



Law of Contract II

JDOC1002

Frustration – Pt 1



Frustration



- Doctrine of frustration, where it applies, operates to automatically discharge contract because of some event that occurs subsequent to the formation of the contract
- Test: whether, without default of either party, contract has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract
 - *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 per Lord Radcliffe



Frustration

- Mere hardship or inconvenience in performance not sufficient to establish frustration
- *Ocean Tramp Tankers Corporation v V/O Sovfrcht (The Eugenia)* [1964] 2 QB 226
- Facts:
 - Charter of ship to transport goods from Genoa to Madras via Black Sea
 - Suez Canal closed and ship trapped for 2 months
- Issue:
 - Would there be frustration on the basis of blocking of Suez Canal and the need for sailing via a longer route?



Frustration

- Held:
 - Contract not frustrated
 - Not a fundamentally different situation
 - Time difference where no blockage and sailing via Suez Canal (108 days) compared with sailing via different route via the Cape (138 days)
 - Difference not sufficiently radical to produce frustration



Frustration

- *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675
 - Lease of warehouse for 10 years for commercial storage
 - Only vehicular access closed for 20 months
 - Lease contract not frustrated on facts



Foreseeability of supervening event

- ➡ No frustration where supervening event foreseeable
 - ➡ *Walton Harvey Ltd v Walker & Homfrays Ltd* [1931] 1 Ch 274
- ➡ Suggested test: whether event would reasonably be seen as having a real likelihood to occur (Treitel)
- ➡ But doctrine may still apply if frustrating event exceeds what would be reasonably contemplated by the parties
 - ➡ *Tatem v Gamboa* [1939] 1 KB 132



Terms dealing with frustration in contract

- Contractual terms apply instead of doctrine of frustration
 - Eg force majeure clauses
- But doctrine of frustration still applicable where contractual term does not cover frustrating event
 - *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119



Self-induced frustration

- Frustration only applies if event occurs through no fault of either party
- No frustration if event is self-induced



Self-induced frustration

- *J Lauritzen AS v Wijsmuller BV (Super Servant Two)*
[1990] 1 Lloyd's Rep 1

- Facts:

- Def agreed to carry pl's drilling rig from Japan to Rotterdam
- Contract allowed use of either vessel Super Servant One or Super Servant Two
- Def allocated Super Servant Two for contract but ship then sunk
- Def elected not to use Super Servant One (needed for other contracts)

- Held:

- Contract not frustrated because of self-induced frustration



Impossibility of performance

- *Taylor v Caldwell* (1863) 3 B&S 826
- Facts:
 - Contract to use Music Hall for concert performances
 - Hall destroyed by fire
- Held:
 - Existence of hall essential for concerts to be held
 - Contract frustrated



Impossibility of performance

- No frustration if one party agreed to bear risk of destruction or guaranteed existence of subject matter
 - *Goldsborough Mort & Co Ltd v Carter* (1914) 19 CLR 329
- Another example of impossibility in performance:
 - employment contract discharged for frustration where employee becomes deceased



Frustration by supervening illegality

- Frustration where performance becomes illegal after contract formed
- Eg *Metropolitan Water Board v Dick Kerr & Co Ltd* [1918] AC 119

Frustration by supervening illegality

- *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32
 - Contract 12 July 1939: English co to sell machinery to Polish co, delivery in Gdynia, Poland
 - WWII: German invasion and occupation of Poland
 - Unlawful to trade with enemy: Trading With the Enemy Act 1939
 - Contract frustrated by supervening illegality



Frustration by supervening illegality

- No frustration merely where illegality makes performance less beneficial or more onerous
 - Eg *Scanlon's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169
- Foreseeability of illegality does not prevent frustration
- Contractual provisions cannot exclude frustration on grounds of illegality



Frustration of purpose

- ➡ *Krell v Henry* [1903] 2 QB 740

- ➡ Facts:

- ➡ K hired out flat in Pall Mall to H for 26 and 27 June 1902

- ➡ Purpose (unstated): view Royal Coronation procession of King Edward VII

- ➡ Procession cancelled because of illness



Frustration of purpose

- Held:

- Contract frustrated
- Where a specified thing or state of affairs must exist for the fulfilment of the contract and which goes to the root of the contract and is essential to its performance, then cessation or non-existence of that thing or state of affairs will frustrate contract
- Not necessary for such thing or state of affairs (ie purpose) to be set out in contract
- Distinguish scenario of hire of taxi cab for particular purpose



Frustration of purpose

- *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683
- Facts:
 - Steam boat owned by pl chartered by def on 28 June 1902 for stated “purpose of seeing the naval review and for a day’s cruise around the fleet” and on 29 June for “similar purposes”
 - Naval review cancelled



Frustration of purpose

- Held:
 - Contract not frustrated
 - Vaughan Williams J: stated purposes were not the foundation of the contract
 - Romer LJ: subject matter of contract was mere hire of steam boat



Frustration of purpose

- Can the cases be reconciled?
- Legal principle: frustration results only if the purpose is a common purpose of both parties that goes to the root of the contract
 - Depends on evidence (including extrinsic evidence)
- Taxi scenario: why is passenger's purpose of trip not a common purpose of both the taxi driver and passenger?
- *Herne Bay*:
 - Boat hired out generally for whatever purposes of hirer: no common purpose
 - Or even if there is common purpose: although one common purpose cannot be fulfilled, other common purpose can be (so no frustration of contract)

Frustration of purpose

- Where written contractual document contains statement of purpose (cf *Herne Bay*):
- Analysis:
 - Is the purpose incorporated as a term? (Is the purpose a condition precedent to obligations to perform?)
 - If not a term, is it a common purpose, failure of which can give rise to frustration (see *Krell v Henry*)?
 - If it is a term and a condition precedent, then failure of purpose means no contract or parties' are discharged from obligations to perform
- Note: *Krell v Henry* regarded as an exceptional case