



# Law of Contract II

## JDOC1002

Frustration – Pt 2



# Frustration: whether contract radically different

- *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696
- Facts:
  - Building contract: 78 houses to be completed in 8 months
  - Delays from lack of skilled labour; actual time for completion: 22 months
- Issue:
  - Was contract frustrated?
  - If yes, then builders not bound by contract price but may charge extra for extra work time (on basis of reasonable remuneration for services rendered – quantum meruit)



# Frustration: whether contract radically different

➡ HL:

- ➡ No frustration
- ➡ Delay foreseeable
- ➡ Contractors regarded as undertaking risk of increased costs arising from delay under contract



# Frustration: whether contract radically different

- *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337
- Facts:
  - Contract for excavation work: fixed period for completion in 130 weeks (time of the essence)
  - Work commenced: 3 shifts seven days a week
  - Third parties obtained injunction preventing work from 10pm to 6am
- Issue:
  - Was contract frustrated?
  - Argument made to recover on quantum meruit basis (to recover additional costs) instead of contract price



# Frustration: whether contract radically different

- ▶ High Court of Australia:
  - ▶ Contract frustrated by injunction
  - ▶ Performance (excavations) not impossible as such
  - ▶ Purpose of excavations can still be fulfilled
  - ▶ But situation resulting from injunction fundamentally/radically different to situation contemplated by contract
  - ▶ Performance by 3 shifts a day (24 hrs) (foundation of contract) fundamentally different to performance by 2 shifts a day (16 hrs) rendering completion within 130 weeks (essential to both parties) impossible



# Delays



- Distinguishing *Davis Contractors* and *Codelfa*:
  - Injunction not foreseeable in *Codelfa*
  - Contractors not regarded as bearing risk of delay (matter of construction of contract) in *Codelfa*
  - Timely completion essential in *Codelfa*



# Delays

- ▶ *Jackson v Union Marine Insurance Co Ltd* (1874) LR 10 CP 125
- ▶ Facts:
  - ▶ Charterparty: ship to sail from Liverpool to Newport “with all possible dispatch, perils of the sea excepted” for purpose of loading iron rails at Newport to be transported to San Francisco (for railway construction)
  - ▶ Ship ran aground before arriving at Newport
  - ▶ Delay of 6 months to repair ship
  - ▶ Charterer chartered another ship for the voyage
  - ▶ Pl shipowner sought recovery against def insurance co for loss of freight due to perils of the sea



# Delays



## Issue:

-  Was the charterparty contract frustrated?
-  Jury's findings: delay had put commercial venture at an end in commercial sense





# Delays



- ▶ Court held:
  - ▶ Jury's findings justify conclusion that contract frustrated
  - ▶ Mere delay often would not frustrate contract
  - ▶ But significant delays in performance can
  - ▶ Present case: delay prevented carrying out of specific voyage intended under the contract (transport of iron rails from Newport to SF)
  - ▶ Contract for specific voyage impossible or contract for charter of ship rendered radically different
  - ▶ Charterer and shipowner released from contract (neither party bore risks under the contract for "perils of the sea")
  - ▶ Insurance company liable to pl shipowner



# Delays





- *Wong Lai-ying v Chinachem Investment Co Ltd* [1980] HKLR 1 (PC)
- Facts:
  - Residential tower blocks to be constructed – vendor contracted to sell to purchasers
  - Major landslide prevented building works for 3.5 years
  - Delay in completion: 2.5 years
- Issue:
  - Was contract of sale frustrated?



# Delays



## Held:

-  Major landslide not foreseeable
-  Delayed completion of 2.5 years sufficient to frustrate contract



# Delays

- ▶ *Cheung Kit Lai v Rich Prosper Ltd* (unreported, CFI, HCA 973/2011, 10 April 2014)
- ▶ Facts:
  - ▶ Owner (D2) of Ting house in NT obtained loan from lender (D1), using house as security
  - ▶ D2 defaulted, D1 obtained order for sale
  - ▶ Contract of sale: D1 to sell to Plaintiff
  - ▶ Delayed completion of sale and purchase contract of 4 years 8 months because of time taken by District Lands Officer to assess premium for sale
- ▶ Issue:
  - ▶ Was the contract frustrated?



# Delays



- Held:

- Where delay relied upon for frustration, “the delay must be abnormal in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplate at the time of contracting”
- Time for assessing premium: normally a few months only
- Radical difference in performance because of significant period of delay + serious unanticipated effects of delay (exorbitant premium payable by D1 under contract, due to D2’s prior breaches of condition of grant to D2, increased by inflation)
- Contract frustrated



# COVID pandemic

- ▶ *Wilmington Trust SP Services (Dublin) Ltd v Spicejet Ltd* [2021] EWHC 1117 (Comm)
- ▶ Facts:
  - ▶ 10 year leases of aircraft (Boeing 737s)
  - ▶ Two planes grounded by government indefinitely from 2019; third plane little used since pandemic
- ▶ Issue:
  - ▶ Were leases frustrated?



# COVID pandemic

➡ Held:

➡ No frustration

➡ Temporary inability for a couple of years to use aircraft: performance not radically different where lease for 10 years



# COVID pandemic

- ▶ *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB)
- ▶ Facts:
  - ▶ Commercial tenancies: cinemas + bingo parlour
  - ▶ Statutory restrictions on use of, and public access to, premises due to pandemic
- ▶ Issue:
  - ▶ Were leases frustrated?





# COVID pandemic

- Held:
  - No frustration
  - COVID pandemic not foreseeable
  - But periods of closure did not add up to more than 18 months
  - Leases here ranged from 15 to 20 years



# COVID pandemic

- *The One Property Ltd v Swatch Group (Hong Kong) Ltd* [2022] 1 HKLRD 975
- Facts:
  - Commercial tenancies in two shopping malls
  - 3 year terms; leases entered into in Sep/Oct 2018
  - Def stopped business in April 2020; failed to pay rent from July 2020
- Issue:
  - Were leases frustrated because of social unrest and pandemic? Def argued frustration from June 2020
  - Def argued: frustration because of radical difference in performance / frustration of common purpose of operating luxury watch retail store



# COVID pandemic

## ➤ CFI:

- Even if operation of luxury watch retail stores was a common purpose: no frustration of leases because such purpose still possible
- Leases possibly frustrated if there was a common purpose for stores to be operated *in a commercial viable manner*
- Was there such a common purpose?
- Court held no
- Under the leases, tenant bears the risk of commercial failure; Landlord did not agree to bear this risk
- Therefore no frustration



# Effects of frustration – common law

- ▶ Automatic discharge of contract at time of frustration (release of parties from further obligations to perform)
  - ▶ *Hirji Mulji v Cheong Yue Steamship Co Ltd* [1926] AC 497
- ▶ Contract not rendered void or voidable
- ▶ Accrued rights or liabilities before frustration unaffected by doctrine of frustration under common law

# Effects of frustration – common law

- ▶ But principles of restitution for unjust enrichment may apply:
  - ▶ ie where unjust for def to retain a benefit that was obtained at the expense of the pl
- ▶ Eg *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*
  - ▶ Prepayment of £1000 by purchaser to seller can be recovered where total failure of consideration (total failure of basis)



# Effects of frustration – common law

- ➡ No recovery in unjust enrichment where failure of basis is only partial
- ➡ Also no recovery for wasted expenditure by a party where other party did not receive any benefit



# Effects of frustration – statute

- Law Amendment and Reform (Consolidation) Ordinance (Cap 23) (“LARCO”) s 16
- Section 16(1): section applies where contract frustrated
- Section 16(2) – first scenario:
  - Payor entitled to recover sum paid to recipient
  - Subject to deduction of expenses incurred by recipient



# Effects of frustration – statute

- Section 16(2) – second scenario:
  - Discharge of pre-frustration obligations for payment
  - Subject to payment of expenses incurred by other party





# Effects of frustration – statute

- ➡ Section 16(3) applies where:
  - ➡ A obtains valuable benefit from B; and
  - ➡ Benefit was obtained by reason of anything done by B in or for purpose of performance of contract
- ➡ Effect of s 16(3):
  - ➡ B entitled to recover from A a sum not exceeding value of the benefit as the court thinks just



# Effects of frustration – statute

- Two step analysis in s 16(3):
  - Determine value of benefit obtained by A
  - Determine just amount payable to B (which must not be more than the value of the benefit)



# Effects of frustration – statute

➡ *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783:

➡ Facts:



- ➡ Hunt owned oil concession granted by Libyan govt
- ➡ Joint venture contract between H and BP for exploration and development
- ➡ Oil field discovered in 1967
- ➡ Govt expropriated BP's interests in oil field in 1971 and H's interests in 1973



# Effects of frustration – statute



## Issues:

-  Contract frustrated
-  BP claimed for amount under Law Reform (Frustrated Contracts) Act 1943 (UK) s 1(3) (equivalent to HK's s 16(3))



# Effects of frustration – statute

- Held:
- Where one party provides services resulting in an end-product for other party:
  - Valuable benefit may be end-product and not services rendered
- Present case:
  - Benefit obtained by H by reason of BP's performance of contract: consisted of oil obtained by H (and financial settlement reached with govt)
  - Valuation of benefit: fixes maximum amount payable under s 1(3)



# Effects of frustration – statute

- ➡ What is the “just sum”?
  - ➡ Reasonable value of services rendered by BP less amounts already received by BP
  - ➡ That sum was less than the value of benefits received by H and hence payable in full to BP



# Effects of frustration – statute

- Other points from case:
- Compare situation where builder partially builds house that is then destroyed by fire
  - Can builder recover anything under s 16(3)?
- Basis for determining “just sum”:
  - Trial judge (Goff J): unjust enrichment (eg quantum meruit – reasonable sum – for services provided); relevant to look at contractual consideration too
  - Eng CA (Lawton LJ): matter of discretion for judge