Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

James Devenney

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10. Frustration

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Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter discusses the doctrine of frustration. It outlines three key questions that need to be posed in addressing issues of possible frustration. Is there a radical change in circumstances? Does any rule of law render frustration inoperative? What are the effects of frustration? It explores two key debates: the fact that a self-induced event will not frustrate a contract, and the consequences of frustration under the Law Reform (Frustrated Contracts) Act 1943.

Keywords: contract law, doctrine of frustration, radical change, valuable benefit, expenses

Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The concept of frustration and its relationship to breach of contract;
- The types of event that may frustrate a contract and the courts' reluctance to allow a party to escape a bad bargain;
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The limitations on the operation of the doctrine of frustration. Broadly a court will consider whether the contract expressly provides for the frustrating event; whether the event was foreseeable and the risk implicitly allocated by the contract; and/or whether the event was self-induced;

- The impact of frustration at common law;
- The effect of the **Law Reform (Frustrated Contracts) Act 1943**.

Key debates

Debate: a self-induced event will not frustrate a contract.

Case law has established that if an alleged frustrating event was brought about by the actions of a contracting party, the contract generally will not be frustrated. However, the limits of self-induced frustration are not clear.

Debate: the consequences of frustration under the Law Reform (Frustrated Contracts) Act 1943.

It is argued that the **Law Reform (Frustrated Contracts) Act 1943** concerns the prevention of unjust enrichment but should the purpose of the law be to apportion loss instead?

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Question 1

IMC own a piece of land in Dorset, 80 square miles in area, with planning permission to mine for tungsten ore. IMC agree to lease this land to Dig Deeper Ltd (DD Ltd) which will extract the tungsten ore. The contract provides that DD Ltd will supply all relevant plant, machinery, and technology for the extraction of the tungsten ore and that the lease rental will become payable when the first tonne of tungsten has been extracted from the land.

A year later, when the site has been developed and mining operations are due to commence, local pressure groups force a public inquiry. As a result of the inquiry, planning permission for mining operations is restricted to an area of 20 square miles. DD Ltd claims that the contract has been frustrated.

Advise the parties.

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Caution!

Problem questions involving frustration can be answered by adopting the following structure:

- Has there been a subsequent radical change in circumstances?
- Are there any rules of law preventing the contract from being frustrated?
- If frustrated, what are the effects?
- Remember, you are presenting arguments and explaining the outcomes for the parties. Do not arrive at definite conclusions, for example, that there was never a radical change in the first place, unless this is unavoidable as this will then curtail further discussion of the issues raised by the question.

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Diagram answer plan

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Suggested answer

This question concerns the possible discharge of contract, and particularly the operation of the doctrine of frustration.[1]

[1] The opening sentence identifies the general area of law to be discussed.

Is the Event Capable of Frustrating the Contract?

The doctrine of frustration potentially applies when, after conclusion but before complete performance of a contract, a change of circumstances renders a contract physically or legally impossible to perform or the changed circumstances transform the expected contract performance into something which is radically different from that which the parties intended when they entered into the contract;[2] ↵ see ***Davis Contractors Ltd v Fareham Urban District Council*** **[1956] AC 696**. On the present facts the mining of tungsten ore is still physically possible, albeit restricted to only 20 square miles. The same considerations apply to legal possibility. Two questions arise in this context: first, what was the object of the contract and, secondly, in the light of this object, has the contract become commercially sterile?[3]

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[2] A statement of what constitutes frustration with authority is given in the first paragraph.

[3] The first issue, of whether the contract is frustrated, is identified.

How clear is the object of the contract?[4] For example, it might be: (a) to lease land; or (b) to lease land for the purpose of mining tungsten ore; or (c) to mine the land for tungsten ore. This is particularly important, for if object (a) is correct, frustration would be difficult to argue as the actual lease would remain unaffected by the changed circumstances. Although some further problems concerning leases will be considered later, it would seem appropriate to state that claim (a) is the least likely to succeed as the object of the contract. First, IMC are not just leasing land and washing their hands of it; rather, IMC's future profits are linked inextricably with DD Ltd's effective use of the land. Secondly, the pre-contractual negotiations between IMC and DD Ltd must have focused on DD Ltd's intended use of the land. One can hardly imagine IMC advertising the availability of a lease without a clear and specific reference to the presence of tungsten deposits. Clear parallels could be drawn with ***Krell v Henry*** **[1903] 2 KB 740** where the initial advertisement stated the intended use to which the room and

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balcony would be put, that use eventually constituting the object of the contract. As Marcus Smith J stated in ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency*** **[2019] EWHC 335 (Ch) at [37]**: 'What the parties were buying and selling [in ***Krell***] was, quite literally, a room with a view.'

[4] Once the object of the contract is established, this allows consideration of whether the event makes the performance of the contract something radically different.

If claim (b) or (c) is correct, the next question is whether the planning limitations constitute a sufficiently radical change in circumstances to warrant a finding of frustration.

On a purely mathematical basis, the 75 per cent restriction in the mining area appears fundamental.[5] But what if the tungsten ore is primarily located in the specified area? If so, the public inquiry has made little difference to the expectations of the parties. Note that an event that reduces profitability (or makes a contract loss-making), increases logistical hardship, or simply causes inconvenience, is not per se sufficient to frustrate the contract (see ***Tsakiroglou & Co. Ltd v Noblee Thorl GmbH*** **[1962] AC 93**, involving a carriage of goods by sea contract that was rendered unprofitable by the closure of the Suez Canal). Conversely, if the tungsten ore is distributed evenly across the whole 80 square miles and the initial site development costs remain the same, it is more arguable that there has been a radical change in circumstances. ***Herne Bay Steamboat Co. v Hutton*** **[1903] 2 KB 683** might be relevant. There a plea of frustration failed, as the ↵ defendant could attain one of the two primary objectives from performance of the contract. However, on the present facts, a 75 per cent reduction appears rather more drastic.

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[5] The paragraph illustrates the use of IRAC, containing an explanation of the law, application of the law, and an appropriate conclusion.

Will Any Rule of Law Render Frustration Inoperative?

There are two important questions here:[6] (a) was the decision of the public inquiry foreseen by either party and/or did either party take the risk of such an event occurring; and (b) can a mining lease be frustrated?

[6] This part of the answer considers whether the operation of the doctrine of frustration is limited by (a) the event potentially being foreseeable and (b) the contract being one for a mining lease.

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Generally, where land is intended to be redeveloped it is the buyer who is assumed to take the risk that planning permission will be refused unless the contract states otherwise. For example, in ***Amalgamated Investment and Property Co. Ltd v John Walker & Sons Ltd* [1956] 3 All ER 509**, the buyer purchased a warehouse for business redevelopment purposes. The building was worth over £1.7 million with planning permission, without which it was worth only £200,000. Subsequent to the sale, the warehouse was legally designated as a building of historic importance, making the intended redevelopment all but impossible. The court concluded that in such circumstances the buyer was taken to have accepted the risk of such an event. But the present facts are slightly different. When IMC and DD Ltd entered into the contract, planning permission had already been successfully obtained. In these circumstances it might be difficult to place the risk on DD Ltd unless, for example, it was clear at the time of contracting that local pressure was mounting for a public inquiry. Equally, in a more environmentally friendly society it might indeed be reasonably foreseeable that large-scale projects might attract unfavourable media comment but unless the contract specifically allocates this risk to one or other of the parties, there is arguably nothing to prevent a court from discharging them. For example, in ***Ocean Tramp Tankers Corp. v VO Sovfracht, The Eugenia* [1964] 2 QB 226**, involving carriage of goods via the Suez Canal, Lord Denning MR recognized that *both* parties had foreseen the possible closure of the canal. However, as they had been unable to reach agreement on any provision to meet this contingency, Lord Denning was quite prepared to make a finding of frustration when the relevant vessel became trapped in the canal. A useful summary on the relevant law was given by Marcus Smith J in ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [211]** who stated that the foreseeability of the event is relevant to determining whether one or both of the parties accepted the relevant risk.

In the present case, there is nothing to suggest that the parties turned their minds to the possibility of a planning limitation so frustration seems possible (see also ***Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547**).

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The second point concerns leases of land. Traditionally it had been argued that a lease could not be frustrated as it creates not only a contract but also an estate in land. If land is requisitioned by the government, for instance, the lessee would still be expected to pay the rent as the act of requisition has not affected the ownership of the estate (eg ***Whitehall Court Ltd v Ettlinger* [1920] 1 KB 680**). But there are two cases which have doubted that, *as a matter of law*, leases are incapable of being frustrated. First, in ***Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221**, the Law Lords were divided equally on the matter (Lord Porter expressing no view).[7] Lords Simon and Wright argued persuasively that a special purpose lease (eg a building lease), in which that purpose could not be performed, might be capable of being frustrated. Secondly, in ***National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 All ER 161**, the House of Lords expressed the opinion that frustration should 'hardly ever' apply to leases rather than discounting the possibility entirely (see also ***London Trocadero (2015) LLP v Picturehouse Cinemas Limited, Gallery Cinemas Limited, Cineworld Cinemas Limited* [2021] EWHC 2591 (Ch)**). As DD Ltd have taken a lease exclusively for the mining of tungsten ore (ie a special purpose lease), which may now be commercially

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redundant, it is arguable that the lease has been frustrated (see also ***BP Exploration Co. (Libya) Ltd v Hunt (No. 2)*** **[1979] 1 WLR 783**, affirmed **[1983] 2 AC 352**, where an oil concession, similar in many ways to a mining lease, was held capable of being frustrated).

[7] Here there is an appreciation shown of controversy in the case law.

Effects

If a contract is frustrated it is discharged from the date of the frustrating event and thereafter both parties are excused further performance; see ***Hirji Mulji v Cheong Yue Steamship Co. Ltd*** **[1926] AC 497**. However, the position at common law has been qualified, to some extent, by the **Law Reform (Frustrated Contracts) Act 1943**.[8]

[8] The common law effect of discharging future obligations, ie after the frustrating event, is noted and the effect of the 1943 Act on performance of obligations prior to the frustrating event is considered.

Under the 1943 Act, the general rule is that any money paid or payable before the frustrating event ceases to be payable or is recoverable.[9] There is no evidence of such a payment so the general rule is inapplicable. Moreover, as the lease rental was only payable when mining had actually commenced, this liability is extinguished under the normal common law rules (eg ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** **[1943] AC 32**). Finally, insofar as **s. 1(2)** offers the possibility of wasted expenses being recovered, this again has no application in the absence of any obligation to make payments before the frustrating event.

[9] **Section 1(2)** and the proviso to **s. 1(2)** are considered and correctly determined to be inapplicable.

p. 167 ↵ However, under **s. 1(3)** of the 1943 Act, the court may award a 'just sum' where one party has obtained a 'valuable benefit' *before* discharge of the contract.[10] Can DD Ltd claim that IMC has retained the benefit of land which has been suitably adapted to mineral extraction? Recourse should be made to the judgment of Robert Goff J in ***BP Exploration Co. (Libya) Ltd v Hunt (No. 2)*** on this point. The learned judge stressed that the value of any benefit must be equated with the end product of services not their cost of provision. This causes DD Ltd some difficulty as much of the site development may be worthless to IMC in the light of planning restrictions. In particular, Robert Goff J

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commented that the effect of the frustrating event might be to reduce, or even extinguish, the value of the benefit received. If DD Ltd has built roads on IMC land which are now unusable, there appears to be little benefit to IMC.

[10] Part-performance of a contract and the effect of **s. 1(3)** are discussed. What constitutes a valuable benefit and the award of a just sum are considered.

Looking for extra marks?

The following issues could be explored further:

■ Whether the mining of 20 square miles is radically different from the mining of 80 square miles or whether it merely causes additional hardship and a consequential reduction in profitability;

■ Whether the object of the contract was to lease land or extract tungsten ore;

■ If the contract is frustrated, whether a 'valuable benefit' has been conferred on either party, noting alternative interpretations of **s. 1(3)**.

Question 2

Victor, as secretary of his local tennis club, hires a bus from the Rambler Bus Co. (RBC) to take 45 members of the club to see the final of the Men's Singles Championships, held at Wimbledon. A term of the contract provides: 'This contract may be cancelled provided that notice of three working days is given to the company, otherwise the full hire charge is payable'.

The contractual price is £1,500 and Victor pays a deposit of £250 in advance. As RBC guarantees the roadworthiness of all of its buses, the designated bus is properly serviced the day before its intended use. However, on the morning of the trip it is announced that none of the tennis matches will be played as political demonstrators have dug holes in the tennis courts. Victor immediately claims that the contract has been frustrated and demands the return of the £250 deposit.

Advise the parties.

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Caution!

■ It is useful to consider the ‘object of the contract’. Is it to hire a bus or to facilitate the viewing of the sporting event? If the former, a plea of frustration will almost certainly fail.

■ The following questions may be considered: is there a radical change in circumstances, what is the effect of the cancellation clause, was the event foreseen or foreseeable, can RBC recover its servicing costs, and has any valuable benefit been conferred?

■ Be aware of the ambit of the **Law Reform (Frustrated Contracts) Act 1943**. The Act does not deal with all elements of the doctrine of frustration; it only deals with aspects of the effect of frustration.

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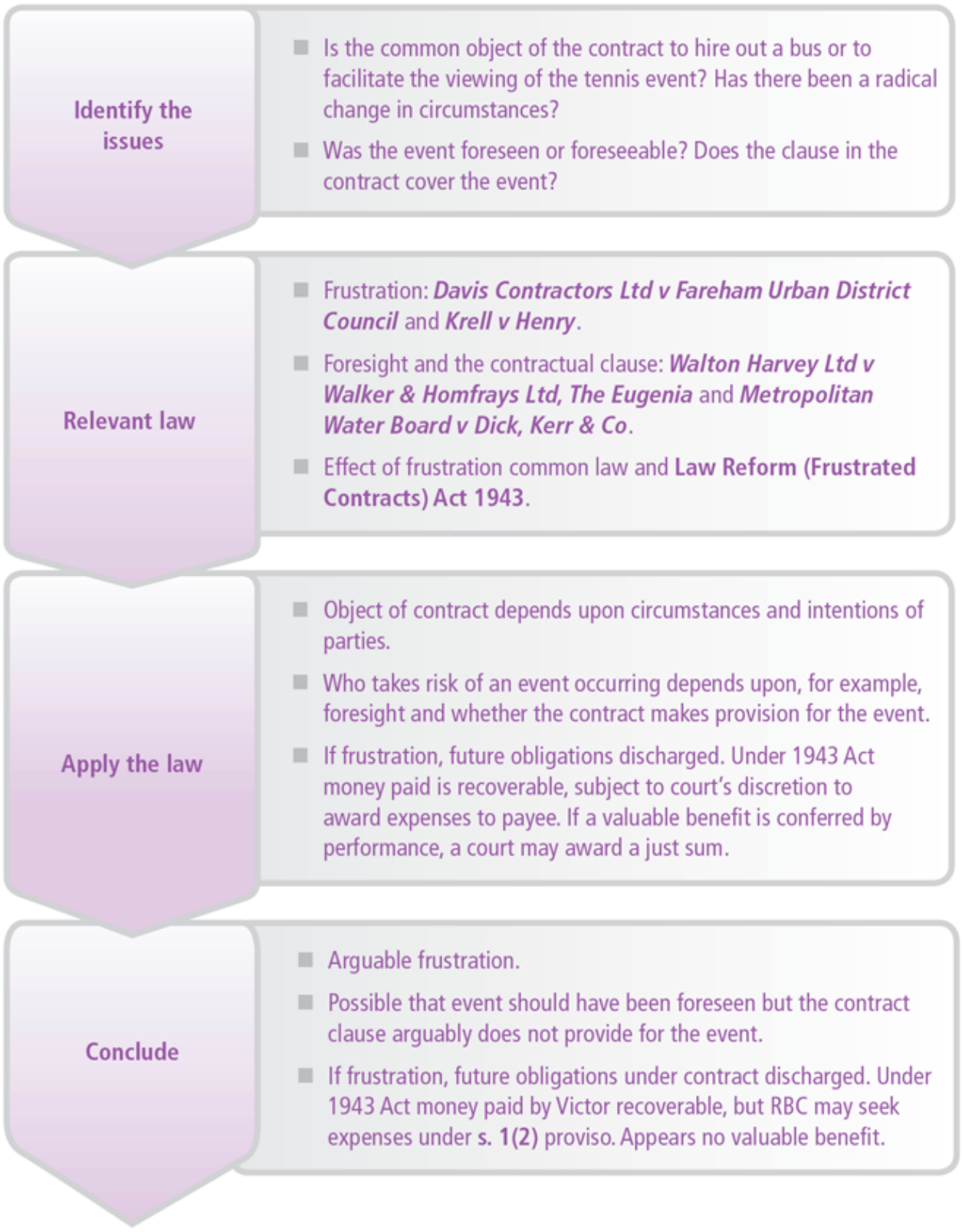
Diagram answer plan



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Suggested answer

In advising the parties the law relating to the discharge of contracts, particularly the doctrine of frustration, requires discussion.[1] Generally a contract is to be performed and failure to do so may amount to a breach of contract. However, the law excuses non-performance of a contract where the contract is said to have been frustrated. In the question, the cancellation of the tennis matches raises the issue of whether, on the facts, there is an event sufficient to frustrate the contract and, if so, with what effect?

[1] This paragraph introduces and contextualizes the issues raised by the question.

Is the Event Capable of Frustrating the Contract?

In broad terms a contract will be discharged by frustration where (often unforeseen) events render performance of the contract radically different from that which was originally intended by the parties: 'it was not this that I promised to do' (***Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696** at 729 per Lord Radcliffe).

The contract to hire the bus can still be performed, as RBC would readily argue. However, from Victor's viewpoint, performance would be pointless as the motive for hiring the bus has disappeared. To decide this issue, one must identify the *object* of the contract. Have the changed circumstances made performance of this object impossible? ***Krell v Henry* [1903] 2 KB 740** considered the hypothetical example of a contract for the hire of a cab to go to Epsom on Derby Day. The races were subsequently cancelled. The court felt that the contract would not be frustrated as it would be viewed as one in which the passenger was transported to Epsom, his motive of seeing the Derby being irrelevant to the cabby. This argument would be used by RBC, contending that the contract was merely to transport Victor and his passengers rather than to facilitate the viewing of Wimbledon tennis matches.[2]

[2] Having explained the relevant rule, an argument in favour of RBC's position is presented.

Conversely, Victor could rely on the actual decision in ***Krell v Henry*** where the contract was frustrated as the court considered that the basis of the contract was to afford a private view of the coronation procession rather than the simple hire of a room.[3] As Marcus Smith J stated in ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) at [37]** the parties in ***Krell*** were negotiating for a room with a view.

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[3] A counter-argument in favour of Victor is then raised, offering an alternative analysis of the facts.

Which argument is stronger? Although both are possible, it is submitted that the court's decision will be determined by the manner in which RBC advertised its services and the general intentions of the parties.[4] In ***Krell***, for example, the plaintiff advertised the room ↵ specifically for the purpose of viewing the coronation—the room hire and its intended use became inseparable. If the facts show that RBC advertised their services in this way (eg 'hire our bus and see Wimbledon tennis') Victor may be successful on this point. If not, RBC will be entitled to claim that the contract remains in force and that, consequently, the cancellation fee is payable.[5]

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[4] This paragraph shows an ability to assess the arguments and acknowledges that the facts of the question may be incomplete and require further investigation.

[5] This sentence gives a qualified conclusion on the possible factual scenarios.

If Victor's arguments prevail it is clear that the cancellation of Wimbledon will be of sufficient magnitude to frustrate the contract. It is proposed to proceed on the basis that Victor succeeds on this first point.[6]

[6] The answer states that the analysis is to continue on the basis that the argument in favour of frustration may be successful.

Will Any Rule of Law Render Frustration Inoperative?

A party may be unable to rely on an event which he/she has foreseen in order to claim frustration[7] (eg ***Walton Harvey Ltd v Walker & Homfrays Ltd*** **[1931] 1 Ch 274**). The rationale is that if an event has been foreseen, then in the absence of an express provision covering that event, one or other of the parties will often be taken to have accepted the risk of its occurring (see also ***Canary Wharf (BP4) T1 Ltd v European Medicines Agency*** **[2019] EWHC 335 (Ch)**).[8]

[7] Consideration is given to the limits to the operation of the doctrine of frustration.

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[8] The element of foreseeability may determine the allocation of risk. Whether foresight of the event will prevent frustration from operating is considered using the IRAC analysis.

In considering this issue courts have, on occasion, distinguished between events that were foreseen by the parties (or one of them) and events which were foreseeable at the time of the contract. In the first situation, if the event and its magnitude have been foreseen, then a plea of frustration will usually fail except, perhaps, where there is evidence that the parties intended 'to leave the lawyers to sort it out' (see ***The Eugenia* [1964] 2 QB 226**, per Lord Denning MR). On the present facts, there is nothing to intimate that the parties foresaw that a political demonstration would lead to the event's cancellation.

If the event was foreseeable at the time of the contract, it becomes a question of construction as to whether the contract allocates the risk of the event (eg ***Larrinaga & Co. v Societe Franco-Americaine des Phosphates de Medulla* (1923) 92 LJKB 455**). It is arguable that in the modern age of violent political demonstration, the possibility that people will resort to such activity in order to enhance the publicity of a particular campaign cannot be discounted. If so, the disruption of a major event is foreseeable (compare also ***Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547**). The question then becomes: have the parties made provision for this eventuality by incorporating a clause which restricts the effects of the potentially frustrating event? In particular, what is the effect of the cancellation clause?

Victor appears to have accepted responsibility for any cancellation which takes place *within* three days of the anticipated performance. ↵ However, in this area courts traditionally apply a very strict test: as the frustrating event, by definition, is usually unforeseen (though not necessarily unforeseeable), clear evidence is required that the parties intended the clause to cover the said event (eg ***Metropolitan Water Board v Dick, Kerr & Co.* [1918] AC 119**).[9]

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[9] Another possible limitation, an express provision in the contract, is identified in this paragraph and linked to the issue of risk.

On the present facts, it is arguable that the parties merely intended the clause to cover a situation where, for example, Victor was unable to find enough passengers to make the trip cost-effective. Moreover, if the object of the contract is to arrange transport to a sporting event, it is arguable that Victor does not so much 'cancel' the contract as that the political demonstrators 'frustrate' it; that is to say, Victor does not notify a desire to cancel as the events have already brought the contract to an end. On this basis it might be justifiably concluded that as the cancellation clause does not cover political

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demonstration, there is no other evidence from which one could deduce that the parties had allocated that particular risk in a certain way. Hence, although the event might be foreseeable, arguably the contract is still capable of being frustrated.

Effects

At common law the effect of frustration is that future obligations are automatically discharged; see ***Hirji Mulji v Cheong Yue Steamship Co. Ltd* [1926] AC 497**. So here RBC would no longer have to provide the bus and Victor would no longer be under an obligation to pay the remaining £1,250.[10] Under the **Law Reform (Frustrated Contracts) Act 1943**[11] the general rule is that any money paid or payable before the frustrating event ceases to be payable or is recoverable by the payer: **s. 1(2) of the Law Reform (Frustrated Contracts) Act 1943**.[12] However, if the payee, RBC, incurred expenses in performance of the contract, a court has discretion to allow that party to retain some or all of the specified prepayment under the proviso to **s. 1(2) of the Law Reform (Frustrated Contracts) Act 1943**. On the present facts, Victor will be reclaiming his £250 deposit whereas RBC will argue that it should retain some part of the deposit as compensation for its servicing costs. Under the proviso to **s. 1(2)**, the court has a discretion to award a sum not exceeding the amount of the prepayment in respect of such expenses. It is unlikely that RBC's claim will succeed as RBC presumably services its buses at periodic intervals anyway, making it unfair to saddle Victor with the ensuing costs. Support for this can be found in ***Gamerco SA v ICM/Fair Warning Ltd* [1995] 1 WLR 1226** where the court refused to deduct an amount from the prepaid sum to cover the defendants' expenses as the plaintiff's loss had been so much greater. However, an alternative argument might be that servicing only takes place because the buses are actually hired for future use; that is, without use, the need to service disappears.

[10] Separate the common law effect of frustration from the effect of the **Law Reform (Frustrated Contracts) Act 1943**.

[11] Once the common law position has been considered, attention may then be turned to the **Law Reform (Frustrated Contracts) Act 1943**.

[12] Note the order in which the issues are addressed: **s. 1(2)** sums paid or payable; the proviso to **s. 1(2)**, expenses incurred by the payee; and **s. 1(3)** valuable benefit.

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p. 172 ↵ Has any valuable benefit been conferred on either party by anything done in, or for the purpose of, the performance of the contract?[13] Technically speaking, RBC is now in possession of a 'recently serviced' bus but a court would probably ignore this: under **s. 1(3)** the valuable benefit must be conferred by the other party, whereas here RBC does its own servicing. It would seem that **s. 1(3)** is inapplicable.

[13] The possibility of a valuable benefit is considered, but discounted. Note that the answer, in consequence, deals with this issue more briefly.

In conclusion, it is arguable that the contract between Victor and RBC is frustrated should the common object of the contract be seeing Wimbledon tennis. While the event may be foreseeable, this would not necessarily prevent the doctrine of frustration from applying, nor would the express provision in the contract necessarily cover the event. The consequence of the contract being frustrated is that at common law future obligations are discharged. Under the **Law Reform (Frustrated Contracts) Act 1943** the sum of £250 is recoverable by Victor but may be subject to RBC setting off a sum in respect of expenses incurred in servicing the bus. This, however, seems unlikely. Finally, as there does not appear to be a valuable benefit conferred on either party, no just sum is payable under **s. 1(3)**.

Looking for extra marks?

■ What is important, especially in frustration, is that you try to look at the potential arguments of *both* sides. An answer needs to be balanced in identifying the issues raised by the question but also shows depth of analysis rather than a superficial treatment of such issues.

■ The treatment of 'effects' will normally separate the average/good script from the excellent script. Always consider the payer's, payee's, and valuable benefit rules.

■ In explaining and applying the **Law Reform (Frustrated Contracts) Act 1943** it is advisable to deal with **s. 1(2)**, the proviso to **s. 1(2)**, and then **s. 1(3)** in that order. This will allow you to arrange your answer logically and spot cross-issues between the proviso to **s. 1(2)** and **s. 1(3)**.

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Question 3

When comparing the common law with the **Law Reform (Frustrated Contracts) Act 1943**, it becomes clear that the latter is more clearly directed towards equitably apportioning the loss between the parties.

Discuss.

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Caution!

■ Before starting to write, read the question carefully and seek to unpack the sentence—what is the subject matter of the essay?—this determines relevance; what tasks am I expected to consider?—(a) compare common law and statute and (b) assess whether the Act is designed to apportion loss fairly.

■ This is not a general question about frustration, but is targeted at the impact of the **Law Reform (Frustrated Contracts) Act 1943**.

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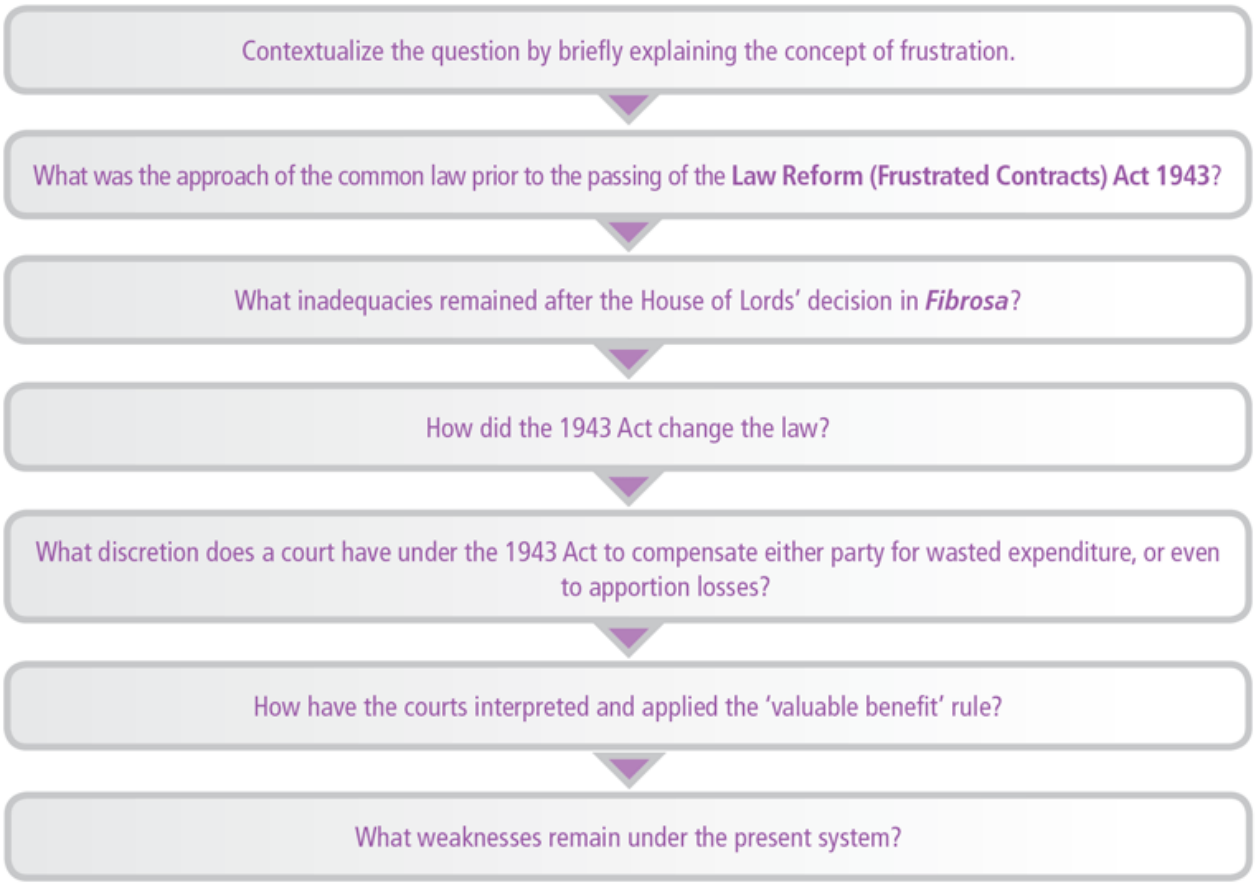
Diagram answer plan



Suggested answer

The question requires a consideration of the effect of the **Law Reform (Frustrated Contracts) Act 1943** on a contract which has been frustrated.[1] When a contract is frustrated the parties are excused from the performance of any future obligations, as at the date of discharge further performance has become impossible in circumstances which ↵ involve no liability in damages for the failure of either party (see ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** **[1943] AC 32**).

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[1] This paragraph introduces and contextualizes the issues raised by the question.

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At common law the logical corollary was that any obligation that had accrued before the frustrating event still had to be performed.[2] This could cause considerable injustice as illustrated in ***Chandler v Webster*** **[1904] 1 KB 493** where the plaintiff hired a room for the purpose of overlooking the coronation procession but the coronation was subsequently cancelled. The price exceeded £140 and was payable in advance. Although the plaintiff actually paid £100 he was still held liable for the balance. The Court of Appeal rejected counsel's submission that there had been a total failure of consideration. As the doctrine of frustration only released the parties from *future* performance, as opposed to past and future obligations, the court held that there could be no total failure of consideration.

[2] The common law is explained prior to the ***Fibrosa*** case.

In ***Fibrosa***, the House of Lords took a different approach and mitigated the harshness of the common law by ruling that in such cases there could be a total failure of consideration, in terms of non-performance, releasing the other party from the performance of an accrued obligation and allowing him/her to recover payments already made.[3] The facts of ***Fibrosa*** are instructive. The respondents agreed to make and deliver machinery according to the appellant's specifications. The contract price was £4,800, £1,600 payable in advance of which only £1,000 had been paid at the time of the frustrating event. As no machinery had been delivered, the House of Lords held, overruling ***Chandler v Webster*** **[1904] 1 KB 493**, that there was a total failure of consideration and that the appellants need not pay the outstanding £600 and were entitled to recover their £1,000.[4]

[3] Note the facts of the ***Fibrosa*** case are explained for the purpose of highlighting the difficulties inherent in the law.

[4] Using PEA, the Point, harshness of the common law, and the Evidence, how the law was developed through case law, is evident in the paragraph.

At first glance the ***Fibrosa*** decision appears perfectly logical: the appellants did not receive any benefit so they were not expected to pay any money. However, closer examination reveals certain flaws.[5] First, the respondents were merely performing their contractual obligations by manufacturing machinery in accordance with the appellant's specifications. Why should the respondents bear the whole loss for performance stipulated by the appellants? Secondly, the machinery was almost complete when the contract was frustrated; on the facts, it seems that it could have been sold without loss. But what if the machinery had been 'custom-built' and was only saleable at a loss? Would it be

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just and equitable for the respondents to receive no recompense for work done? On these hypothetical facts, the respondents' prudence in stipulating for a prepayment would be side-stepped, which is especially worrying in view of their blameless conduct. Yet the common law would still place the whole loss on their shoulders. ↵ Thirdly, consider a variation on these facts in which the appellants received a very small part of the anticipated delivery of machinery. Insofar as this represented only a partial failure of consideration, the appellants would forfeit their £1,000 and be liable for the balance of £600, even if the delivery had been unusable without the remainder of the consignment.

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[5] The difficulties within the common law are explained, emphasizing where loss falls. This paragraph provides the Analysis to the Point and Evidence of the previous paragraph.

These points demonstrate the inadequacies of the common law even after ***Fibrosa***. Moreover, that decision was limited to the recovery of money payments and did not offer any general restitutionary relief for the conferment of non-monetary benefits.[6]

[6] A running conclusion is given on the previous discussion.

The **Law Reform (Frustrated Contracts) Act 1943** addressed some of these issues. It introduced a general principle that all money paid or payable before the frustrating event was recoverable or ceased to be payable, irrespective of whether there had been a total failure of consideration. However, this rule was subject to two exceptions.

First, under **s. 1(2)** a court could allow the payee to retain the whole or part of any advance payment (paid or payable before the frustrating event) in order to compensate for expenses incurred in performance of the contract. Applied to the facts of ***Fibrosa***, this might have allowed the respondents, subject to the court's discretion, to retain and/or claim a part of the £1,600 advance payment as recompense for their manufacturing expenses. However, this exception only applies if the contract provides for an advance payment prior to the frustrating event (or an actual payment *is* made), otherwise compensation for expenses is unavailable. Equally, if expenses exceed the advance payment, a court is powerless to award the excess under this provision, emphasizing another deficiency in the 1943 Act. The moral is to negotiate for payment of the entire contract price in advance.[7] These two points, taken together, suggest that the 1943 Act was never intended to apportion losses equitably as, otherwise, the expenses rule would operate without the need for an advance payment. Additionally, it is unclear on what basis the discretion is to be exercised under the

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proviso to **s. 1(2)**. In ***Gamerco SA v ICM/Fair Warning Ltd*** **[1995] 1 WLR 1226** Garland J said that the words of **s. 1(2)** conferred a broad discretion on a court. There is no clear guidance given, either in the statute or in the case law, as to how the discretion is to be exercised.

[7] This is a good point showing how the law can be used to the advantage of a payee. An examiner would be impressed by this insightful comment.

Secondly, under **s. 1(3)** of the 1943 Act the court may award a 'just sum' where one party has obtained a 'valuable benefit' before discharge of the contract. Robert Goff J in ***BP Exploration Co. (Libya) Ltd v Hunt (No. 2)*** **[1979] 1 WLR 783** (affirmed [1983] 2 AC 352) made a number of useful observations. Most importantly, the value of any benefit was to be equated with the end product of services,

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not the cost of their provision. Perhaps for this reason Robert Goff J emphasized that the 1943 Act was more concerned with preventing unjust enrichment rather than providing for an equitable apportionment of loss.[8] For example, if the benefit conferred was destroyed by the frustrating event, no sum would be payable except, possibly, where one party had benefited from insurance cover. This confirms that a valuable benefit must be conferred, rather than payment made for *work done*. Thus, if the facts of ***Fibrosa*** were to be repeated, there would be no valuable benefit as no machinery had been delivered.

[8] This statement goes to the heart of the question—the 1943 Act is concerned with the prevention of unjust enrichment rather than the apportionment of loss.

Robert Goff J's interpretation has been criticized.[9] It is true that under **s. 1(3)(b)** the court must take account of the effect of the frustrating event upon the said benefit, thereby suggesting that destruction of the benefit will render it valueless. However, **s. 1(3)** expects a court to value the benefit *before* the time of discharge and then have 'regard to all the circumstances', including the effect of the frustrating event. This implies that a court could value a benefit before discharge and only *partially* reduce its value in the event of its subsequent destruction. The decision in ***BP v Hunt*** ignores this potential flexibility, thereby emphasizing the role of unjust enrichment at the expense of an equitable apportionment of loss. As the law stands, the effect of Robert Goff J's judgment would be that, on the facts of ***Appleby v Myers*** **(1867) LR 2 CP 651**, the claimants would still bear the whole loss as the frustrating event destroyed the machinery.[10]

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[9] The judgment of Robert Goff J in ***BP v Hunt*** has been the subject of academic criticism, eg Treitel argues for an alternative interpretation of **s. 1(3)**.

[10] Here the answer draws another comparison with the common law position in relation to part-performance of a contract before the time of discharge.

Robert Goff J's judgment also considered that, although the Act was silent on the matter, the best guide to valuing a benefit was the contract price. These points, taken together, establish clear limits on a court's flexibility to apportion losses fairly. Nevertheless, there are exceptions.

First, **s. 1(3)** requires a court to take into account any advance payment made which the court has allowed the payee to retain under **s. 1(2)**, thereby preventing a double payment for the same benefit. In the same context, any expenses incurred by the benefited party have to be deducted from the benefit received rather than the 'just sum' which is eventually awarded by the court. Secondly, the Act can apportion benefits; that is, if both parties confer benefits on each other, a court would be entitled to award the balance to the less favoured party. Thirdly, **s. 1(3)** can include 'benefits' of a more intangible nature, such as the knowledge and experience gained from pre-frustration contractual performance (eg ***BP v Hunt***). This might allow the provider of specialist advice to be paid a reasonable sum of money for its potential post-frustration use by the recipient.

In summary, the 1943 Act offers considerable advantages over the common law by allowing courts greater flexibility in the awards that can be made.[11] However, the scheme is not perfect (compare also the ↵ European Law Institute's *Principles for the COVID-19 Crisis*, Principle 13(3)). Expenses cannot be recovered in the absence of a provision for prepayment or actual payment and compensation for benefits conferred is dependent upon those benefits surviving the frustrating event. Indeed the 1943 Act, as Robert Goff J indicated, concerns the prevention of unjust enrichment and not, it would seem, apportionment of loss. This clearly falls short of any scheme aimed at apportioning losses equitably between the parties.

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[11] The previous discussion is summarized and related to the requirements of the question.

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Looking for extra marks?

■ The answer divides broadly into two parts. First, a brief description of the common law and an assessment of its advantages and disadvantages, setting this in the context of the House of Lords' decision in ***Fibrosa***. Secondly, the changes brought about by the 1943 Act and whether they improved the situation, focusing especially upon the analysis adopted in ***BP*** and ***Gamerco***.

■ Better students will try to answer the question by including their own evaluation of whether the 1943 Act ensures a more equitable distribution of loss. Consideration should be given to the interpretation of **s. 1(3)**.

Taking things further

■ Baker, J.H., 'Frustration and Unjust Enrichment' (1979) 38 CLJ 266.

Raises issues concerning the meaning of valuable benefit under **s. 1(3) of the Law Reform (Frustrated Contracts) Act 1943**.

■ Chandler, P.A., 'Self-Induced Frustration: Foreseeability and Risk' (1990) 41 NILQ 362.

Looks at the issues arising out of ***Lauritzen AS (J) v Wijsmuller BV, The Super Servant Two*** **[1990] 1 Lloyd's Rep 1**.

■ Clark, P., 'Frustration, Restitution and the Law Reform (Frustrated Contracts) Act 1943' [1996] LMCLQ 170.

Provides an analysis of ***Gamerco SA v ICM/Fair Warning (Agency) Ltd*** **[1995] 1 WLR 1226**, *exploring the application of the discretion under the proviso to* **s. 1(2) of the Law Reform (Frustrated Contracts) Act 1943**.

■ Hall, C.G., 'Frustration and the Question of Foresight' (1984) 4 LS 300.

Explores the views of Professor Treitel in relation to the issue of foresight.

■ Haycroft, A.M. and Waksman, D.M., 'Frustration and Restitution' [1984] JBL 207.

The article considers the **Law Reform (Frustrated Contracts) Act 1943** *and argues that the basis of the Act is apportionment of loss.*

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