(a) and (b). In the case of an award under section 1(3) there are, therefore, two distinct stages—the identification and valuation of the benefit, and the award of the just sum. The amount to be awarded is the just sum, unless the defendant's benefit is less, in which event the award will be limited to the amount of that benefit. The distinction between the identification and valuation of the defendant's benefit, and the assessment of the just sum, is the most controversial part of the Act. It represents the solution adopted by the legislature of the problem of restitution in cases where the benefit

does not consist of a payment of money; but the solution so adopted has been criticised by some commentators as productive of injustice, and it certainly gives rise to considerable problems, to which I shall refer in due course.

(b) Identification of the defendant's benefit. In the course of the argument before me, there was much dispute whether, in the case of services, the benefit should be identified as the services themselves, or as the end product of the services. One example canvassed (because it bore some relationship to the facts of the present case) was the example of prospecting for

p. 743 minerals. If minerals are discovered, should the benefit be regarded … simply as the services of prospecting, or … as the minerals themselves being the end product of the successful exercise? Now, I am satisfied that it was the intention of the legislature, to be derived from section 1(3) as a matter of construction, that the benefit should in an appropriate case be identified as the end product of the services. This appears, in my judgment, not only from the fact that section 1(3) distinguishes between the plaintiff's performance and the defendant's benefit, but also from section 1(3)(b) which clearly relates to the product of the plaintiff's performance. Let me take the example of a building contract. Suppose that a contract for work on a building is frustrated by a fire which destroys the building and which, therefore, also destroys a substantial amount of work already done by the plaintiff. Although it might be thought just to award the plaintiff a sum assessed on a quantum meruit basis, probably a rateable part of the contract price, in respect of the work he has done, the effect of section 1(3)(b) will be to reduce the award to nil, because of the effect, in relation to the defendant's benefit, of the circumstances giving rise to the frustration of the contract. It is quite plain that, in section 1(3)(b), the word 'benefit' is intended to refer, in the example I have given, to the actual improvement to the building, because that is what will be affected by the frustrating event; the subsection therefore contemplates that, in such a case, the benefit is the end product of the plaintiff's services, not the services themselves. This will not be so in every case, since in some cases the services will have no end product; for example, where the services consist of doing such work as surveying, or transporting goods. In each case, it is necessary to ask the question: what benefit has the defendant obtained by reason of the plaintiff's contractual performance? But it must not be forgotten that in section 1(3) the relevance of the value of the benefit is to fix a ceiling to the award. If, for example, in a building contract, the building is only partially completed, the value of the partially completed building (i.e. the product of the services) will fix a ceiling for the award; the stage of the work may be such that the uncompleted building may be worth less than the value of the work and materials that have gone into it, particularly as completion by another builder may cost more than completion by the original builder would have cost. In other cases, however, the actual benefit to the defendant may be considerably more than the appropriate or just sum to be awarded to the plaintiff, in which event the value of the benefit will not in fact determine the quantum of the award. I should add, however, that, in a case of prospecting, it would usually be wrong to identify the discovered mineral as the benefit. In such a case there is always (whether the prospecting is successful or not) the benefit of the prospecting itself, i.e. of knowing whether or not the land contains any deposit of the relevant minerals; if the prospecting is successful, the benefit may include also the enhanced

value of the land by reason of the discovery; if the prospector's contractual task goes beyond discovery and includes development and production, the benefit will include the further enhancement of the land by reason of the installation of the facilities, and also the benefit of in part transforming a valuable mineral deposit into a marketable commodity.

(c) I add by way of footnote that all these difficulties would have been avoided if the legislature had thought it right to treat the services themselves as the benefit. In the opinion of many commentators, it would be more just to do so; after all, the services in question have been requested by the defendant, who normally takes the risk that they may prove worthless, from whatever cause. In the example I have given of the building destroyed by fire, there is much to be said for the view that the builder should be paid for the work he has done, unless he has (for example by agreeing to insure the works) taken upon himself the risk of
p. 744 destruction by fire. But my task is to construe the Act as it stands. On the true construction of the Act, it is in my judgment clear that the defendant's benefit must, in an appropriate case, be identified as the end product of the plaintiff's services, despite the difficulties which this construction creates, difficulties which are met again when one comes to value the benefit.

(d) Apportioning the benefit. In all cases, the relevant benefit must have been obtained by the defendant by reason of something done by the plaintiff. Accordingly, where it is appropriate to identify the benefit with an end product and it appears that the defendant has obtained the benefit by reason of work done both by the plaintiff and by himself, the court will have to do its best to apportion that benefit, and to decide what proportion is attributable to the work done by the plaintiff. That proportion will then constitute the relevant benefit for the purposes of section 1(3) of the Act.

(e) Valuing the benefit. Since the benefit may be identified with the product of the plaintiff's performance, great problems arise in the valuation of the benefit. First, how does one solve the problem which arises from the fact that a small service may confer an enormous benefit, and conversely, a very substantial service may confer only a very small benefit? The answer presumably is that at the stage of valuation of the benefit (as opposed to assessment of the just sum) the task of the court is simply to assess the value of the benefit to the defendant. For example, if a prospector after some very simple prospecting discovers a large and unexpected deposit of a valuable mineral, the benefit to the defendant (namely, the enhancement in the value of the land) may be enormous; it must be valued as such, always bearing in mind that the assessment of a just sum may very well lead to a much smaller amount being awarded to the plaintiff. But conversely, the plaintiff may have undertaken building work for a substantial sum which is, objectively speaking, of little or no value—for example, he may commence the redecoration, to the defendant's execrable taste, of rooms which are in good decorative order. If the contract is frustrated before the work is complete, and the work is unaffected by the frustrating event, it can be argued that the defendant has obtained no benefit, because the defendant's property has been reduced in value by the plaintiff's work; but the partial work must be treated as a benefit to the defendant, since he requested it, and valued it as such. Secondly, at what point in time is the benefit to be valued? If there is a lapse of time between the date of the receipt of the benefit, and the date of

frustration, there may in the meanwhile be a substantial variation in the value of the benefit. If the benefit had simply been identified as the services rendered, this problem would not arise; the court would simply award a reasonable remuneration for the services rendered at the time when they were rendered, the defendant taking the risk of any subsequent depreciation and the benefit of any subsequent appreciation in value. But that is not what the Act provides: section 1(3)(b) makes it plain that the plaintiff is to take the risk of depreciation or destruction by the frustrating event. If the effect of the frustrating event upon the value of the benefit is to be measured, it must surely be measured upon the benefit as at the date of frustration. For example, let it be supposed that a builder does work which doubles in value by the date of frustration, and is then so severely damaged by fire that the contract is frustrated; the valuation of the residue must surely be made on the basis of the value as at the date of frustration. However, does this mean that, for the purposes of section 1(3), the benefit is always to be valued as at the date of frustration? For example, if goods are transferred and retained by the defendant till frustration when they have appreciated or depreciated in value, are they to be valued as at the date of frustration? The answer must, I think, generally speaking, be in the affirmative, for the sake of consistency. But this raises an acute problem

p. 745

in relation to the time value of money. Suppose that goods are supplied and sold, long before the date of frustration; does the principle that a benefit is to be valued as at the date of frustration require that allowance must be made for the use in the meanwhile of the money obtained by the disposal of the goods, in order to obtain a true valuation of the benefit as at the date of frustration? This was one of the most hotly debated matters before me, for the very good reason that in the present case it affects the valuation of the parties' respective benefits by many millions of dollars. It is very tempting to conclude that an allowance should be made for the time value of money, because it appears to lead to a more realistic valuation of the benefit as at the date of frustration; and, as will appear hereafter, an appropriate method for making such an allowance is available in the form of the net discounted cash flow system of accounting. But I have come to the conclusion that, as a matter of construction, this course is not open to me. First, the subsection limits the award to the value of the benefit obtained by the defendant; and it does not follow that, because the defendant has had the money over a period of time, he has in fact derived any benefit from it. Secondly, if an allowance was to be made for the time value of the money obtained by the defendant, a comparable allowance should be made in respect of expenses incurred by the defendant, i.e. in respect of the period between the date of incurring the expenditure and the date of frustration, and section 1(3)(a) only contemplates that the court, in making an allowance for expenses, shall have regard to the 'amount of [the] expenses.' Thirdly, as I have already indicated, no allowance for the time value of money can be made under section 1(2); and it would be inconsistent to make such an allowance under section 1(3) but not under section 1(2). ...

(f) Finally, I should record that the court is required to have regard to the effect, in relation to the defendant's benefit, of the circumstances giving rise to the frustration of the contract. I have already given an example of how this may be relevant, in the case of building contracts; and I have recorded the fact that this provision has been the subject of criticism. There may,

> however, be circumstances where it would not be just to have regard to this factor—for example if, under a building contract, it was expressly agreed that the work in progress should be insured by the building-owner against risks which include the event which had the effect of frustrating the contract and damaging or destroying the work.
>
> (g) Assessment of the just sum. The principle underlying the Act is prevention of the unjust enrichment of the defendant at the plaintiff's expense. Where, as in cases under section 1(2), the benefit conferred on the defendant consists of payment of a sum of money, the plaintiff's expense and the defendant's enrichment are generally equal; and, subject to other relevant factors, the award of restitution will consist simply of an order for repayment of a like sum of money. But where the benefit does not consist of money, then the defendant's enrichment will rarely be equal to the plaintiff's expense. In such cases, where (as in the case of a benefit conferred under a contract thereafter frustrated) the benefit has been requested by the defendant, the basic measure of recovery in restitution is the reasonable value of the plaintiff's performance—in a case of services, a quantum meruit or reasonable remuneration, and in a case of goods, a quantum valebat or reasonable price. Such cases are to be contrasted with cases where such a benefit has not been requested by the defendant. In the latter class of case, recovery is rare in restitution; but if the sole basis of recovery was that the defendant had been incontrovertibly benefited, it might be legitimate to limit recovery to the defendant's actual benefit—a limit which has (perhaps inappropriately) been imported by the legislature into section 1(3) of the Act. However, under section 1(3) as it stands, if the defendant's actual benefit is less than the just or reasonable sum which would otherwise be awarded to the plaintiff, the award must be reduced to a sum equal to the amount of the defendant's benefit.
>
> p. 746 (h) A crucial question, upon which the Act is surprisingly silent, is this: what bearing do the terms of the contract, under which the plaintiff has acted, have upon the assessment of the just sum? First, the terms upon which the work was done may serve to indicate the full scope of the work done, and so be relevant to the sum awarded in respect of such work … Secondly, the contract consideration is always relevant as providing some evidence of what will be a reasonable sum to be awarded in respect of the plaintiff's work. … Thirdly, however, the contract consideration, or a rateable part of it, may provide a limit to the sum to be awarded … It is unnecessary for me to decide whether this will always be so; but it is likely that in most cases this will impose an important limit upon the sum to be awarded—indeed it may well be the most relevant limit to an award under section 1(3) of the Act. The legal basis of the limit may be section 2(3) of the Act; but even if that subsection is inapplicable, it is open to the court, in an appropriate case, to give effect to such a limit in assessing the just sum to be awarded under section 1(3), because in many cases it would be unjust to impose upon the defendant an obligation to make restitution under the subsection at higher than the contract rate.

Both parties appealed to the Court of Appeal ([1981] 1 WLR 232) on various points and the defendants further appealed to the House of Lords ([1983] 2 AC 352). The grounds of appeal generally concerned issues with which we are not here concerned. But there is one passage from the judgment of Lawton LJ in the Court of

Appeal which is of considerable significance. Its importance lies in the fact that it casts doubt upon the analytical approach adopted by Robert Goff J, in particular, his attempt to analyse the Act in terms of an underlying principle of the prevention of unjust enrichment. Lawton LJ stated (at pp. 237–238 and 241–243):

> The Act of 1943 was passed shortly after the decision of the House of Lords in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, which overruled *Chandler* v. *Webster* [1904] 1 KB 493. The earlier case had been regarded as authority for the proposition that, on the occurrence of an event which frustrates the performance of a contract, the loss lies where it falls and that money paid by one party to the contract to the other party is to be retained by the party in whose hands it is. The object of the Act was to make the operation of the law more fair when a contract governed by English law … has become impossible of performance and the parties to it have for that reason been discharged from further performance. This was to be done by adjusting the rights and liabilities of the parties in the ways set out: see section 1(1). …
>
> Before the court can make an award under [section 1(3)] it must be satisfied that one party to a contract has obtained a valuable benefit by reason of something done by the other. In this case the plaintiffs did a great deal for the defendant and he obtained, before the frustrating events happened, a most valuable benefit from what they had done for him, which was so great that it was incapable of any exact valuation. This part of the problem presented no difficulties for the judge. What was difficult was the assessment of the sum which the court considered just, having regard to all the circumstances of the case. Save for what is mentioned in paragraphs (a) and (b), the subsection gives no help as to how, or upon what principles, the court is to make its assessment or as to what factors it is to take into account. The responsibility lies with the judge: he has to fix a sum which he, not an appellate court, considers just. This word connotes the mental processes going to forming an
> p. 747 opinion. What is just is what ↵ the trial judge thinks is just. That being so, an appellate court is not entitled to interfere with his decision unless it is so plainly wrong that it cannot be just. The concept of what is just is not an absolute one. Opinions among right thinking people may, and probably will, differ as to what is just in a particular case. No one person enjoys the faculty of infallibility as to what is just. It is with these considerations in mind that we approach this case.
>
> The judge assessed the just sum on what can be described as a reimbursement basis, that is to say, by ensuring as far as was practicable that the plaintiffs got back what they had paid out on the defendant's behalf before the frustrating events happened. …
>
> Mr Rokison, on behalf of the plaintiffs, accepted that there could be more than one way of assessing a just sum. He pointed out that there was nothing in the Act to indicate that its purpose was to enable the judge to apportion losses or profits, or to put the parties in the positions which they would have been in if the contract had been fully performed or if it had never been made. This we accept. He submitted that the concept behind the Act was to prevent unjust enrichment. This is what the judge had thought. We get no help from the use of words which are not in the statute. … In our judgment, this court would not be justified in setting aside the judge's way of assessment merely because we thought that there were better ways. Mr Rokison tried to show that the judge's way was wrong and palpably wrong. … In our judgment, it cannot be said that the judge went wrong, and certainly not palpably wrong, in assessing a just sum by reference to the concept of reimbursing the plaintiffs.

Commentary

Applying the principles he had set out to the complex facts of the case, Robert Goff J concluded that the 'valuable benefit' which Mr Hunt obtained as a result of the work done by BP before the frustration of the contract was the 'end product' of BP's services. This Robert Goff J identified with the enhancement in the value of Mr Hunt's concession. When valuing that benefit Robert Goff J held that section 1(3)(b) required him to take account of the circumstances giving rise to the frustration of the contract which, on the facts, had the effect of reducing the value of the benefit to the value of the oil which Mr Hunt had actually obtained from the oil field and the financial settlement which he had reached with the Libyan government. In assessing the 'just sum' BP were awarded the costs and expenses which they had incurred on Mr Hunt's account plus the 'farm-in' contributions in cash and oil received by Mr Hunt less the reimbursement oil which BP had received. In essence, the just sum was the reasonable value of the services rendered and goods supplied by BP with counter-restitution being made for the value of the oil received by BP.

Leaving to one side the complex facts of the case, three principal issues arise out of *BP* v. *Hunt* and the interpretation placed by the judges upon the provisions of the 1943 Act. The first relates to the principle which underpins the Act. Robert Goff J stated that the principle was the prevention of unjust enrichment, whereas Lawton LJ stated, somewhat dismissively, that the court derived 'no help from the use of words which are not in the statute'. This leaves the basis of the Act obscure. The analysis of Robert Goff J does, however, seem to be the preferable one. The Act is not designed to provide a flexible machinery for the adjustment of losses. Unlike legislation subsequently enacted in other parts of the Commonwealth, the 1943 Act does not empower the court to apportion losses between parties to the contract. While the Act does confer a discretion upon the court, it is not a discretion that relates explicitly to the apportionment of losses. In all cases the court must first identify the benefit which the defendant has obtained at the expense of the claimant. The discretion
p. 748 given to the court relates only to the proportion of that benefit which is recoverable by the claimant. ↵ It is a discretion exercisable within a framework which seeks to prevent the unjust enrichment of one party at the expense of the other.

The second point relates to the scope of section 1(2). This subsection was not directly in issue on the facts of *BP* v. *Hunt* but it was nevertheless analysed in some detail by Robert Goff J. Section 1(2) differs from *Fibrosa* in two principal respects. First, the entitlement of the payor to recover the money paid is not confined to cases in which there has been a total failure of consideration. Money paid is recoverable even upon a partial failure of consideration. Secondly, the proviso to section 1(2) gives to the court a discretion to allow the payee to retain some or all of the prepayment that has been made. Robert Goff J rationalized the proviso as a statutory recognition of the defence of change of position. A rather different approach was, however, taken by Garland J in *Gamerco SA* v. *ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226. A contract to promote a rock concert was held to have been frustrated when the permit to hold the concert at a sports stadium in Madrid was suddenly withdrawn because of safety fears about the stadium. The plaintiff promoters had paid the defendant group the sum of $412,500 prior to the frustration of the contract and both parties had incurred expenditure in preparing for the concert. Garland J held that the plaintiffs were entitled to the return of the prepayment which they had made under section 1(2) of the Act and that no deduction should be made under the proviso to that subsection. The plaintiffs were therefore entitled to recover the $412,500. In so concluding Garland J stated (at pp. 1236–1237):

p. 749 ↵

Various views have been advanced as to how the court should exercise its discretion and these can be categorised as follows:

1. *Total retention*. This view was advanced by the Law Revision Committee in 1939 (Cmnd 6009) on the questionable ground 'that it is reasonable to assume that in stipulating for pre-payment the payee intended to protect himself from loss under the contract'. As the editor of *Chitty on Contracts*, 27th edn, (1994) vol 1., 1141, para 23-060, note 15 (Mr EG McKendrick) comments: 'He probably intends to protect himself against the possibility of the other party's insolvency or default in payment'. To this, one can add: 'and secure his own cash flow'.

[He then considered two passages from the judgment of Robert Goff J in *BP* v. *Hunt* set out at pp. 717–718, earlier in the section, and continued]

I do not derive any specific assistance from the *BP Exploration* case. There was no question of any change of position as a result of the plaintiffs' advance payment.

2. *Equal division*. This was discussed by Professor Treitel in *Frustration and Force Majeure* pp. 555–556 at paras 15-059 and 15-060 of his book. There is some attraction in splitting the loss but what if the losses are very unequal? Professor Treitel considers statutory provisions in Canada and Australia but makes the point that equal division is unnecessarily rigid and was rejected by the Law Revision Commission in the 1939 report to which reference has already been made. The parties may, he suggests, have had unequal means of providing against the loss by insurers, but he appears to overlook sub-section (5). It may well be that one party's expenses are entirely thrown away while the other is left with some realisable or otherwise usable benefit or advantage. Their losses may, as in the present case, be very unequal. Professor Treitel therefore favours the third view.

3. *Broad discretion*. It is self-evident that any rigid rule is liable to produce injustice. The words, 'if it considers it just so to do in all the circumstances of the case' clearly confer a very broad discretion. Obviously the court must not take into account anything which is not 'a circumstance of the case' or fail to take into account anything that is and then exercise its discretion rationally. I see no indication in the Act, the authorities, or the relevant literature that the court is obliged to incline either towards total retention or equal division. Its task is to do justice in a situation which the parties neither contemplated nor provided for, and to mitigate the possible harshness of allowing all loss to lie where it has fallen.

I have not found my task easy. As I have made clear, I would have welcomed assistance on the true measure of the defendants' loss and the proper treatment of overhead and non-specific expenditure. Because the defendants have plainly suffered some loss, I have made a robust assumption. In all the circumstances, and having particular regard to the plaintiffs' loss, I consider that justice is done by making no deduction under the proviso.

We can see here the same approach as that adopted by the Court of Appeal in *BP* v. *Hunt*, namely an emphasis on the discretion of the court and a refusal to confine that discretion by seeking to articulate the principles upon which the exercise of the discretion is based. One point which does, however, emerge with some clarity from *Gamerco* relates to the location of the onus of proof. Garland J stated that the onus of proof was on the defendant. The significance of this can be seen from the case of *Lobb* v. *Vasey Housing Auxiliary* [1963] VR 239. 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. The defendants refused to return the £1,250. Mrs Smith's executrix sued to recover it. It was held that the death of Mrs Smith frustrated the contract between the parties and that 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 prepayment. They were unable to do this. The trial judge stated that in the typical case one would expect the defendants to sell the right to occupy the flat to someone else and to recover their expenses in that way.

The third point relates to the construction of section 1(3). The most important point here is Robert Goff J's interpretation of 'valuable benefit'. He concluded that, in 'an appropriate case', the benefit is to be identified with the 'end product' of the claimant's services and not with the services themselves. This has unfortunate consequences where the effect of the frustrating event is to destroy the work of the claimant. In such a case there is no end product and so nothing to value. An example is provided by the old case of *Appleby* v. *Myers* (1867) LR 2 CP 651. The plaintiffs contracted to make and erect machinery in the defendant's factory and to maintain the machinery for a period of two years. After part of the machinery had been erected, an accidental fire destroyed the factory and the machinery and so frustrated the contract. It was held that the plaintiffs were not entitled to recover any payment in respect of the work done prior to the frustration of the contract. The same result would appear to follow under section 1(3). The result is an unfortunate one but here it must be recalled that the Act does not seek to engage in loss apportionment as such. A claimant can only recover where the defendant has received a benefit as a result of the work he has done and the consequence of identifying the benefit with the end product of the work is to narrow the concept of benefit that underpins the Act so that reliance expenditure which does not result in an end product will not be recoverable under section 1(3). An example of this is provided by *Taylor* v. *Caldwell* (21.1) itself. The claim brought by the plaintiffs was one to recover the expenses they had incurred in advertising the concerts. It is unlikely that such expenditure would generate a claim under the Act because it does not result in a valuable benefit to the defendant.

p. 750 ↵ A three-stage approach must be taken to any claim brought under section 1(3). First, the benefit itself must be identified. The benefit will generally be the goods or, in the case of the provision of services, the end product of these services. Secondly, the benefit must be valued. Thirdly, the court must decide what is a 'just sum' on the facts of the case. The 'just sum' cannot exceed the value of the benefit conferred. In *BP* v. *Hunt* Robert Goff J took a similar approach to that taken in a restitutionary claim and held that the just sum was, essentially, the reasonable value of the services rendered. But the Court of Appeal chose to place emphasis instead on the discretion of the judge at first instance. Thus Lawton LJ stated that 'what is just is what the trial judge thinks is just' and that an appellate court is not entitled to interfere with the finding of the just sum by the trial judge unless it is 'so plainly wrong that it cannot be just'. On this view the trial judge has a substantial measure of discretion and it is extremely difficult to predict what will constitute a 'just sum' in any case involving the provision of services prior to the frustration of the contract. In this respect it is perhaps

fortunate that a frustrated contract is a comparative rarity in commercial practice. This being the case, the Act rarely comes into play and so the deficiencies in the Act and in the reasoning of the Court of Appeal in *BP* v. *Hunt* rarely come to light.

21.7 The Basis of Frustration

What is the basis of the doctrine of frustration? Given that the courts do not have the power at common law to set aside a term on the basis that it is unreasonable, on what basis can the courts claim to be entitled to set aside an entire contract on the ground that the circumstances have turned out to be radically different from those which the parties had in mind when they entered into the contract? Perhaps surprisingly, these questions do not appear to have troubled the courts. The doctrine of frustration is well established, albeit that its exact juridical basis remains uncertain. The different possible bases for the doctrine of frustration were, however, discussed by the House of Lords in *National Carriers Ltd* v. *Panalpina (Northern) Ltd* [1981] AC 675, alongside the question of whether or not a lease can be frustrated. While the House of Lords decided in clear terms that a lease could, in principle, be frustrated, they were less clear as to the basis of the doctrine of frustration.

National Carriers Ltd v. Panalpina (Northern) Ltd
[1981] AC 675, House of Lords

National Carriers, the respondents, owned a warehouse on English Street, Kingston-upon-Hull. By an agreement dated 12 July 1974 they leased the warehouse to Panalpina, the appellants, for a ten-year term. Panalpina used the warehouse for the commercial storage of goods. They agreed not to use the warehouse other than for this purpose without the consent of National Carriers. The only vehicular access to the warehouse was by Kingston Street. On 16 May 1979 the Kingston-upon-Hull City Council closed Kingston Street to allow the demolition of a derelict building nearby. Kingston Street was closed for 20 months. During this time Panalpina could not use the warehouse and stopped paying rent to National Carriers. National Carriers brought an action for unpaid rent. In its defence Panalpina claimed that the lease had been frustrated by the closure of Kingston Street. The judge held that he was bound by authority to decide that a lease could not be the subject of frustration.

p. 751

↵ The House of Lords held that the doctrine of frustration was in principle applicable to leases (Lord Russell *dubitante*) but that, on the facts, the lease in this case had not been frustrated.

Lord Hailsham of St Marylebone LC

The doctrine of frustration is of comparatively recent development. …

It is generally accepted that the doctrine of frustration has its roots in the decision of the Court of Queen's Bench given by Blackburn J in *Taylor* v. *Caldwell* (1863) 3 B & S 826 …

At least five theories of the basis of the doctrine of frustration have been put forward at various times, and, since the theoretical basis of the doctrine is clearly relevant to the point under discussion, I enumerate them here. The first is the 'implied term' or 'implied condition' theory on which Blackburn J plainly relied in *Taylor* v. *Caldwell*, as applying to the facts of the case before him. To these it is admirably suited. The weakness, it seems to me, of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement. In the present case, had the officious bystander pointed out to the parties in July 1974 the danger of carrying on the business of a commercial warehouse opposite a listed building of doubtful stability and asked them what they would do in the event of a temporary closure of Kingston Street pending a public local inquiry into a proposal for demolition after the lease had been running for over five years, I have not the least idea what they would have said, or whether either would have entered into the lease at all. In *Embiricos* v. *Sydney Reid & Co* [1914] 3 KB 45, 54 Scrutton J appears to make the estimate of what constitutes a frustrating event something to be ascertained only at the time when the parties to a contract are called on to make up their minds, and this I would think to be right, both as to the inconclusiveness of hindsight which Scrutton J had primarily in mind and as to the inappropriateness of the intrusion of an officious bystander immediately prior to the conclusion of the agreement.

Counsel for the respondent sought to argue that *Taylor* v. *Caldwell*, 3 B & S 826, could as easily have been decided on the basis of a total failure of consideration. This is the second of the five theories. But *Taylor* v. *Caldwell* was clearly not so decided, and in any event many, if not most, cases of

frustration which have followed *Taylor* v. *Caldwell* have occurred during the currency of a contract partly executed on both sides, when no question of total failure of consideration can possibly arise.

In *Hirji Mulji* v. *Cheong Yue Steamship Co Ltd* [1926] AC 497, 510 Lord Sumner seems to have formulated the doctrine as a ' ... device [sic], by which the rules as to absolute contracts are reconciled with a special exception which justice demands' and Lord Wright in *Denny, Mott & Dickson Ltd* v. *James B Fraser & Co Ltd* [1944] AC 265, 275 seems to prefer this formulation to the implied condition view. The weakness of the formulation, however, if the implied condition theory, with which Lord Sumner coupled it, be rejected, is that, though it admirably expresses the purpose of the doctrine, it does not provide it with any theoretical basis at all.

Hirji Mulji v. *Cheong Yue Steamship Co Ltd* is, it seems to me, really an example of the more sophisticated theory of 'frustration of the adventure' or 'foundation of the contract' formulation, said to have originated with *Jackson* v. *Union Marine Insurance Co Ltd* (1874) LR 10 CP 125, compare also, for example, per Goddard J in *W J Tatem Ltd* v. *Gamboa* [1939] 1 KB 132, 138. This, of course, leaves open the question of what is, in any given case, the foundation of the contract or what is 'fundamental' to it, or what is the 'adventure'. Another theory, of which the parent may have been Earl Loreburn in *F A Tamplin Steamship Co Ltd* v. *Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 is that the
p. 752 doctrine is based on the ↵ answer to the question: 'What in fact is the true meaning of the contract?': see p. 404. This is the 'construction theory'. In *Davis Contractors Ltd* v. *Fareham Urban District Council* [1956] AC 696, 729 Lord Radcliffe put the matter thus, and it is the formulation I personally prefer:

> ' ... 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.'

Incidentally, it may be partly because I look at frustration from this point of view that I find myself so much in agreement with my noble and learned friends that the appellants here have failed to raise any triable issue as to frustration by the purely temporary, though prolonged, and in 1979 indefinite, interruption, then expected to last about a year, in the access to the demised premises. In all fairness, however, I must say that my approach to the question involves me in the view that whether a supervening event is a frustrating event or not is, in a wide variety of cases, a question of degree, and therefore to some extent at least of fact, whereas in your Lordships' House in *Tsakiroglou & Co Ltd* v. *Noblee Thorl GmbH* [1962] AC 93 the question is treated as one at least involving a question of law, or, at best, a question of mixed law and fact. ...

This discussion brings me to the central point at issue in this case which, in my view, is whether or not there is anything in the nature of an executed lease which prevents the doctrine of frustration, however formulated, applying to the subsisting relationship between the parties. That the point is open in this House is clear from the difference of opinion expressed in *Cricklewood Property and Investment Trust Ltd* v. *Leighton's Investment Trust Ltd* [1945] AC 221 between the second Lord Russell of

> Killowen and Lord Goddard on the one hand, who answered the question affirmatively, and Viscount Simon LC and Lord Wright on the other, who answered it negatively, with Lord Porter reserving his opinion until the point arose definitively for consideration. The point, though one of principle, is a narrow one. It is the difference immortalised in HMS Pinafore between 'never' and 'hardly ever', since both Viscount Simon and Lord Wright clearly conceded that, though they thought the doctrine applicable in principle to leases, the cases in which it could properly be applied must be extremely rare.
>
> With the view of Viscount Simon and Lord Wright I respectfully agree. … I conclude that the matter is not decided by authority and that the question is open to your Lordships to decide on principle. In my view your Lordships ought now so to decide it. Is there anything in principle which ought to prevent a lease from ever being frustrated? I think there is not …
>
> In the result, I come down on the side of the 'hardly ever' school of thought. No doubt the circumstances in which the doctrine can apply to leases are, to quote Viscount Simon LC in the *Cricklewood* case, at p. 231, 'exceedingly rare'. Lord Wright appears to have thought the same, whilst adhering to the view that there are cases in which frustration can apply, at p. 241. But, as he said in the same passage: ' … the doctrine of frustration is modern and flexible and is not subject to being constricted by an arbitrary formula'. To this school of thought I respectfully adhere.

Lord Wilberforce

> p. 753 Various theories have been expressed as to [the] justification [for the doctrine of frustration] in law: as a device by which the rules as to absolute contracts are reconciled ↵ with a special exception which justice demands, as an implied term, as a matter of construction of the contract, as related to removal of the foundation of the contract, as a total failure of consideration. It is not necessary to attempt selection of any one of these as the true basis: my own view would be that they shade into one another and that a choice between them is a choice of what is most appropriate to the particular contract under consideration … the doctrine can now be stated generally as part of the law of contract; as all judicially evolved doctrines it is, and ought to be, flexible and capable of new applications.
>
> In my opinion … though such cases may be rare, the doctrine of frustration is capable of application to leases of land. It must be so applied with proper regard to the fact that a lease, that is, a grant of a legal estate, is involved. The court must consider whether any term is to be implied which would determine the lease in the event which has happened and/or ascertain the foundation of the agreement and decide whether this still exists in the light of the terms of the lease, the surrounding circumstances and any special rules which apply to leases or to the particular lease in question.

Lord Simon of Glaisdale

A number of theories have been advanced to clothe the doctrine of frustration in juristic respectability, the two most in favour being the 'implied term theory' (which was potent in the development of the doctrine and which still provides a satisfactory explanation of many cases) and the 'theory of a radical change in obligation' or 'construction theory' (which appears to be the one most generally accepted today). … My noble and learned friends who have preceded me have enumerated the various theories … Of all the theories put forward the only one, I think, incompatible with the application of the doctrine to a lease is that which explains it as based on a total failure of consideration. Though such may be a feature of some cases of frustration, it is plainly inadequate as an exhaustive explanation: there are many cases of frustration where the contract has been partly executed. …

I can for myself see nothing about the fact of creation of an estate or interest in land which repels the doctrine of frustration. … A fully executed contract cannot be frustrated; and a sale of land is characteristically such a contract. But a lease is partly executory: rights and obligations remain outstanding on both sides throughout its currency. Even a partly executed contract is susceptible of frustration in so far as it remains executory: there are many such cases in the books. … My conclusion on the first issue is therefore that the doctrine of frustration is in principle applicable to leases.

Lord Roskill

My Lords, I do not find it necessary to examine in detail the jurisprudential foundation upon which the doctrine of frustration supposedly rests. At least five theories have been advanced at different times. … At one time without doubt the implied term theory found most favour, and there is high authority in its support. But weighty judicial opinion has since moved away from that view. What is sometimes called the construction theory has found greater favour. But my Lords, if I may respectfully say so, I think the most satisfactory explanation of the doctrine is that given by Lord Radcliffe in *Davis Contractors* v. *Fareham UDC* [1956] AC 696, 728. There must have been by reason of some supervening event some such fundamental change of circumstances as to enable the court to

p. 754

↵ say—'this was not the bargain which these parties made and their bargain must be treated as at an end'—a view which Lord Radcliffe himself tersely summarised in a quotation of five words from the Aeneid '*non haec in foedera veni*'. Since in such a case the crucial question must be answered as one of law—see the decision of your Lordships' House in *Tsakiroglou & Co Ltd* v. *Noblee Thorl GmbH* [1962] AC 93—by reference to the particular contract which the parties made and to the particular facts of the case in question, there is, I venture to think, little difference between Lord Radcliffe's view and the so-called construction theory.

Lord Russell of Killowen concurred in the result but expressed his doubts about the application of the doctrine of frustration to leases.

Commentary

Does the debate as to the jurisprudential basis of the doctrine of frustration matter? Probably not a great deal. The issue is put as follows in H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 27-018 (footnotes omitted):

> It is … 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. 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. 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.

The statement that it is unlikely that practical consequences flow from the debate as to the correct conceptual basis of the doctrine plainly does not tell us what is the correct conceptual basis. It could be a concern for the fairness of the bargain made by the parties: in this sense it could be said that the courts are struggling to strike a balance between a concern for the fairness of the bargain made by the parties and the desire to hold people to the terms of their contract. On the other hand, it could be said that the courts are primarily engaged in an interpretative exercise; that is to say they are endeavouring to ascertain whether or not the parties have
p. 755 made provision for the event ↵ which has occurred and, if they have not, to determine whether performance of the bargain according to its terms in the changed circumstances would be something radically different from the obligations which the parties had originally assumed under their contract.

From a comparative perspective, one of the most striking features of the doctrine of frustration in English law is the narrow scope within which it operates. There are two points here. First, the doctrine is rarely invoked and, secondly, where it is applicable, its effect is to discharge the contract. The courts are not given a power to adjust the contract to meet the changed circumstances; they must either uphold the contract according to its terms or set it aside. Parties who wish to adjust their contract must insert an express term in the contract to this effect. In other legal systems the courts do have broader powers to intervene and to adjust the contract. As far as English law is concerned, it is for the parties to protect themselves against the consequences of an improvident bargain by inserting an appropriately drafted force majeure clause or hardship clause into the contract: they cannot rely on the courts to act as their saviour. It can be argued that this approach unnecessarily increases the transaction costs of the parties because it compels them to incur the cost of drawing up an appropriate clause. On the other hand, the diversity and sophistication of the various force

majeure and hardship clauses currently in use demonstrates that these are complex issues and it can be said with some justification that they are best dealt with by the parties and not by the courts. Further, a cost of giving a power to the court to adjust contracts in a wider range of circumstances is that it will generate uncertainty. The current English position may be harsh on a party who has entered into a bad bargain, but it has the merit of being clear. Once again we can see the tension between the demands of certainty and a concern for fairness.

The narrow scope of the doctrine of frustration has been questioned by some lawyers in the light of the current global pandemic. The Covid 19 pandemic has had an enormous impact on many businesses, particularly in the travel and leisure industries. Two groups of cases have thus far come before the English courts, one of which concerned contracts for the lease of aeroplanes and the other contracts for the lease of premises to be used as cinemas. The outcome was the same in all cases, namely that the contracts had not been frustrated. The cases involving contracts for the lease of aeroplanes which were grounded as a consequence of the pandemic provide a helpful illustration of the issues that arose in these cases (see *Salam Air SAOC* v. *LATAM Airlines Group plc* [2020] EWHC 2414 (Comm) and *Wilmington Trust SP Services (Dublin) Ltd* v. *SpiceJet Ltd* [2021] EWHC 1117 (Comm)). The contracts were held not to have been frustrated for two principal reasons. First, the terms of the lease were held to show that the lessees had assumed the risk of the unavailability of the aircraft and had accepted an extremely broad obligation to continue to make payment notwithstanding their inability to use the aircraft. Second, the duration of the leases was between six and 10 years and the unavailability of the aircraft for approximately 18 months of that period was held to be insufficient to frustrate the leases. Other jurisdictions have responded more flexibly to the pandemic by utilizing doctrines such as a hardship doctrine or a doctrine of commercial impracticability in order to adapt contracts to the changing circumstances (see generally Klaus Peter Berger and Daniel Behn 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2019–2020) 6 *McGill Journal of Dispute Resolution* 78). As we have noted, English law has not gone down this route. If parties wish to incorporate a
p. 756 hardship clause into their contract (on which see 12.3.9), they are free do so and the courts ↵ should give effect to such clauses. But in the absence of such a clause, a court has no power to adapt the contract to changing circumstances, even a change of circumstances as extreme and unprecedented as the current pandemic. It may be that the pandemic will cause English law to reconsider the scope of the doctrine of frustration (although that reconsideration could only be carried out, in an appropriate case, by the Supreme Court or, more likely, by the Law Commission).

In this connection it is interesting to compare English law with the Vienna Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law. The Vienna Convention does not make any provision for hardship or adjustment of the contract. Article 79 (extracted later) proved to be one of the most controversial provisions in the Convention. Its scope is uncertain in that it is not clear what constitutes an 'impediment' for the purposes of Article 79(1). Further, the effect of force majeure is to protect a party against a liability in damages but it leaves other remedies, such as termination, intact.

Both the Principles of European Contract Law (later in this section) and the Unidroit Principles make provision for hardship as well as force majeure. Two comments can be made here. First, it may not always be a straightforward matter to decide whether a particular case falls within the hardship/change of circumstances provisions or whether it falls within the force majeure/excuse provisions. Secondly, the hardship/change of circumstances provisions are likely to generate some uncertainty. The commentary to Article 6:111 of the

Principles of European Contract Law states that 'the mechanism reflects the modern trend towards giving the court some power to moderate the rigours of freedom and sanctity of contract'. This may be true. But in doing so it will generate uncertainty. In many ways we are debating what is the most appropriate default rule. English law in principle holds the parties to their bargain and so leaves it to the parties to make their own provision for events which may make performance more onerous. The Principles of European Contract Law, by contrast, confer broader powers on the court, while leaving it open to the parties to exclude these powers should they wish to do so. Striking the most appropriate balance between these competing considerations is a difficult matter.

Vienna Convention on Contracts for the International Sale of Goods

> **Article 79**
>
> 1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
> 2. If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
>   (a) he is exempt under the preceding paragraph; and
>   (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

p. 757

> 3. The exemption provided by this article has effect for the period during which the impediment exists.
> 4. The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
> 5. Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

Principles of European Contract Law

> **Article 6:111—Change of Circumstances**
>
> 1. A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.
> 2. If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
>   (a) the change of circumstances occurred after the time of conclusion of the contract,
>   (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
>   (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
> 3. If the parties fail to reach agreement within a reasonable period, the court may:
>   (a) terminate the contract at a date and on terms to be determined by the court; or
>   (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.
>
> In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.
>
> **Article 8:108—Excuse Due to an Impediment**
>
> 1. A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
> 2. Where the impediment is only temporary the excuse provided by this article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the obligee may treat it as such.
> 3. The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.

p. 758

Further Reading

BERGER, KP AND BEHN, D, 'Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study' (2019–2020) 6 *McGill Journal of Dispute Resolution* 78.

MCKENDRICK, E, 'Frustration, Restitution and Loss Apportionment' in A BURROWS (ed), *Essays on Restitution* (Oxford University Press, 1991), p. 147.

MCKENDRICK, E, 'Force Majeure and Frustration—Their Relationship and a Comparative Assessment' in E MCKENDRICK (ed), *Force Majeure and Frustration of Contract* (2nd edn, LLP, 1995), p. 33.

MCKENDRICK, E, 'The Regulation of Long-Term Contracts in English Law' in J BEATSON AND D FRIEDMANN (eds), *Good Faith and Fault in Contract Law* (Oxford University Press, 1995), p. 305.

PEEL, E, *Frustration and Force Majeure* (4th edn, Sweet & Maxwell, 2022).

Test your knowledge by trying this chapter's **Multiple Choice Questions** *<https://iws.oupsupport.com/ebook/access/content/mckendrick11e-student-resources/mckendrick11e-chapter-21-self-test-questions?options=showName>*

Related Books

View the Essential Cases in contract law

Related Links

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/poole-devenney-shaw-mellors-concentrate5e-student-resources/poole-devenney-shaw-mellors-concentrate5e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198898047>*