



Contract Law Concentrate: Law Revision and Study Guide (6th edn)
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p. 166 **8. Contractual impossibility and risk**

Frustration and common mistake

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<https://doi.org/10.1093/he/9780198904618.003.0008>

Published in print: 05 August 2024

Published online: August 2024

Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter examines the law's response to events that render performance of the contract impossible for reasons beyond the control of the contracting parties, and so provide an excuse for non-performance. The default legal doctrines—common mistake (initial impossibility) and frustration (subsequent impossibility)—may come into play in instances of impossibility of performance only where there is no express or implied allocation of the risk of the event in the contract. These default doctrines determine what is to happen to the existing and future obligations of the parties.

Keywords: non-performance, common mistake, void, risk, impossibility, frustration, fault, self-induced, Law Reform (Frustrated Contracts) Act 1943 (LR(FC)A 1943), unjust enrichment

Key facts

- This chapter is concerned with situations where a contract is or becomes impossible to perform.
- Where the contract terms expressly or impliedly **allocate the risk** of a contract being or becoming impossible to perform on a particular ground to one party (such as on the ground of the destruction of the contractual subject matter) and that event occurs, that party cannot rely on the impossibility of performance as an excuse to a claim for non-performance or breach of that contract.

However, in the absence of a contractual allocation of the risk, a contract may be void (of no effect from the very beginning) if unknown to the parties at the time the contract was made, it was impossible to perform from the outset (e.g. unbeknown to the parties the subject matter of the contract (such as goods) had already been destroyed (**common mistake**)). Non-performance in such circumstances is *excused* since there is no valid contract to perform.

- Circumstances falling short of impossibility, such as common mistakes as to the quality of the subject matter (e.g. both parties thought the goods in question were much more valuable than was really the case) rather than as to its existence, generally do not render the contract void and the contract must therefore be performed in accordance with its terms or a non-performing party will be in breach.
- This is an ‘all or nothing’ principle, i.e. a contract is valid or void. The courts, it seems, have no equitable jurisdiction to set aside the contract for a fundamental mistake as to quality.
- Equally, in the absence of a contractual allocation of the risk, if an event occurs *after* the contract has been made which renders further performance of the contract ‘impossible’ and that event occurs without the fault of either party, the contract may be discharged by frustration and parties have an excuse for future non-performance.
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- If the subsequent event which renders further performance impossible can be attributed to one of the contractual parties, that party may be in breach and cannot rely on frustration as a defence to a claim based on non-performance.
- Where a contract is discharged by frustration both parties are excused performance of their future obligations and the application of the **Law Reform (Frustrated Contracts) Act (LR(FC)A) 1943** usually determines what happens to advance payments (such as deposits) due before the frustrating event, and claims for reimbursement for contractual expenses and performance conferred prior to frustration.
- The legal treatment of initial and subsequent impossibility is very different. It is important to appreciate this and to attempt to explain the difference in treatment.

8.1 Introduction

This chapter examines the law’s response to events that render performance of the contract impossible for reasons beyond the responsibility of the contracting parties. More specifically it examines when such circumstances provide an excuse for non-performance.

Practical example 1

Alex agrees to sell his bicycle (named make and model) to Becky and to deliver it on Friday. However, the day after the agreement was made the government passed emergency legislation which required the compulsory requisition of all bicycles in private ownership and so prevented Alex from performing the contract.

8. Contractual impossibility and risk

Frustration and common mistake

Should Alex be liable for his failure to perform, assuming that the contract is silent as to this risk? What happens if Becky has already paid the price for the bicycle or paid a deposit?

This type of impossibility occurs *after* the contract was made (subsequent impossibility) but it is also possible to envisage the impossibility existing from the outset, albeit in quite limited circumstances.

Practical example 2

Alex agrees to sell his bicycle to Becky and to deliver it on Friday. However, unknown to Alex and Becky at the time when they make this contract, Alex no longer has such a bicycle since a few hours earlier Alex's mother had inadvertently driven her car over it and destroyed it beyond repair. Both Alex and Becky thought there was such a bicycle in existence, but unknown to both it did not exist at the time they made the contract of sale.

Does Alex need to refund the price or any deposit that Becky has paid?

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- ↳ This type of impossibility exists from the outset and is known as initial impossibility (the subject matter of the contract does not exist).

8.1.1 Risk allocation

The law's initial response to impossibility is to look to what the contract says is to happen in the circumstances that have occurred (an express provision allocating the risk to one of the parties), e.g. there may be a *force majeure* clause placing the risk of events such as strike, riot, flood, or fire on one of the parties. In these circumstances the express provision will govern and any dispute between the parties tends to concern construction issues regarding this provision (interpreting the scope of the words used; see Chapter 6). In *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* (2022) the Court of Appeal (CA) rejected an argument, on the basis that this would interfere with the express risk allocation in the contract, that COVID restrictions which prohibited certain leased premises from being used as cinemas resulted in a failure of the basis of those contracts. In *Iris Helicopter Leasing Ltd v Elitaliana Srl* (2021) the court held that a helicopter lease was not frustrated by the arrest by the Italian authorities of the helicopter as the contract allocated the risk of that event to the lessee (through various provisions including one which made it clear that the lessee was the importer of the helicopter).

Metropolitan Water Board v Dick Kerr & Co. Ltd (1918) (HL)

FACTS: Contractual provision allowed engineer to grant an extension of time in relation to contract to build a reservoir in six years if contractor had been ‘unduly delayed or impeded’ by ‘any difficulties, impediments or obstructions whatsoever and howsoever occasioned’.

HELD: This did not cover a government prohibition on construction of the reservoir as a consequence of the First World War.

William Sindall plc v Cambridgeshire County Council (1994) (CA)

The CA held that the contract allocated the risk of the existence of a sewer on development land to the purchaser. The purchaser could not avoid the contract and recover the purchase price by relying on mistake as to the existence of the sewer.

If the contract says nothing as explicit, then the court may consider that the contract terms and context *impliedly* places the risk of the existence of the subject matter on the seller. In such circumstances the non-existence of the ‘promised’ subject matter may constitute a breach. This is what happened in *McRae v Commonwealth Disposals Commission* (1951): the sale of the wreck of an oil tanker was stated to be at a specified location. The seller impliedly promised that the wreck was located there. Its absence was a breach of contract, entitling the purchaser to obtain damages.

^{p.169} **8.1.2 Default legal doctrines where there is no allocation of the risk**

It is only where there is no express or implied allocation of the risk of the relevant event in the contract that the default legal doctrines—frustration (subsequent impossibility) and common mistake (initial impossibility)—may come into play in instances of impossibility of performance.

Think like an examiner

So, how do examiners approach this area of law? Essay-style questions are popular, not least because the academic interest in these topics far outweighs their significance for the practising lawyer (see ‘Key debates’).

Some tutors and examiners adopt a less contextual approach to the law of mistake than appears in this book and amalgamate problem questions on the law of mistake. This involves the distinction between those mistakes which prevent agreement being reached (mutual mistake (cross-purposes) and unilateral mistake, see Table 2.1) and instances of fundamental common mistake (see Table 8.1) where, although an agreement has clearly been reached (as in the Alex and Becky contract to sell the destroyed bicycle: Practical example 2), both parties enter that contract based on the same fundamentally mistaken assumption, i.e. that the bicycle is in existence so that its ownership can be transferred.

Table 8.1 Nature of common mistake

Mistake which nullifies the agreement reached.	Both parties are mistaken. In <i>National Private Air Transport Co. v Kaki</i> (2017) the judge stressed that a party could not claim common mistake if there were no reasonable grounds for their mistaken belief.	Each party makes the same mistake, e.g. both believe subject matter of the contract exists when it does not— <i>Couturier v Hastie</i> .
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It is possible to construct a problem question based only on establishing whether there is a sufficiently fundamental common mistake, usually including a mistake as to quality (discussed in ‘8.2.3 Mistakes as to quality’). It can be difficult to spot the issue as being one which concerns a quality. You need to look out for references to particular types of goods in the question, e.g. types of teas, types of pottery, paintings by famous artists (see ‘Don’t fall into the trap’ in 8.2.3). Use the case law facts as your guide. By comparison, problem questions based on subsequent impossibility, identifying the fact that the frustration doctrine can operate on the facts and assessing the consequences for the parties, are relatively common in examination papers.

8.2 Initial impossibility and the excuse of common mistake

Assuming that there is no express or implied provision allocating the risk of the event in question to one party, if a contract was entered into under a fundamental common mistake, then the contract may be void at common law for mistake (of no effect from the very beginning). If a contract is void, then the parties are clearly excused from all performance.

- p. 170 ↵ This occurs where the event renders performance in accordance with the contract terms an **impossibility**, e.g. unknown to the parties the subject matter of the contract does not exist (*res extincta*), or both parties believe the property that the seller purports to sell belongs to the seller when in fact it already belongs to the buyer (*res sua*—the thing was already his: *Cooper v Phibbs*). In both instances there can be no transfer of title/ownership of the goods or property so that the basic premise of the contract is impossible.

8.2.1 *Res extincta*: Mistake as to the existence of the subject matter

Couturier v Hastie (1856) (HL)

FACTS: Seller sold corn, which was believed to be in transit on board a ship, to the buyer. Unknown to both, the cargo had already been sold because it had begun to ferment on route. Thus, in effect, the subject matter had ceased to exist before the time of the contract.

HELD: Since the contract was for the sale of existing goods, the contract was void and the buyer was not liable to pay for the corn. (This proposition can now be seen in s. 6 Sale of Goods Act (SGA) 1979: where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.)

Compare this with *McRae v Commonwealth Disposals Commission* (see '8.1.1 Risk allocation'), where the seller was impliedly taken to accept the risk of the non-existence of the tanker.

Another useful example to mention in your answers is *Griffith v Brymer*.

Griffith v Brymer (1903)

FACTS: When a contract was made at 11 a.m. on 24 June 1902 to hire a room to view the coronation procession of Edward VII (the subject matter of the contract), neither party was aware that at 10 a.m. on 24 June the decision had been taken to cancel the procession due to the King's surgery.

HELD: This went to the root of the hire contract, which was therefore void. The plaintiff could therefore recover the £100 hire charge he had paid. Compare this decision with *Krell v Henry* (see 'The final possibility' in 8.3.1).

Returning to Practical example 2 concerning initial impossibility, this is a common mistake (both parties make the same mistake) as to the existence of the subject matter at the date of the contract. It is similar to *Couturier v Hastie* and s. 6 SGA 1979 would apply.

Practical example 2

Alex agrees to sell his bicycle to Becky and to deliver it on Friday. However, unknown to Alex and Becky at the time when they make this contract, Alex no longer has such a bicycle since a few hours earlier Alex's mother had inadvertently driven her car over it and destroyed it beyond repair. Both Alex and Becky thought there was such a bicycle in existence, but unknown to both it did not exist at the time they made the contract of sale.

Does Alex need to refund the price or deposit that Becky has paid?

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- ↳ The contract is void and it follows that the price or deposit must be refunded.

8.2.2 **Res sua: Mistake as to ownership of the subject matter of the contract**

Cooper v Phibbs (1867) (HL)

FACTS: A fishery belonged to a nephew but he thought it was owned by his uncle so that, on his uncle's death, he entered into an agreement to rent the fishery from his uncle's daughters.

HELD: The nephew was entitled to have the contract set aside. (Although this suggests that the agreement was voidable so that the court needed to intervene with an appropriate order, the agreement would clearly be void as this is true impossibility.)

8.2.3 **Mistakes as to quality**

It may be contended that a mistake as to some important quality (mistake as to quality) which both parties mistakenly believe the goods possess *should* render the contract void because if the real state of affairs was known the parties would probably not have contracted, e.g. both believe that a picture was painted by a famous artist such as Constable although neither party makes express reference to their belief.

Don't fall into the trap

Do not fall into the trap of confusing s. 14(2) SGA 1979 (and the equivalent provision in consumer sale and supply contracts, s. 9(1) Consumer Rights Act (CRA) 2015) ‘satisfactory quality’ with the position where the goods or subject matter do not possess *a particular quality* which both parties thought the goods possessed.

Although there is some overlap, ‘satisfactory quality’ refers to a minimum quality level in a broad sense, whereas mistakes as to quality refer to a characteristic of the goods—e.g. a particular type of pottery, a particular quality or type of tea, whether a service agreement could be terminated only by paying compensation to the director, the relative positions of vessels.

Summary: Other possible remedies if the goods do not possess a particular quality that had been anticipated

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- Was the particular quality a term of the contract, for example was it part of the contractual description in a sale of goods by description (s. 13 SGA 1979 (B2B) or s. 11 CRA 2015 (B2C)) (i.e. there was a promise that the goods possessed this quality)? In the context of consumer contracts covered by the CRA 2015, s. 11(4) provides that any information supplied by the trader relating to the ‘main characteristics of the goods’ falling within the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134)** will constitute ‘a term’ (or promise). In these circumstances, there will be a remedy for breach of contract.
 - Did the vendor state that the goods possessed a particular quality and did this have the effect of inducing the contract? If so, there may be a remedy in misrepresentation—rescission and/or damages for misrepresentation (see Chapter 9) or, in the context of consumer contracts and at the time of writing, remedies under the **Consumer Protection from Unfair Trading Regulations (CPUTRs) 2008** as amended (discussed in Chapter 9).
 - If no statement of fact was made, then the last-resort remedy of mistake may be attempted.

However, an argument based on common mistake as to quality is most unlikely to succeed. Unless the quality is made a term (promise) of the contract, the absence of this quality will generally not make the contract **impossible to perform in accordance with its terms** (*Bell v Lever Bros Ltd* (1932) and *Great Peace Shipping Ltd v Tsavlis Salvage International Ltd* (2002)). If there is such a promise relating to the quality, there will be an action for breach of contract. Link this back to *Smith v Hughes* (1871), Chapter 2, and the principle of ‘*caveat emptor*’ (let the buyer beware): it was a contract for ‘oats’ in the absence of any statement that the oats being sold were ‘new’ or ‘old’ or a statement from the buyer that he wanted only ‘old’ oats.

Leaf v International Galleries (1950) (CA)

FACTS: Both the gallery selling a painting and the purchaser of the painting believed the painting was by Constable.

HELD (obiter): In the absence of any assumption of risk, e.g. a promise by the gallery, the contract remained valid despite the parties' mistake. The parties were agreed in the same terms on the same subject matter (painting).

Don't fall into the trap

Do not fall into the trap of thinking that what matters is whether the parties would have contracted had they known the truth. They usually would not, but this is not the applicable legal principle (see *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* (2018)). Equally, in English and Welsh law the value associated with the mistake is not determinative, e.g. the fact that a picture is bought and sold at a high price does not mean that any common mistake that it was painted by a famous artist must be fundamental and will render the contract void.

p. 173 ↵ There are two key cases concerning common mistake as to quality.

1. *Bell v Lever Bros Ltd (1932) (HL)*

FACTS: £30,000 compensation was paid to an employee to terminate his service contract with the company. This was a common mistake as to quality since both parties thought that the service contract could only be terminated with compensation, when in fact no compensation was required.

HELD (3:2): The compensation agreement was not void for such a mistake as to quality.

Nevertheless there are *dicta* in *Bell v Lever Bros* suggesting that a contract may be void if the mistake as to quality is sufficiently fundamental, Lord Atkin commented that:

a mistake as to quality will affect assent if it is as to the existence of some quality which makes the thing without the quality *essentially different* from the thing as it was believed to be.

However, Lord Atkin then gave some examples of situations where the mistake as to quality would not be sufficiently fundamental, i.e. where the parties are taken to agree in the same terms on the same subject matter so that there is no ‘essential difference’. These examples are so restrictive that it is difficult to envisage situations where the mistakes will be sufficiently fundamental to render the contract void. For example, A buys a picture from B; both A and B believe it to be the work of an old master and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty (contractual promise).

2. *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (2002) (CA)*

The CA accepted that the test of whether the contract performance would be ‘essentially different from the performance that the parties contemplated’ amounted to whether performance in accordance with the contractual terms or adventure is impossible due to the common mistake. Only if it is impossible will the contract be void. ‘Essential difference’ was, therefore, equated to the fairly strict test of impossibility of performance—on the difficulties of terminology in this area see *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* (2018) and *Chalcot Training Ltd v Ralph* (2020) (impossibility does not necessarily mean physically impossible (there was a different focus in *Chalcot* (2021) on appeal)).

FACTS: A ship suffered structural damage at sea. The Ds (salvage service) sought the closest vessel which both the Ds and the Ps (owners of *The Great Peace*) thought was *The Great Peace* at about 35 miles distance. The Ds therefore hired this ship on the basis of terms which required them to pay a charge if the contract was cancelled. In fact, the vessels were 410 miles apart. The Ds cancelled the contract once they had found an alternative vessel (although they did not cancel straight away) but refused to pay the cancellation charge pleading the mistake.

HELD: The test was narrow and this mistake was not fundamental enough since performance was not impossible. *The Great Peace* would have arrived in time to provide several days of stand-by service and the contract had not been cancelled until an alternative vessel had been arranged.

It follows that impossibility will rest on the facts and context of each individual case. For example, it may not have been possible for *The Great Peace* to have provided any part of the contracted for salvage services had it been 4,000 miles away from the damaged ship. If cancelled on discovery, such a contract might be void for fundamental common mistake as to quality. In other words, there would then be a total failure of consideration.

The CA also refused to follow its own previous decision in *Solle v Butcher* (1950) and held that there was no (wider) equitable jurisdiction to set aside the contract on terms for mistake as to quality. The advantage of this remedy was that it offered great flexibility and discretion to the courts to do justice

on the facts (see ‘Key debates’). Interestingly there is *dicta* in the recent Supreme Court decision in *Test Claimants in the FII Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners)* (2020) which suggests that the existence of an equitable jurisdiction in this area has not been finally resolved.

p. 174 **Compromise agreements**

In the context of agreements to compromise claims which were alleged to have been entered into under common mistakes as to law or fact, subsequent courts have sometimes considered that since the compromise agreements remained capable of performance despite the mistakes they would not be void: *Brennan v Bolt Burdon* (2004) and *Kyle Bay (t/a Astons Nightclub) v Underwriters Subscribing Under Policy Number 019057/08/01* (2007) (mistake as to insurance cover held had led to a compromise agreement on reduced terms but the compromise was capable of being performed). (Consider why this conclusion has practical significance for compromise agreements and their sanctity; see also *Elston v King* (2020) on the distinction between mistakes of law (which might vitiate a contract) and mispredictions of law (which will not vitiate a contract).) By contrast, in *British Red Cross v Werry* (2017) a settlement agreement in respect of a claim under the *Inheritance (Provision for Family and Dependents) Act 1975* was held to be void when it was subsequently discovered that the deceased had, in fact, left a will and the partner of the deceased had been left the property in question.

8.3 Subsequent impossibility: Frustration doctrine and discharge of the contract

A contract may be automatically discharged (so that the parties are excused further performance of their contractual obligations (performance due before the frustrating event *prima facie* remains binding)) if, during the currency of the contract, and **without the fault of either party, some event occurs which renders further performance:**

- impossible;
- illegal;
- radically different so that the purpose of both parties is no longer possible and the contract becomes essentially different (see also *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* (2019) where it was accepted that Brexit might frustrate particular contracts although it did not do so on the facts of this case).

In a problem question you first need to identify the issue as involving subsequent impossibility and ensure that the contract does not contain an express or implied allocation of this risk, e.g. *force majeure* clause. (Bear in mind that this is unlikely as the examination question would then be about breach—and simple breach at that.)

Let us look again at Practical example 1 concerning the bicycle

Alex agrees to sell his bicycle (named make and model) to Becky and to deliver it on Friday. However, the day after the agreement was made the government passed emergency legislation which required the compulsory requisition of all bicycles in private ownership, and so prevented Alex from performing the contract.

Should Alex be liable for his failure to perform, assuming that the contract is silent as to this risk? What happens if Becky has already paid the price for the bicycle or paid a deposit?

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- ↳ **Note:** This contract became illegal *after* it was made. It was not illegal at inception.

Having noted that there is no risk allocation provision (or *force majeure* clause), there are two questions to address:

1. **Is this a frustrating event so that the frustration doctrine will apply?** It will be necessary to rule out 'fault' on the part of any contracting party since the frustration doctrine applies only where the event is 'external' and occurs without the fault of either party.
2. **What effect does the frustrating event have on the contract and the parties' obligations under it? How does the law allocate the risk of the event?**

Issue 1 is usually relatively straightforward (as in the bicycle example) since the examiner is often keen to test how well you understand the effects and the application of the legislation, the LR(FC)A 1943.

8.3.1 Is this a frustrating event so that the frustration doctrine will apply?

The first possibility: Is further performance impossible?

- (i) Has the subject matter of the contract been destroyed by an external occurrence or is it otherwise unavailable for the duration of the contract? *Taylor v Caldwell* (1863): hire of music hall for concerts but, before the concert dates, the hall was destroyed by fire. Another example would be the sinking, or requisitioning, of a hired (chartered) ship for the remainder of the contract term.

Practical example

If in Practical example 2 Alex's mum had reversed over his bicycle **after he had made the contract** with Becky, the contract might be frustrated by the destruction of its subject matter. Since she had reversed over it **before the contract was made**, it is initial impossibility based on the absence of subject matter.

- (ii) If there is an agreed means of performing the contract and this becomes unavailable, the contract may be frustrated, e.g. *Nickoll & Knight v Ashton, Edridge & Co.* (1901): shipment to be made on a specified ship which was stranded at sea. (Compare the position where there is no agreed means of performance, only an expectation, e.g. that shipment will be made via the Suez Canal as this was the quickest route: *Tsakiroglou & Co. Ltd v Noble Thirl GmbH* (1962)—contract not frustrated when the Suez Canal was closed.)
 - (iii) Is this a personal contract (requiring personal performance only by a named individual) where, ahead of the performance, the performer dies or has a permanent illness preventing performance on the date in question? *Robinson v Davison* (1871): contract to play the piano at a concert on a particular day. The pianist was unable to play due to illness and this was successfully pleaded as a defence to a claim of breach of contract.
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- (iv) What if the subject matter, agreed means of performance, or performer (in a personal contract) is **only temporarily unavailable**? This may amount to impossibility if the interruption is of such a nature and likely duration as to undermine further performance when assessed in relation to the contract as a whole and render the contract ‘radically different’, e.g. *Morgan v Manser* (1948): contract to manage comedian from 1938 for ten years was frustrated from the time when the comedian was called up for the army in 1940. He was not demobilized until 1946.

Jackson v Union Marine Insurance Co. Ltd (1874)

FACTS: Ship sailed from Liverpool to Newport on 2 January. It was to ‘proceed with all possible dispatch’ and load a cargo of iron rails in Newport for transport to San Francisco. However, it ran aground en route to Newport on 3 January and was not repaired until the end of August. The charterers had purported to terminate the charter on 15 February.

HELD: The charter contract was frustrated. The resumed voyage would have been a very different voyage to the spring voyage contemplated by the charterers.

Compare with *Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage and Towage) Ltd, The Sea Angel* (2007): purpose already largely performed when vessel unlawfully detained (no frustration).

Rix LJ in *The Sea Angel* at [111]:

In my judgment, the application of the doctrine of frustration requires a multifactorial approach. 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.

Returning to practical example 1

The day after the agreement was made the government passed emergency legislation which required the compulsory requisition of all bicycles in private ownership, and so prevented Alex from performing the contract. The terms of the contract require Alex to deliver the bicycle on Friday but he no longer has the bicycle and the circumstances may indicate that the requisition will continue beyond Friday. The requisition may initially be temporary but in relation to the contract terms it can be argued to be equivalent to the permanent unavailability of the subject matter through no fault of either party.

p.177 **The second possibility: Is further performance illegal?**

If, during the currency of the contract, a change in the law renders further performance illegal, the contract will be frustrated for subsequent impossibility: *Denny, Mott & Dickson v James B Fraser & Co. Ltd* (1944): the Control of Timber Order 1939 frustrated a trading agreement involving timber.

A contract may also be frustrated by *temporary* illegality, although compare *National Carriers Ltd v Panalpina (Northern) Ltd* (1981): a lease of a warehouse for ten years from 1974 was not frustrated when the local authority closed the street (so there was no vehicular access) for 20 months from 1979. The interruption was only 20 months out of ten years and there were still three years to run after the interruption ceased (see also *Dayah v Partners of Bushloe Street Surgery* (2020) where an agreement between three GP partnerships to contribute to the running costs of the relevant surgeries was not frustrated by some of the partners being subsequently barred from practice, not least as the relevant agreements envisaged that some of the partners might cease to be able to practice at the surgeries). On the other hand, in *Metropolitan Water Board v Dick, Kerr & Co.* (1918) a contract was made in 1914 to construct a reservoir in six years. In 1916 the Minister of

Munitions ordered the contractor to stop. The HL held that this interruption was of such a character and likely duration as to frustrate the contract for supervening illegality. The resumed contract would be very different in nature.

The final possibility: Has the common purpose of both parties been frustrated by the subsequent event?

In some circumstances frustration may occur where further performance, though technically possible, would become something radically different from that originally envisaged by *both* parties, i.e. the event has destroyed the purpose of the contract for both parties (compare also *Flying Music Co. Ltd v Theater Entertainment SA* (2017) where a contract for theatre performances was not frustrated by civil unrest in Greece as the civil unrest was present at the time the contract was signed and had not got worse).

Krell v Henry (1903) (CA)

FACTS: The case involved a contract to hire rooms to view the coronation procession of Edward VII. The coronation was subsequently cancelled due to the King's illness and surgery.

HELD: The contract of hire was frustrated since the CA considered the viewing of the procession was the 'foundation of the contract' for *both* parties.

It is not enough that the purpose of only *one* party is destroyed. Vaughan Williams LJ gave an example to explain this:

Suppose a person hires a cab to go to Epsom on Derby Day and Derby Day is cancelled. The contract is not frustrated since seeing the races is not the foundation of the contract for *both* parties. It is only the hirer's purpose. The cab driver's purpose is to drive to Epsom and back.

p. 178 ↵ (But if, for example, a person buys a coach ticket for an excursion to Epsom 'to see the races on Derby Day' the common basis of both may be to see the races. Therefore, if the races are cancelled, the contract may be frustrated.)

Compare *Krell v Henry* with *Griffith v Brymer* (1903), see '8.2.1 Res extincta' (decided on the basis of common mistake because, unknown to the parties, the procession had already been cancelled at the time the contract was entered into). *Krell v Henry* was more recently considered in *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* (2019), with Marcus Smith J noting:

What the parties were buying and selling [in *Krell*] 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 ... I have held that it is possible—notwithstanding the true construction of a contract—for that contract nevertheless to be discharged if the common purpose of the bargain (which I have found to be something beyond the true construction of the contract) is frustrated. In this case, I find no common purpose beyond the purpose to be derived from a construction of the lease. This is not a case like *Krell v Henry* where the parties had a common purpose going beyond their agreement, which was thwarted. (At [37], [244].)

Krell v Henry can also be contrasted with the CA decision in *Herne Bay Steam Boat Co. v Hutton* (1903) where there were two purposes to the contract—one of which was still possible.

Herne Bay Steam Boat Co. v Hutton (1903) (CA)

FACTS: The Ds had chartered a steamboat from the Ps to take out a party:

- to view the naval review; and
- for a day's cruise around the fleet.

The naval review was cancelled because of the King's illness but the fleet remained.

HELD: The contract was not frustrated since the review was not regarded as the foundation of the contract and the cruise around the fleet was still possible.

Limitations on frustration

A contract is not frustrated by an event which leaves it possible to perform but makes it more burdensome to one party.

Davis Contractors Ltd v Fareham UDC (1956) (HL)

FACTS: The Ps agreed to build council houses for D council in eight months. The work took 22 months and the Ps argued that the contract was frustrated by the long delay, which was due to a severe manpower and materials shortage.

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Frustration and common mistake

HELD: The contract had not been frustrated. Lord Radcliffe: ‘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 [radically] different thing from that contracted for.’

Tsakiroglou & Co. Ltd v Noble Thirl GmbH (1962) (HL)

Contract was not frustrated by the closure of the Suez Canal as the seller could perform by shipping the goods via the Cape of Good Hope, although that would be more expensive and would take longer.

p. 179 **Was the frustrating event foreseen by the parties—or by one of the parties—and not provided for?**

If one party foresaw or should have foreseen the ‘frustrating event’, it will be difficult for them to argue that the doctrine of frustration applies with the result that such a party may be liable for breach of contract.

Walton Harvey Ltd v Walker & Homfrays Ltd (1931): the Ds were aware of the possibility of compulsory purchase of the premises on which the sign had been erected under the terms of the agreement with the Ps. The Ps had no such knowledge. The Ds could have expressly provided against this risk but they did not.

What if the parties should have foreseen the event but made no express provision to deal with it? Is this a risk allocation or does the doctrine of frustration apply?

There have been two positions:

- (i) There is HL authority supporting the conclusion that the contract would not be frustrated in these circumstances. In *Davis Contractors* the shortage of labour and materials was foreseeable but, since there was no express contractual provision to provide for it, the contractors had taken this risk on themselves and the contract was not frustrated. Equally, in *Amalgamated Investment & Property Co. Ltd v John Walker & Sons Ltd* (1977), the contract to purchase commercial property was not frustrated by the decision to list the property, since there was a risk that the building might be listed and this was a risk that the purchaser had to bear.
- (ii) However, there are *dicta* in *Tatem Ltd v Gamboa* (1939), and comments by Lord Denning in *The Eugenia* (1964), suggesting that the frustration doctrine might still apply where an event was foreseen but not provided for (although on the facts in *The Eugenia* it did not).

In *Edwinton Commercial Corp. v Tsavliris Russ (Worldwide Salvage and Towage) Ltd, The Sea Angel* (2007), the risk of government detention of a salvage vessel given environmental concerns was foreseeable but Rix LJ considered that foreseeability did not necessarily rule out the application of the frustration doctrine. He noted

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 other factors in the case, may lead on to frustration’. See also *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* (2019).

Practical example 1

The government passing emergency legislation to compulsorily requisition all bicycles in private ownership is probably unforeseeable, so this issue need not unduly detain our application.

p. 180 Was the event attributable to the fault of one of the parties—or was it the result of a choice made by one of the parties?

The frustration doctrine only applies where the frustrating event comes about without the fault of either party. Therefore, if it was brought about by the fault of one of the parties, that party may be in breach and the frustration doctrine will not apply. (This is commonly known as ‘self-induced frustration’ but it may actually be a breach.) For example, in *The Eugenia*, in breach of contract, the vessel had gone into the Suez Canal without the owner’s consent and had become trapped when the canal had been closed. Charterers claimed the contract had been frustrated but the CA held that this was their own fault:

- (i) Self-induced frustration can occur if a party deliberately elects to pursue a course of conduct rendering performance impossible, such as making a choice over which vessels were to receive licences for nets and claiming that the charter of trawlers from the Ps had been frustrated by the absence of the necessary licences (*Maritime National Fish Ltd v Ocean Trawlers Ltd* (1935)). It followed that the Ds were not excused the payment of hire for these trawlers.
- (ii) More surprisingly (so that this has become an examiners’ favourite), the mere existence of a choice may be sufficient to establish self-induced frustration.

J Lauritzen AS v Wijsmuller BV, The Super Servant Two (1990) (CA)

FACTS: The contract permitted performance by either of two vessels, the *Super Servant One* (SS1) and the *Super Servant Two* (SS2). The Ds allocated the work to SS2 and employed SS1 on other contracts. When the SS2 sank the Ds claimed that this frustrated the contract.

HELD: Since it was Ds’ decision not to use the alternative vessel, the sinking of SS2 could not automatically bring the contract to an end.

8.3.2 What effect does the frustrating event have on the contract and the parties' obligations under it? How does the law allocate the risk of the event?

The effect of frustration is to automatically discharge the contract as to the future (i.e. each party is excused from future obligations (whereas any contractual obligations which became due before the frustrating event *prima facie* remain binding)).

Looking for extra marks?

- (i) This is a principle of common law (and has nothing to do with the LR(FC)A 1943).
- (ii) Frustration does not render the contract void—rather it discharges future obligations (like termination for repudiatory breach). It is a grave error to state otherwise in an examination or coursework as the examiner will assume that you are confused on a fundamental issue.
- (iii) However, the discharge of a contract for frustration happens *automatically* on frustration (although a court will later confirm this), whereas termination (discharge of future obligations) for repudiatory breach is dependent on the election of the innocent party (see Chapter 5).

p. 181 **What about the position of obligations which had arisen prior to frustration, expenses incurred, and any performance conferred?**

At common law (prior to the LR(FC)A 1943 and the common law remains applicable where the Act has no application):

- Obligations arising before the frustrating event remained binding and the loss was said to lie where it fell. It followed that advance payments paid or due to be paid before the frustration could not be recovered or remained payable (*Chandler v Webster* (1904)), unless there had been a total failure of consideration, i.e. the payer had received no part of the contracted for performance (*Fibrosa SA v Fairbairn Lawson Combe Barbour Ltd* (1943)). However, in cases of total failure of consideration, where the advance payment has to be returned by the payee, there was no provision to attempt to recompense the payee who had incurred expenses in preparing to perform the contract.
- If payment under a contract was to be made on the completion of the work and frustration occurred before the work was completed, then no payment (or any part of it) could be recovered at common law.

Appleby v Myers (1867)

FACTS: The Ps had contracted to install and maintain all machinery in the D's factory, payment to be made upon completion. Before the task of installation had been completed, the factory and machinery were destroyed by fire and the contract was frustrated.

HELD: The future payment obligation was discharged by frustration and the Ps could recover no part of it.

8.3.3 The modification of the common law rules by the Law Reform (Frustrated Contracts) Act 1943

1. Recovery of advance payments

Section 1(2): recovering money paid in advance of the frustrating event:

Payer's rule: money paid before the frustrating event is recoverable and money payable before the frustrating event ceases to be payable (irrespective of whether there has been a total failure of consideration).

Payee's rule: however, if the party to whom the sums were paid or payable incurred **expenses before discharge in performance of the contract**, the court *may* award him such expenses up to the limit of the money paid or payable before the frustrating event.

Practical example

- (i) Henry, the purchaser, pays £500 in advance. Isabel, the seller, incurs £350 in expenses for the purpose of performing the contract before the frustration occurs. Henry is *prima facie* entitled to the return of his £500, but *the court may* allow Isabel to retain *up to* £350 as expenses.
- (ii) If Henry has paid £500 in advance and Isabel incurs £800 as expenses, the maximum Isabel can recover as expenses is £500 (the amount paid in advance).

Thus the *maximum* amount of recovery under s. 1(2) is the amount of the advance payment. The court possesses a *discretion* to award an amount below this advance payment figure.

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- ↳ Section 1(2) does not provide that the performing party (Isabel in the example) will be entitled to retain all of her expenses from the advance payment amount.

Gamerco SA v ICM/Fair Warning (Agency) Ltd (1995)

FACTS: A concert by the group ‘Guns N’ Roses’ at a stadium in Madrid had to be cancelled due to safety issues affecting the stadium. The Ps were promoting the concert and had already paid \$412,000 on account and were under an obligation to pay, but had not yet paid, a further \$362,500. The Ps had also incurred expenses of \$450,000 prior to the cancellation and the Ds had expenses of \$50,000.

HELD: On the basis that the contract was frustrated, the Ps were able to recover the advance payment of \$412,000 and did not need to make the further payment of \$362,500 already due. Although the court had a ‘broad discretion’ to allow the Ds to set off their expenses under the proviso to s. 1(2), having particular regard to the expenses incurred by the Ps which would be lost, no deduction for the Ds’ expenses was made under the proviso.

Practical example

On 1 July Sarah engages Tyler, a painter and decorator, to paint the outside of her house for £900, payable on completion. The painting work is to commence on 16 July and it is estimated that it will take five days. It is agreed that Sarah will pay Tyler an advance payment of £200 on or before 10 July to cover the costs of hiring scaffolding and purchasing the masonry paint. Sarah paid the £200 on 9 July. Tyler started work on 16 July but on 18 July (to take a simple example) the government passes legislation rendering domestic house painting illegal. This frustrates the contract.

What is the position with regard to payment of the price? Can Sarah recover the £200 advance payment? Can Tyler claim to retain all of the £200 and recover for other expenses he has incurred since starting work (an additional £75)?

- (i) The obligation to pay the balance of the price (£700) has been automatically discharged by the frustration (common law rule).
- (ii) In accordance with s. 1(2) LR(FC)A 1943, Sarah can *prima facie* recover the amount of the advance payment (£200), unless the court in its discretion allows Tyler to keep up to £200 (amount of the advance payment) to cover his expenses. Let us suppose that Tyler is able to establish that he has expenses of this amount (or more) and the court exercises its discretion to allow him to retain it all.
- (iii) Tyler cannot claim to recover any more than the amount of the advance payment under s. 1(2).

Revision tip

- (i) **Section 1(2)** is popular with examiners (probably because s. 1(3) is more complex in its application and only likely to apply in limited circumstances). You should express the application of s. 1(2) as meaning that *prima facie* the advance payment is recoverable by its payer but that the court '*acting in its discretion*' may allow the payee to retain up to £X (whatever figure may be given as the expenses—or the lower figure of the advance payment) to cover the payee's expenses. This may involve some simple maths but you should not panic. As in the previous example, the figures will be straightforward and the examiner is looking primarily for the correct principles—correctly expressed.
- (ii) If there is no advance payment, then expenses cannot be recovered under s. 1(2).

p. 183 **2. Recovery for performance prior to frustration**

Key points

A performing party can recover for his pre-frustration performance but:

- (i) **only where this performance confers a valuable benefit on the party receiving performance;**
- (ii) recovery is subject to the court's discretion.

Section 1(3) limitation: There must be a tangible benefit to the recipient which remains after the frustration

There was no s. 1(3) claim in *Gamerco v ICM* in respect of the Ps' expenditure incurred in preparing the stadium because the expenditure had not resulted in any benefit to the Ds at the time of discharge for frustration.

Practical example

In the painting example Tyler may argue that his painting work has left him out of pocket, over and above the £200 expenses he has recovered. Can he recover for this work? He can seek to argue that he has conferred a valuable benefit (partially painted house) on Sarah prior to the frustration. How will the court approach such a claim?

If a party has conferred a valuable benefit before the frustration, the court may award him a just sum to recompense him for the benefit he has conferred. This cannot be greater than the value of that benefit to the party receiving it.

In deciding on the just sum, the court must consider all the circumstances of the case and in particular:

- (i) whether the benefited party (Sarah in the painting example), has incurred expenses in the performance of the contract before the time of discharge (including the fact that Sarah made an advance payment to Tyler of £200 which Tyler was allowed to retain under s. 1(2)—Tyler cannot recover the same figure twice);
- (ii) the effect of the frustrating event on the benefit received.

BP Exploration Co. (Libya) Ltd v Hunt (No. 2) (1979)

The P oil company had agreed to explore for oil and develop the D's oil concession in Libya on the basis of being entitled to share in oil revenues if oil was discovered. The P spent considerable sums drilling for oil before finding oil in commercial quantities. However, the Libyan government then expropriated the concession.

The P sought a 'just sum' under s. 1(3) LR(FC)A 1943 in respect of the benefit obtained by the D as a result of the P's performance of the contract prior to frustration.

p. 184 Section 1(3): Performance conferring a valuable benefit

Robert Goff J considered that the purpose underpinning the LR(FC)A 1943 was the prevention of unjust enrichment, i.e. one party unfairly acquiring a benefit which he would not otherwise have to pay for. Accordingly, he identified the following as the steps to determine a 'just sum' to award:

- Identify the valuable benefit that the D has received.

The benefit, he said, was the end product of the services and not the services themselves.

On the facts in *BP v Hunt*, the benefit was not the services of exploration but the end product (i.e. the increased value of the concession due to the discovery of oil, valued (given what had happened) by the oil received through the P's performance before the frustrating event).

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In the painting example, the valuable benefit would be the partially painted house received by Sarah rather than the reasonable cost of Tyler's work in painting.

- Value the benefit to the party receiving it.

Such value forms the upper limit of any award.

The court would therefore need to determine how much the partially painted house was worth to Sarah, particularly given the fact that it cannot be finished due to the prohibition on such painting. Let us say that the court values this benefit to Sarah as being worth £500.

According to the judge, at this stage the court would need to take account of the expenses already recovered by Tyler under s. 1(2) from the advance payment (or the fact that Sarah has already paid £200 towards the painting). (It is arguable that s. 1(3) states that this is a factor to take into account at the next stage. The positioning is important since the figure produced at the stage of valuing the benefit forms the upper limit of any award of a just sum.) This leaves a figure of £300 (£500 – £200) as the value of the benefit and the upper limit of any award made.

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- Then the court may award such sum, not greater than the value of such benefit to the D, as the court considers just, having regard to all the circumstances of the case, i.e. the just sum.

As a basic measure, the claimant should get the reasonable value of his or her performance (as long as this is not more than the value of the benefit to the D). In any event, the court probably will not award more than the contract price.

Let us suppose that the court considers that the reasonable value of Tyler's painting work is £600 at the time when the frustration intervenes. The just sum awarded to Tyler could not be more than £300 since Sarah should not have to pay any more than the value of the painted house to her (and we have concluded that was £300, after taking account of the money already paid for expenses).

Consequences of the approach adopted by Robert Goff J

Goff J considered that the Act was concerned with preventing unjust enrichment which meant allowing recovery of no more than the value of any benefit received from performance. He defined 'benefit' as the end product of services. It follows that, on this view, if there is no valuable benefit because the effect of the frustration is to destroy it, then there can be no s. 1(3) award of a 'just sum'.

Practical example

What if, on the facts of the painting contract, the frustration was not illegality but the destruction of Sarah's house due to a freak forest fire?

Sarah is left with no valuable benefit if the benefit is the end product of the services (painted house) and not the services themselves. Tyler could not recover any 'just sum' under s. 1(3) and would be seriously out of pocket. His recovery would be limited to the recovery of expenses under the s. 1(2) proviso. He is fortunate therefore that there was an advance payment since no expenses could be recovered had there been no such pre-payment.

You should now be able to advise on the parties' positions in the simple bicycle example at the beginning of this chapter: Practical example 1.

Should Alex be liable for his failure to perform, assuming that the contract is silent as to this risk? What happens if Becky has already paid the price for the bicycle or paid a deposit?

At common law the frustration will discharge both parties' future obligations and that includes Alex's obligation to deliver the bicycle. Becky's advance payment (full price or deposit) is *prima facie* to be returned to her (s. 1(2) LR(FC)A 1943) unless the court, in its discretion, allows Alex to retain any part of that payment to cover his expenses. On these facts we have no evidence of any expenses.

p. 186 **Key debates**

1. The denial in *The Great Peace* of any equitable jurisdiction to set aside (rescind) a contract for common mistake as to quality

Until 2002 where a contract was entered into as a result of a common mistake which was not sufficiently fundamental at common law to render the contract void (i.e. mistakes as to quality), that contract might still be treated as voidable in equity and be set aside on terms. This possibility was recognized by the CA (the judgment of Denning LJ) in *Solle v Butcher* (1950) and allowed for great flexibility of remedy in such cases. However, in order to be voidable in equity the mistake needed to be 'fundamental' and it proved to be particularly difficult to justify the position that a mistake was not sufficiently fundamental at common law to render the contract void but could be sufficiently fundamental to set it aside in equity (Evans LJ in *William Sindall plc v Cambridgeshire County Council* (1994)).

A key debate is whether *The Great Peace* denial of such an equitable jurisdiction can be justified on a historical analysis and it is clearly unhelpful in terms of the flexibility of remedy:

- Chandler, Devenney, and Poole, 'Common Mistake: Theoretical Justification and Remedial Inflexibility' [2004] JBL 34, the New Zealand **Contractual Mistakes Act 1977** and now the New Zealand **Contract and Commercial Law Act 2017**.

2. The legal treatment of ‘impossibility’

The effects of common mistake and frustration are very different although both operate in a general sense to excuse further performance.

- **Common mistake:** the contract will be void for common mistake (at common law) but in very narrow circumstances, arguably based on there being a total failure of consideration; otherwise it seems that the contract remains valid. Where the contract is void (e.g. *res exticta*), each party hands back anything received under the void contract but there are no means of redressing any other financial consequences (compare the **LR(FC)A 1943**). There is also no possibility of recovering damages in pure mistake cases.

Revision tip

It is important to avoid any inappropriate reference to ‘damages’ in the context of common mistake and frustration.

It may be possible to justify such an ‘all or nothing’ conclusion based on the very limited circumstances in which operative common mistakes can occur and therefore the potentially limited impact on third parties. Equally, it would seem that a common mistake might be discovered quite quickly and before significant performance has occurred (see Tettenborn, ‘Agreements, Common Mistake and the Purpose of Contract’ (2011) 27 JCL 91, arguing that a mistake should not be raised once → performance has begun). The same might not be true of frustration which can occur towards the end of a contract term where payment is due on completion.

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- Frustration (subsequent impossibility) discharges the contract for the future and there is a statutory adjustment of the parties’ positions regarding pre-frustration obligations in accordance with the **LR(FC)A 1943** and Goff J’s interpretation of the Act as aimed at preventing unjust enrichment.

In practice, there can be very fine distinctions of timing and fact which distinguish the application of the doctrines, e.g. **Amalgamated Investment & Property Co. Ltd v John Walker & Sons Ltd** (1977): the operative date was taken to be the date of the listing of the property although the decision to list had, unknown to the parties, been taken before the date of the contract of purchase. Similar facts led to different outcomes based on timing in **Krell v Henry** (1903) (frustration) and **Griffith v Brymer** (1903) (mistake because unknown to both parties the decision to cancel the procession had already been taken).

3. The basis of the LR(FC)A 1943: whether s. 1(2) and (3) in fact operate to prevent unjust enrichment or whether the purpose of the Act should be to apportion losses

Haycroft and Waksman, 'Frustration and Restitution' [1984] JBL 207, and McKendrick, 'Frustration, Restitution and Loss Apportionment' in Burrows (ed.), *Essays on the Law of Restitution* (Clarendon Press, 1991), argue that the aim of the Act should be the apportionment of losses. It is arguable that this may underpin the broad discretion in *Gamerco v ICM* (1995) (at least as far as this was a means to redress losses in the limited context of the s. 1(2) expenses proviso). It may follow that on this interpretation the benefit would not be the end product of the services but the services themselves.

See also the excellent discussion of this question in Morgan, *Great Debates: Contract Law*, 3rd edn (Palgrave Macmillan, 2020), Ch. 5.

p. 188 **Key cases**

Case	Facts	Principle
Couturier v Hastie (HL)	Seller sold corn, believed to be in transit, to the buyer. Unknown to both, the corn had been sold en route as a result of it beginning to ferment. HL held: since the contract was for the sale of existing goods and they did not exist at the time of sale, the contract was void and the buyer was not liable to pay for the corn.	Res extincta: unknown to both parties the subject matter of the contract had ceased to exist by the time they made the contract so the contract may be void for initial impossibility.
Bell v Lever Bros Ltd (HL)	£30,000 compensation was paid to an employee to terminate his service contract with the company. There was a common mistake as to quality since both parties thought that the service contract could only be terminated with compensation, when in fact no compensation was required. HL held that the compensation agreement was not void for such a mistake as to quality.	Mistake as to quality will not generally render the contract void as parties are agreed on the same terms on the same subject matter. Only if the mistake as to quality is fundamental—i.e. renders the subject matter 'essentially different'—will the contract be void, and this is interpreted restrictively.
Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (CA)	Ds (salvage service) sought the closest vessel when a ship was damaged at sea. Both Ds and Ps (owners of <i>The Great Peace</i>) thought it was <i>The Great Peace</i> at about 35 miles distance and the ship was hired. The ships were 410 miles apart (mistake as to quality). CA held that this mistake was not fundamental since performance of obligation to reach destination and 'stand by' was not impossible.	CA accepted that the test of whether the contract performance would be 'essentially different from the performance that the parties contemplated' amounted to whether performance in accordance with the

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Case	Facts	Principle
		contractual terms or adventure is impossible due to the common mistake.
		This is the most important recent case on common mistake and CA discussed the development of the law and denied any equitable jurisdiction to set aside a contract on terms for 'fundamental' common mistake as to quality.
Krell v Henry (CA)	A contract to hire rooms advertised as rooms to view the coronation procession of Edward VII was frustrated when the coronation was subsequently cancelled due to the King's illness and surgery. CA considered the viewing of the procession as the 'foundation of the contract' for <i>both</i> parties.	A contract may be frustrated if the common purpose of <i>both</i> parties has been destroyed by the event. It is not enough that the purpose of only <i>one</i> party is destroyed or if there are two purposes and one remains (Herne Bay Steam Boat Co. v Hutton).
Davis Contractors Ltd v Fareham UDC (HL)	Contractors argued that a construction contract was frustrated because they were unable to acquire manpower and materials in a period of shortages after the Second World War and they could therefore recover on a <i>quantum meruit</i> basis for performance to date. HL held that the contract had not been frustrated.	The shortages had made the contract more onerous to perform but had not altered the fundamental nature of the contractual performance. The shortages should have been foreseen so, in the absence of a risk provision, this was a risk which fell on the contractor.
Gamerco SA v ICM/Fair Warning (Agency) Ltd	Concert by the group 'Guns N' Roses' at a stadium in Madrid had to be cancelled due to safety issues affecting the stadium. Ps, promoters, had already paid \$412,000 and had incurred expenses of \$450,000 prior to the cancellation. Ds had expenses of \$50,000. Held: contract was frustrated and Ps could recover advance payment under s. 1(2) LR(FC)A 1943 . There would be no deduction for Ds' expenses under the proviso bearing in mind that Ps had expenses of \$450,000 which they had no way of recovering.	Section 1(2) LR(FC)A 1943 and the exercise of the broad discretion to permit expenses to be retained before the return of an advance payment to the payer.
BP Exploration Co. (Libya) Ltd v Hunt (No. 2) (Robert Goff J)	P oil company had agreed to explore for oil and develop D's oil concession in Libya. P spent considerable sums drilling for oil and found it. However, the Libyan government then expropriated the concession. P sought a 'just sum'	The decision is of greatest significance for what is said in the judgment about the purpose of the Act (prevention of unjust enrichment) and calculation of a just sum under s. 1(3) .

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Case	Facts	Principle
	under s. 1(3) LR(FC)A 1943 for the benefit it had conferred on D prior to frustration. Held the contract had been frustrated and the Act applied.	

p. 189 Exam questions

Problem question

Radha is an avid rugby fan. Last month she organized a trip to Twickenham for her local rugby club. She entered into a contract with Howden Coaches Ltd to transport her and her local rugby club to Twickenham on the day of the match. The contract stated that Howden Coaches Ltd would use one of its two 'superior deluxe' coaches to perform the contract. Radha was required to pay for the coach in advance which she did. On the morning of the trip to Twickenham, Howden Coaches Ltd telephoned Radha to tell her that the trip would need to be cancelled as one of its 'superior deluxe' coaches had broken down and they had engaged the other 'superior deluxe' coach to transport a group to Anfield for a football match.

Advise Radha. Would your answer be different if, instead of the coach breaking down, the rugby match at Twickenham had been cancelled as the result of a terrorist alert?

Head to the Outline Answers <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-8-outline-answers-to-essay-questions?options=showName> **section of the online resources for help with this question.**

Essay question

Critically discuss the current operation of the doctrine of common mistake.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-8-outline-answers-to-essay-questions?options=showName>
- Interactive key cases <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-8-interactive-key-cases?options=showName>

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- Multiple-choice questions <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-8-multiple-choice-questions?options=showName>

You can also find an interactive glossary <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName> on our online resources.

Additionally, to help you focus your revision, there is also a diagnostic test <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName> available. For general advice on your revision and exam technique, you can listen to our podcast <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>, or alternatively, you can access the transcript here <https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>.

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