

BUSINESS LAW – KEY ELEMENTS (lecture 3) DISCHARGE

Frustration is used as a defence for a claim for breach. A frustrating event is supervening, unforeseeable event (*Amalgamated Investment v John Walker*), at no fault of either party (*The Eugenia*), that renders the contract either impossible, illegal or radically different (*Davis Contractors v Fareham UDC*). Contract ended by operation of the law, all future obligations discharged. There used to be a rule of absolute obligations (*Paradine v Jane*) and implied term theory 'artificial' (*Taylor v Caldwell*), but the modern day approach is 'radical difference' theory (*Davis Contractors v Fareham UDC*).

IMPOSSIBILITY

Unavailability of a thing or person necessary to perform the contract.

1. Destruction of the thing – *Taylor v Caldwell*; *Appleby v Myers*
2. Unavailability of thing – A matter of degree - *Jackson v Union Marine Insurance Co*; *FA Tamplin v Anglo-Mexican*; *Bank Line v Arthur Capel*; *Edwinton Commercial Cooperation Tsavrilis Russ, The Sea Angel*. In latter case, the 20 days charter hire had been pretty much completed before the 3 month delay kicked in when authorities impounded the ship illegally. As the purpose of the contract had been achieved, the court held that no frustration occurred, although it was stated that had there been much of the purpose still to achieve this could have potentially frustrated the contract.
3. Unavailability of person – incapacity (*Morgan v Manser*); death (*Stubbs v Holywell Railway Co*)

SUPERVENING ILLEGALITY - *Fibrosa v Fairbairn*

*A contract to do what has become illegal to do cannot be legally enforceable – *Denny, Mott, Dickson v Fraser*

FRUSTRATION OF PURPOSE/NON-OCCURRENCE OF EVENT

*Must be common purpose of both parties. The 'Corona' on cases – *Krell v Henry*; *Chandler v Webster*, cf *Herne bay Steamboat v Hutton* (where it was not held to be frustrated as the purpose has not been wholly affected by incident)

GOVERNMENT INTERVENTION – *Metropolitan Water Board v Dick Kerr*

CAN LEASES BE FRUSTRATED?

*Generally never – *Paradine v Jane*, but the HL was split in *Cricklewood Property v Leighton's Investment Trust*. In *National Carriers v Panalpina*, it was again decided it was not frustrated but in principle it could be, in rare circumstances. They would consider the unavailability of property against the length of lease, or a short lease for specific purpose.

NO FRUSTRATION WHERE...

***Contract made merely more onerous** – Commercial impracticability insufficient (*Tsakiroglou v Noble Thorl*; *The Eugenia*; *Davis Contractors v Fareham UDC*)

***Event is self-induced** – If party exercised a choice and it is your fault then no frustration - *Maritime National Fish v Ocean Trawlers*; *The 'Super Servant Two'*. Burden of proof on other party – *Joseph Constantine Steamship line v Imperial Smelting Corporation*.

***Event is foreseeable** – *Walton Harvey Ltd v Walker & Homfrays Ltd*. The less that an event is foreseeable, the more likely it is to lead on to frustration – *The Sea Angel*.

CONSEQUENCES OF FRUSTRATION

All future obligations discharged by operation of law, from date of frustrating event. The doctrine is "not lightly to be invoked as per Lord Roskill in *The Nema*."

COMMON LAW – ORIGINAL POSITION

*If total failure of consideration, money paid under the contract can be recovered – *Fibrosa v Fairbairn*. Partial failure of consideration – *Chandler v Webster*. Either way no recovery of expenses. Only applies now where Act excluded.

LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943

The Act now applies unless excluded.

*S1(2) – Money paid before frustrating event is recoverable AND money payable before frustrating event ceases to be payable.

*S1(2) – Expenses recoverable up to limit of money paid/payable before frustrating event – *Gamerco SA v ICM/Fair Warning*

*S1(3) – 'Valuable benefit' – non-monetary 'end product', benefiting party may have to pay 'just sum' – *BP Exploration v Hunt*. Must be tangible.

*S2(3) – Parties can contract out of act.

*S2(4) – Multiple obligations eg leases

*S2(5) – Contracts excluded from act eg carriage of goods by sea insurance contracts

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